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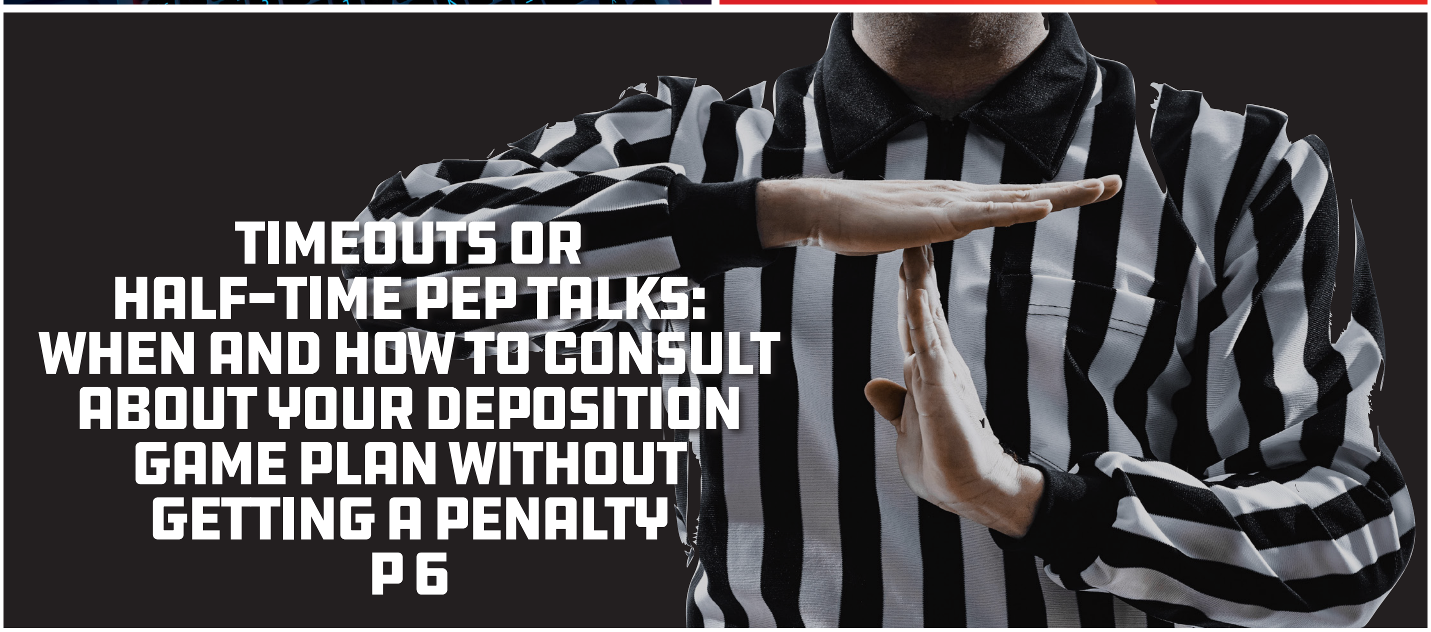

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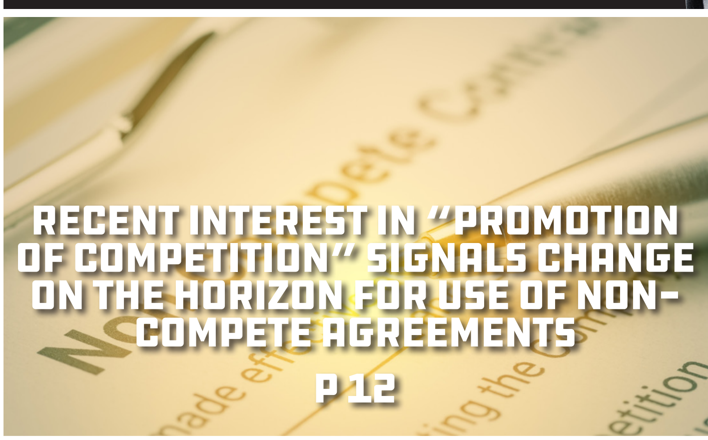

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from the CHAIR'S DESK

On behalf of USLAW NETWORK, I am pleased to welcome you to the spring 2022 edition of *USLAW Magazine*. This is a quarterly publication featuring content written by attorneys from across our global network plus our exclusive corporate partners that brings diverse perspectives on a range of issues facing today's legal and business leaders.

The world and how we conduct business is changing at an ever-increasing pace due to COVID, technology, cybersecurity, supply chain, changing legislation, labor issues, and so much more. Through this magazine and many complimentary client resources created throughout the year, USLAW members share the latest trends and issues we face from coast to coast and around the world. In this issue, you will read about the latest in preserving your company's confidential business information, gig economy regulation, possible changes in the future of noncompete agreements, antitrust matters, NFTs, NILs, patents, collateral source rule and much more.

We also spotlight recent trial successes, members honored with national leadership positions, industry recognition, and those who are contributing to their local communities, including those firms and clients who are promoting pro bono and diversity initiatives. And with respect to our DEI initiatives, we are proud to showcase the USLAW NETWORK Law School Diversity Scholarship program to support eligible, diverse law students who need financial assistance to achieve their academic and professional dreams.

As we continue to move business forward in this ever-changing environment, please know that our members are available and accessible to support your legal needs wherever they may arise.

Thank you for your continued support of USLAW and our members.

Sincerely,

Rodney L. Umberger
USLAW NETWORK Chair
Williams Kastner | Seattle, Washington

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LESSONS FROM SURFSIDE

Implications for Property and Liability Coverage

Paul McCullough, P.E. S-E-A • **Lisa Rolle** Traub Lieberman

One impact of a tragic, highly publicized event such as the collapse of the Champlain Towers South in Surfside, Florida, is to bring heightened scrutiny to a particular issue—in this case, the structural integrity of aging residential towers and the many closely related insurance and liability concerns. This publicity, coupled with the potential for insurance coverage and entitlement to attorney's fees, has the potential to spark a new wave of litigation related to collapse coverage.

Several pending lawsuits may signal the beginning of the heightened scrutiny soon to confront condo boards, property management companies, contractors, and inspectors, among others. For example, although 40-year recertification of a building is the current standard in Florida, legislators have already begun to propose laws requiring recertification of buildings after 20 to 30 years, with increased scrutiny of buildings near coastal areas. Given the concentration of condo towers in many coastal areas, it is worth considering how many of these buildings are likely to face heightened certification requirements. If a condo board has not set aside the substantial reserves to cover the repairs necessary to bring the building up to code, its members will face lawsuits from the building's condo owners. Whether such claims are covered under the condo board's liability insurance will depend in part on what the board members knew and when they knew it, as reflected within meeting minutes and other documentation. Some of these issues are already being litigated in connection with the other Champlain Towers.

Moreover, past experience has shown that property insurance coverage can be implicated not only in cases of catastrophic collapse, but also partial collapse, which overlaps with many of the issues above. For these reasons, it is worth considering the scope of collapse coverage under commonly used commercial and residential property insurance forms and a few of the most common arguments and defenses arising from such coverage.

Prior to the early 1980s, collapse was addressed under named perils coverage within many property policies as applying to "collapse of a building or any part thereof," without limitation, and without defining collapse. The rise of the concurrent causation doctrine made cases involving the old collapse language difficult to defend and led to increased exposure for insurance carriers, because the insurer would be obligated to cover an entire claim involving a building collapse even if, for example, the collapse was caused in large part by an excluded cause, such as negligent upkeep of the building. Carriers responded in part by adopting newer policy forms, drafted by insurance organizations such as Insurance Services Office Inc. (ISO) and the American Association of Insurance Services (AAIS), with language defining and limiting the scope of collapse coverage.

Standard policy forms now used by insurance carriers often specifically exclude loss caused by collapse and then add this coverage back in as an additional coverage—but only if the collapse was caused by certain named perils, such as hidden decay of the building. This can avoid the problem of having to provide property coverage for a collapsed building where the collapse was caused in part by a non-covered cause. As with most insurance issues, then, the policy is always an important place to look in determining whether the cause of a collapse or potential collapse may fall within the scope of coverage.

But a second issue that arises in many cases and claims involving a building's collapse is whether "collapse" means collapse of the building to the ground or if it also includes a partial or imminent collapse as well. On this issue, older policy forms simply did not define the term collapse, and courts, asked to construe undefined policy terms, developed two different views. One view was that "collapse" means the complete collapse of a building to the ground. In other jurisdictions, including Florida, courts ruled that collapse meant a "material and substantial impairment" of the building's structural integrity without an actual collapse of the building being required. This latter view would often prompt a battle among the parties' experts—with one or more experts on each side opining as to whether the structure had suffered a "material and substantial impairment."

In general, insurers responded to these varying interpretations of the term "collapse" by making an effort to define the term within their standard policy forms and to include exclusions. For example, one version of the homeowners policy developed by AAIS now states that "collapse of a building or part of a building means the sudden and unexpected falling in, caving in, or giving way of the building or part of the building into a flattened form of rubble". In other policies, collapse is defined to mean "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose." It is worth emphasizing that these definitions describe collapse as "sudden" or "abrupt"—in other words, an identifiable event. It is also worth noting that these definitions of collapse leave room for coverage of a *partial* collapse.

These nuances with a property policy's collapse coverage can mean that policyholders will look to their property insurance carrier to cover, for example, a balcony that has suffered some amount of concrete abruptly falling down, leaving it unsafe to be occupied for its intended purpose. An increase in inspection and safety concerns arising from the Surfside collapse will make such claims more common. Similarly, it is not uncommon for counsel of policyholders to argue that a collapse occurred across multiple policy periods, thereby triggering multiple policy limits. Nonetheless, engineering experts for either side will commonly disagree over whether deterioration of the structure can reliably be pinpointed to a particular event or series of events occurring within a particular period of time.

Establishing whether a collapse occurred, as defined within the policy, is often only half the battle. The next issue that is frequently disputed in litigation involving collapse coverage is what is the extent of the collapse (or partial collapse) and what is the appropriate associated scope of repair? Assume, for example, that a portion of a parking garage has experienced damage to its concrete structure, causing some concrete to crack, and some additional concrete to noticeably fall. Perhaps a bystander even witnessed the event. The question then arises as to the extent of the damaged concrete, whether the damaged concrete portions can be safely repaired using advanced repair techniques in localized areas, or if replacing significant portions of the structure is necessary. Given the respective cost of replacement versus localized repairs, it is common for disputes to arise over this issue, with opposing experts opining to each view. Additionally, the means and methods of any associated repair of building components (localized repair versus replacement) can have a significant impact on the extent to which the building or part of the building can/cannot be occupied for its intended purpose. In short, the extent of repairs and repair methodology opined on by the experts can be significant factors in determining whether the associated damage at/around a partial collapse qualifies for coverage.

Overall, the heightened scrutiny prompted by the Champlain Towers South tragedy will place even greater emphasis on the review of building integrity and related coverage issues. Past experience with collapse-related litigation suggests that parties should be aware that the following issues, among others, will arise in any claim or lawsuit involving a complete or partial collapse of the building: (1) Has a "collapse" occurred, either partial or complete? (2) What caused the collapse and what did the owner(s), condo board, inspector(s), or management company know about it? (3) What property or liability policies may apply to claims arising out of the collapse? (4) How does the property policy or applicable jurisdiction define the term "collapse"? (5) What policy period or periods did the collapse occur during? (6) Was notice timely furnished to all applicable insurance carriers? (7) What repairs are necessary or even possible?

Of course, each of these questions involves not only various complex legal issues, but also factual issues surrounding a building's maintenance and structural integrity. This means that meeting minutes, condition reports, emails, and property inspections should be understood as items that could potentially be used in court to establish or disprove coverage for the building or the liability of its condo board. Ultimately, the tragic events observed in Surfside, Florida, should prompt more careful and rigorous consideration of the safety of residential towers and other similar structures—from the standpoint of owners, insurance carriers and lawmakers. As these changes unfold, however, parties involved with these types of structures must anticipate the likelihood of increased scrutiny and litigation arising from the reassessment that will be demanded of aging buildings.

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TIMEOUTS OR HALF-TIME PEP TALKS:

When and How to Consult About Your Deposition Game Plan Without Getting a Penalty

Megan Fulcher Bosak and **Michaela L. Cloutier** Flaherty Sensabaugh Bonasso PLLC

In both football and depositions, taking a break can be a savvy way to change the pace of play when the game isn't going your way, give players a chance to rest when they're not at the top of their game, and adjust strategy once the opposing team has revealed their formation. But, while the rules on discovery conduct are identical in all federal jurisdictions and most states, judges don't always call the same fouls. What constitutes a permissible break in a deposition differs from state to state, case to case, and even between different federal courts in the same circuit. This article seeks to clarify what types of mid-deposition conferences deponents and lawyers can engage in without risking penalties. However, because of the jurisdiction-specific nature of this issue, witnesses and attorneys must become familiar with their referee before a deposition begins.

CALLING TIMEOUTS

The seminal decision on mid-deposition attorney-client consultation is *Hall v. Clifton Precision*,[1] in which an attorney conferred privately with his deponent-client twice during a deposition, despite opposing counsel's objections. In response, the presiding judge issued an extensive "no consultation" order barring, among other tactics, private attorney-client consultations during questioning as well as during regular deposition breaks and recesses. The *Hall* order also permitted opposing counsel to question the witness about any conversations between the witness and his counsel during a break, "to ascertain whether there has been any witness-coaching and, if so, what."

The Federal Rules of Civil Procedure were revised in 1993, five months after the *Hall* decision, to incorporate anti-coaching principles, including a prohibition on speaking objections. However, they do not prohibit off-the-record attorney-client consultations. Federal Rule of Civil Procedure 30(c)(1), still the only federal rule addressing the question, requires that "examination and cross-examination of a deponent proceed as they would at trial...." This vagueness permits individual jurisdictions and judges substantial leeway in deciding whether or not to allow mid-deposition consultations.

Most courts that have considered the issue have agreed with the essential principle of *Hall*, concluding that breaks for attorney-client consultations should not be permitted between the asking and answering of a question. Some states have also explicitly incorporated prohibitions of pre-answer conferences into their Rules of Civil Procedure. Though few courts have had an opportunity to consider the issue, the passing of notes or written discussion of testimony between witness and counsel during witness's active testimony has been similarly universally prohibited. In any jurisdiction, it is not advisable to attempt to call a recess when a question has been asked but not yet answered or to attempt to consult with counsel in written form while answering a question.

Jurisdictions also appear to have universally agreed with the major exception in *Hall*, namely that consultations are permitted at any point during the deposition to discuss whether to assert a privilege. Attorneys and deponents in all jurisdictions should feel comfortable calling for a break to discuss an issue of privilege but should ensure they know the rules regarding what to state on the record when they return. Typically, they must state the reason for the break and the decision reached.

KNOWING YOUR REFEREE

Some of *Hall*'s more extreme principles have not been as widely adopted. While some jurisdictions expressly prohibit attorney-client conferences during scheduled breaks—such as for lunch and even when the deposition adjourns for the day—several courts have rejected this approach, permitting discussions during scheduled breaks to varying degrees. Similarly, most jurisdictions analyze breaks requested by opposing counsel in the same manner as scheduled breaks. Thus, with limited exceptions, deponents in jurisdictions that allow consultations during scheduled breaks should also feel free to consult during opposing-counsel-requested breaks. Jurisdictions also differ as to whether attorneys and clients may consult during a non-scheduled break, requested by the deponent or their counsel, but not requested while a question was pending. Because jurisdictions are split on this issue, and the Rules allow for alteration by individual judges, attorneys and deponents are strongly encouraged to check the rules, case law, and discovery order applicable to their case before calling a timeout.

While some of these rules appear to be geared toward attorneys, in practice they generally apply equally to breaks requested by deponents. The *Hall* prohibition applies to conferences initiated by the attorney and those initiated by the witness. Cases that have considered the issue also do not distinguish between breaks requested by deponents and those requested by deponents' counsel. One limited exception is New York federal courts, which historically expressed a preference for witness-requested breaks.[2] Deponents in those jurisdictions might strategically choose to request breaks themselves.

CALLING AN AUDIBLE OR "WITNESS COACHING"?

Some courts have noted that the motivation for the break request, or the subject of the conversations during the consultation, may be relevant to determining whether a recess is permissible. Generally, conversations about topics other than mid-deposition changes to substantive testimony are more likely to be permissible. For example, attorneys and deponents in West Virginia state court are explicitly permitted to take breaks to clear up witness confusion and are only prohibited from taking breaks when they are requested for an improper purpose.[3] In contrast, other courts have held that the motivation is irrelevant and impossible to discern.

However, as always, attorneys and deponents should check interpretive case law. South Carolina's state rules, arguably the strictest in the country on deposition coaching, only disallow conferences regarding the substance of the testimony.[4] Interpretive case law, however, has concluded that "[c]onferences called to . . . calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanctions" as well.[5] To be safe, attorneys and deponents in "no-consultation" states should avoid having private conversations during breaks at all, even if those conversations have nothing to do with the case or the deponent's testimony.

Furthermore, a claim that nothing of substance or impermissible was discussed during a break is not guaranteed to avoid penalties. Courts often order a re-opening of a witness's deposition to inquire into the content of the conversation and determine if it was, in fact, improper. Re-opening a deposition may be both expensive and risky, substantively, even if it does not result in sanctions.

BEST COURSE OF ACTION – SCRIPT YOUR PLAYS

The rules regarding the permissibility of attorney-client consultations during depositions vary immensely from jurisdiction to jurisdiction. It behooves deponents and attorneys to become apprised of their jurisdiction's rules and interpretive case law and not to assume they'll be able to take a timeout whenever the opposing team is coming on strong. The safest route is to ensure a witness is fully prepared before the start of questioning. Deponents and attorneys should prepare ahead of time for various areas of questioning, coordinate regarding who will request a break, if necessary, and discuss how to ensure said request does not appear to be made for an improper purpose.

In jurisdictions that allow attorney-client consultations only on standard breaks, attorneys and deponents should place emphasis ahead of time on preparation for important topics that they believe the deposing attorney will cover early in the deposition. Then, during any breaks, they may have the opportunity to clarify concerns regarding areas that have not been addressed.

In states that allow conferences on specific topics but not others, attorneys and deponents can adjust some aspects of their deposition strategy during mid-deposition discussions without flouting the rules. They might discuss a witness's attitude or nerves (possibly "saving" a deposition).

In general, courts are more likely to impose sanctions or mandate the re-opening of depositions when it is clear from the record that a deponent's testimony changed after the conference. Courts are also more likely to award sanctions when the attorney or deponent's other behavior throughout the deposition was egregiously unprofessional. Good sportsmanship is key to avoiding discovery sanctions.

In conclusion, deponents and attorneys should use their timeouts strategically. In most states, litigants are less likely to run afoul of the rules if they discuss strategy during half-time lunch breaks or timeouts called by the other team than if they repeatedly request breaks on their own. The rules on mid-deposition conferencing can be complicated. If you don't understand them, you're going to get a flag thrown, and the penalty could cost you the game.

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1 *Hall v. Clifton Precision*, 150 F.R.D. 525, 528, n.4 (E.D. Pa. 1993).
2 *See Okoumou v. Safe Horizon*, 2004 U.S. Dist. LEXIS 19120, at *5 (S.D.N.Y. Sep. 17, 2004) (citing to the Local Civil Rules for the Eastern District of New York 30.6); *Musto v. Transp. Workers Union of Am., AFL-CIO*, No. 03-CV-2325 (DGT)(RML), 2009 U.S. Dist. LEXIS 3174 (E.D.N.Y. Jan. 9, 2009).
3 *See, e.g., State ex rel. Means v. King*, 205 W. Va. 708, 715, 520 S.E.2d 875, 882 (1999).
4 S.C. R. Civ. P. 30(j)(5)–(6).
5 *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 191, 552 S.E.2d 10, 17 (2001).

PRESERVING YOUR COMPANY'S CONFIDENTIAL BUSINESS INFORMATION *in the Age of Working Remotely and Cybersecurity Threats*

Brian Whiteley, Michael Murphy, and **Payne Horning** Barclay Damon LLP

All businesses have information they consider confidential. Many expect the use of confidentiality and nondisclosure agreements with business partners, vendors, and employees—as well as trade secret and fair competition laws—to protect that confidential information. The assumption is correct, to a degree, but protecting confidential business information requires a comprehensive plan and consistent overview, with periodic assessments and updating. Those companies that fail to remain vigilant, particularly as more and more employees work remotely, can find themselves at the mercy not only of bad actors but of the law, which demands careful safeguarding to protect confidential information.

In one recent case in Delaware,[1] a court denied a company's attempt to enjoin another business from competing with it because some of the alleged confidential information had been shared on videoconference calls that were not sufficiently guarded. The company had failed to take basic steps to police who joined the calls by requiring passwords for entry, admitting participants from a virtual waiting room into the call individually, or taking roll call at the start of the meetings. Despite the fact that the company had required some participants on the videoconference calls to sign nondisclosure agreements, others who had joined could not be identified let alone confirmed to have signed binding contracts. Because the company could not demonstrate that it met its own burden to protect the alleged trade secrets, the court declined to halt the competitor's operations.

While the lessons of this case may not be new—businesses have always had to implement measures to protect confidential information—the circumstances are emblematic of a changing landscape. More employees are working remotely, widening the avenues for trade secrets and other valuable business assets to become compromised. Additionally, companies are increasingly at risk of sophisticated cyberattacks. The U.S. Department of Justice reported in 2020 that Massachusetts-based vaccine developer Moderna, Inc. was the victim of a Chinese government–linked hack.

So, what should you do to protect your information? First, understand what a trade secret is and identify your confidential information. Second, design a comprehensive plan to protect the information, understanding the need to play defense. Third, recognize the importance of the human element and how to guard against mistakes, particularly in the digital age. Fourth, be sure to stay on top of your protection plan with consistent and thorough reviews (i.e., at least on an annual basis). And finally, if there has been a breach, act quickly.

WHAT CONSTITUTES A TRADE SECRET?

Trade secrets come in all shapes and sizes: formulas, patterns, compilations, methods, techniques, processes, devices, etc. Whatever the form, the key is that a trade secret involves something not generally known or available to the public or readily ascertainable by other means. If the public knows the "secret sauce," odds are your claim will be unsuccessful. In one case,[2] the fact that recipes a party sought to protect had been published in the *New York Times* weighed against the recipes' characterization as trade secrets. Most broadly, trade secrets can be thought of as something that gives the possessor some kind of an economic edge over its competitors, whether actual or potential.

Identifying what information qualifies for protection under state and federal law is the first step in preparing a comprehensive plan. Once known, the next step is actually developing that plan.

WHY YOU NEED TO PLAY DEFENSE

Developing a plan to protect confidential information requires a holistic approach. Today, all plans must include an adequate cybersecurity program, including up-to-date encryption and antivirus software. Internally, organizations should restrict the availability of electronic information to those with a need to know. Payroll employees do not need access to engineering plans; engineers likely do not need information concerning new sales strategies.

But don't lose sight of the basics—protect physical space through locks, posted notices, and restricted-access places. Have secure disposal methods for sensitive documents and electronic files. Have nondisclosure agreements with third parties forbidding unauthorized use and disclosure of confidential information and be sure to get those agreements in place before disclosing any confidential information.

Taking steps like these to protect a trade secret are not just advisable, they are crucial—not only for your business in general but to succeed in any litigation brought to protect the information. One required element in a misappropriation claim is convincing a court the organization took reasonable measures to safeguard the information. What is reasonable will vary with the particular circumstances, with courts potentially requiring more of larger, more sophisticated organizations than smaller ones.

WHY THE HUMAN FACTOR IS SO CRITICAL

Perhaps the biggest threat to sensitive information comes from disclosure by employees with access during their employment. The disclosures can be innocent, arising from a lack of education or inattentiveness, particularly with the increasingly sophisticated tools and ploys designed by hackers—or intentional, arising from an employee taking the company's confidential information to compete. Whatever the reason, businesses should take steps to protect against employee misuse.

Businesses can shore up the risk of employee disclosures by maintaining policies concerning access to confidential information, including prohibitions on sharing confidential information with those who don't have a need to know. Employees should be educated regarding the need to keep information confidential wherever they are. No business wants to learn its strategic business plans were left in a hotel while an employee worked off-site. One of the best defenses against this particular risk is having your employees sign confidentiality and nondisclosure agreements. These contracts not only provide a record of your efforts, but they can also serve as convincing evidence in court. Last year, an individual seeking an injunction in a trade secrets case[3] fell short because of a lack of any agreement limiting the use or disclosure of the proprietary property at issue. While the court acknowledged the individual had limited access to where the information was stored internally and monitored who used it, the court found the failure to have a nondisclosure or licensing agreement in place limiting the use of the information fatal.

When an employee has signed a confidentiality agreement, the employer can claim breach of contract. And while it is always best to have an agreement in place—even in the absence of an agreement—the employer may have other remedies, including trade secret claims.

WHY YOU NEED AN ANNUAL REVIEW

Protecting confidential information is not a one-time project or investment; it is an essential and ongoing component of a business's day-to-day operations. To that end, companies should incorporate a continual monitoring program to ensure those with access to their trade secrets are preserving them. This can take the form of an annual review of what confidential material the business owns and what protections have been taken to preserve it. Moreover, the review should take into account developments or other changes that may have taken place with the technology or programs that are used to safeguard the confidential information. The annual review also provides a good opportunity to review employee files to ensure each member of the staff who comes into contact with confidential information has signed a nondisclosure agreement and that each of those contracts is up to date.

Employers also need to implement a process for when employees depart. Each staff member who has had access to trade secrets should be asked about their post-exit plans. Additionally, it is crucial to remind them about their contractual obligations, noting the legal consequences if not abided.

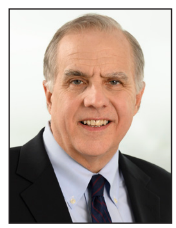
HOW PROMPT ACTION CAN MAKE A DIFFERENCE

In the digital age, misappropriated confidential information can be shared with the click of a button. Thus, the harm from losing the information begins immediately, and businesses seeking to protect that information must act quickly.

To ultimately prevail in court, the business will need to satisfy a potentially skeptical judge up front that: (1) the information is truly confidential, (2) the business has taken reasonable measures to protect it, and (3) information was taken by improper means. However, it is often the case that asking for a preliminary injunction is the very first step. To obtain a preliminary injunction, a plaintiff must demonstrate (1) a likelihood of success on the merits, (2) a threat of irreparable harm if an injunction is not granted, (3) that the balance of the equities favors the issuance of an injunction, and (4) if the injunction is granted, it will not disserve the public interest.

How soon a company actually moves for the injunction can be just as important as how they make the case for one. Unreasonable or unnecessary delay can weigh against an argument that the threat is significant enough for immediate court intervention.

Confidential information is critically important to many businesses. Protecting it requires careful planning, diligence, vigilance, and prompt action when there is an issue.



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1 See *Smash Franchise Partners, LLC v. Kanda Holdings, Inc.*, No. 2020-0302-JTL, 2020 Del. Ch. LEXIS 263 (Ch. Aug. 13, 2020).
2 See *WGJ Holdings, Inc. v. Greenberg*, No 07 Civ. 2742, 2008 U.S. Dist. LEXIS 850, 2008 WL 80932 (S.D.N.Y. Jan. 8, 2008).
3 See *Mason v. AmTrust Fin. Servs.*, 848 F. App'x 447 (2d Cir. 2021).

WILL EUROPE STRANGULATE ITS GIG ECONOMY?

European Union prepares legal framework for working through digital labor platforms

Dr. Jan Tibor Lelley, LL.M. and **Diana Ruth Bruch** BUSE

INTRODUCTION

These days companies like Uber, Lyft or Deliveroo have become household names, and their business model, called the gig economy, for quite some time now has become part of people's everyday lives. In the European Union (EU) in 2021 alone, there were 28 million individuals working through digital labor platforms of the gig economy. A big part of this group are the couriers in the restaurant industry who, as independent contractors, partner with food delivery platforms. In 2025, it is expected there will be 43 million people working with the digital labor platform model. And in 2020, the whole platform economy in the EU generated around €14 billion in revenues. However, the growth of this gig economy is not only making a noticeable impact on businesses but also increasingly in the labor and employment law area. With more and more jobs being created, questions concerning the employment status of the gig workers, their labor rights and their working conditions are being raised. This has become a topic of – sometimes heated – discussions in courtrooms and with EU lawmakers. Our article gives an overview of the current legal status-quo of the gig workers in Europe as well as the essential aspects of the new legal framework the EU has now begun to prepare. We also make a recommendation on how the gig economy can prepare.

COURTS IN EUROPE DISAGREE ON THE LEGAL STATUS OF GIG WORKERS

Currently, the EU sees major challenges concerning the legal classification of the 28 million gig workforce: Are they self-employed contractors, or are they employees after all? The EU's official bodies, like the European Commission, believe that 5.5 million gig workers could be incorrectly classified as self-employed. This raises questions about employee rights, such as minimum wage, protection against unfair dismissal, sickness benefits or pensions. Although there are numerous court decisions on the employment status of gig workers, these decisions are often inconsistent in their results and, therefore, not able to provide reliable guidelines on how to address the legal question of potentially misclassified gig workers.

Most notably are court decisions in France, Germany, Spain and England that favor gig workers, where courts did recognize their employee status. In Spain, lawmakers went as far as introducing a new law classifying gig workers as employees. However, a court in Belgium only recently found the exact opposite – that gig workers are self-employed contractors. The court mainly argued that gig workers are free to organize their work performance themselves and are thus not in a legal subordinate relationship.

WHAT IS ON BRUSSELS' MIND?

The lack of a consistent legal framework within the EU has also been considered and discussed in EU institutions over the past year. To increase legal certainty, the EU, in December 2021, proposed a legal framework "to improve the working conditions of people working through digital labour platforms." The EU's overall goal is to reduce the risks of platform work, such as poor working conditions and inadequate access to social protection and ensure that platform workers can enjoy the labor rights they are entitled to (if they were employees). To achieve this, platform workers, who have so far been incorrectly classified as self-employed, should in the future be re-classified as employees. To determine whether the platform workers in question are employees, the draft includes a list of five criteria. If the platform meets at least two of these criteria, there is a rebuttable presumption that an employment relationship exists:

- Effectively determining the remuneration or setting upper limits for the level of remuneration.
- Requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work.
- Supervising the performance of work or verifying the quality of the results of work, including electronic means.
- Effectively restricting the possibility of freedom, including through sanctions, to organize one's work, in particular, the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes.
- Effectively restricting the possibility to build a client base or to perform work for any third party.

By using the above-mentioned presumption that gig workers are employees if two of five criteria are met, there will be a shift of the burden of proof. Currently, gig workers bear the burden of proof to establish their employment status in court. In the future, it will be the reverse, and digital labor platforms will have to establish that their associates are not employees but independent contractors.

The new framework also contains regulations against an overreach of the so-called "algorithmic management." Algorithmic management is widely seen in the gig economy, where platforms use automated systems and/or algorithms to assign tasks or jobs and to monitor and evaluate platform workers. To have more transparency with these automated decisions, the EU believes platforms should be required to inform their workers about how their tasks are allocated and how they are being monitored and evaluated. Furthermore, the individuals would have the right to question and contest decisions that affect their working conditions.

A KILLER FOR EUROPE'S GIG ECONOMY?

Although the proposed framework is only a proposal and the directive (the EU's legal tool to have its members transpose the framework into their national laws) is not yet in place, it is estimated that approximately between 1.7 million and 4.1 million people could be classified as employees based on the above-mentioned criteria. Once those gig workers are classified as employees, they would have the rights and protections they are entitled to as employees, e.g., statutory minimum wage, regulated working hours etc.

Digital labor platforms will face far-reaching changes as well as legal and information obligations regarding their business model. Not everyone, not even all gig workers, may like the outcome: A recent study with couriers working as independent contractors on food delivery platforms found that up to 250,000 of them could lose the opportunity to work and correspondingly €800 million in earnings for these workers could be at stake. In this sense, the framework could block further development of the gig economy and also go far beyond common sense rules.

WHAT CAN DIGITAL PLATFORMS DO NOW?

Here are some measures companies connected to the gig economy can take to stay compliant and manage to avoid an all-too-serious impact on their business:

Review status of gig workers

Reviewing if their workers are independent contractors or employees will be a must for digital labor platforms in the gig economy. While doing so, it is important to keep in mind that the legal classification of gig workers depends on a case- by-case assessment:

- How exactly are the tasks assigned to the gig workers? Can they choose for themselves, or do they have to accept assigned jobs?
- Are there binding rules regarding appearance or behavior on the job that must be followed?
- Do the work assignments have to be executed within a certain time frame, or are the workers free to determine their time when they get the job done?

In this regard it will also be crucial for companies in the gig economy to pay particular attention to the five criteria introduced by the new EU framework and review whether any of them apply in order to avoid the rebuttable burden of proof shifting to the company, e.g., if a gig worker challenges her/his status in court. Digital platforms that exercise a certain degree of control over their workers may need to review and adjust the terms and conditions they use to ensure they manage their workers loosely enough to keep them genuinely self-employed.

Review algorithmic management

Companies in or connected to the gig economy should also evaluate how extensively they use algorithm-based management of their workers. While doing so, they should ensure that they have sufficient human resources available to guarantee human monitoring of their automated, algorithmic decisions. Companies should also inform their workers about how automated decisions influence their work conditions, such as their job assignments, earnings and how they are being monitored and evaluated.

CONCLUSION & OUTLOOK

The draft still has to go through the EU's law-making process. This process will take several months, and implementation by the member states will take another one to two years. Nevertheless, once the directive has been adopted, there will be significant changes that will affect the food delivery and ride-hailing industry and other sectors of the gig economy. Whether it will be dusk or dawn for digital labor platforms in Europe is yet to be seen.

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Recent Interest in "PROMOTION OF COMPETITION" Signals Change on the Horizon for Use of Non-Compete Agreements

Kayla M. Scarpone Carr Allison

Non-compete agreements are generally used as part of employment agreements or business sale agreements to restrict an individual's ability to work for or start a competing business. Proponents of such clauses argue they solve an "incentive" problem for employers, meaning employers will be encouraged to invest in developing specialized knowledge and training for employees if they know that such value will not be transferred to a competitor. Proponents likewise suggest employees have leverage to receive additional compensation for their agreement, in the form of either upfront incentives or future compensation and wage growth, reflecting a future return on investment by the employer in the employee.

In recent years, however, the use of these agreements has come under heightened scrutiny, with opponents arguing there is little support that the "incentive" exchange described above is benefiting employees, and that use of such agreements (even in jurisdictions where they are unenforceable) is negatively influencing the larger economic system by unnecessarily chilling employee mobility.

Historically, the enforceability of non-compete agreements has been controlled by state common law. With slight variation, these agreements have generally been held enforceable in the vast majority of states as long as there is a limitation on the duration and geographical scope of the agreement, noting public policy demands that the limitations be only as restrictive as necessary to protect the employer's "legitimate business interests." Most states have now also passed legislation further limiting the use of such agreements, with a small minority banning their use outright.

In July 2021, President Biden issued his "Executive Order on Promoting Competition in the American Economy," which included vast aims on combatting a "lack of competition" in the American economy. The Order suggests corporate consolidation and lack of competition have driven up prices for consumers, driven down wages for workers, and inhibited economic growth and innovation. Within the Order, President Biden encouraged the Federal Trade Commission (FTC) to use its rule-making authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." The accompanying fact sheet for the Order states the FTC is directed to "ban or limit non-compete agreements." Notably, the Executive Order has no immediate impact on employers, as the FTC will have to first engage in the regulatory rule-making process. Based on the vague direction of the Order, the scope of future regulatory action is still unknown and will be subject to hotly contested debate.

The FTC has recently held an informal workshop on December 6-7, 2021, entitled "Making Competition Work: Promoting Competition in Labor Markets." The "increased use of restrictive contractual clauses in labor agreements, including non-competes" was just one of the topics upon which the workshop focused. Thirty-seven public comments were submitted at or shortly after the workshop for consideration. Additionally, the FTC recently released its draft Strategic Plan for Fiscal Years 2022-2026 for public comment in November 2021. One of the strategies listed included:

> "Improve compliance: . . . Increase use of provisions to improve worker mobility including restricting the use of non-compete provisions."

These actions indicate the FTC is laying the foundation for eventual rule-making on non-compete agreements.

A study by the Economic Policy Institute released in 2019 suggests that somewhere between 27.8% and 46.5% of American public-sector workers (translating to 36 to 60 million employees) are subject to non-compete agreements. A survey based on 2014 data from American workers by the University of Michigan reported that 18.1% of workers were then covered by non-competes, but that 38.1% of workers had agreed to one at some point in their lives. That same study found that while non-competes were more routine amongst workers with higher levels of education and higher earnings, they were still prevalent amongst less-educated and lower-wage employees. For example, 34.7% of employees without a bachelor's degree responded that they had entered into a non-compete agreement at some point and 14.3% were currently working under one. For those workers earning less than $40,000 a year, 13.3% were currently working under a non-compete, and 33% had agreed to one at some point. FTC Commissioner Rebecca Slaughter focused heavily on the impact of non-compete agreements on lower-wage workers in a speech during a prior FTC workshop specifically addressing non-compete agreements in January of 2020. The focus on the prevalence of non-competes amongst lower-wage earners suggests that future regulation or legislation will most likely focus on this category of workers, at a minimum.

Several states have also recently amended or enacted legislation further limiting or restricting non-compete agreements.

- **Washington, D.C.** passed a law in 2020, with a delayed effective date of April 1, 2022, completely banning non-compete agreements in the district, similar to prior prohibitions in **California, North Dakota** and **Oklahoma**. The law also includes non-retaliation provisions and requires all employers to provide written notice to employees of the prohibition under the law.
- **Oregon** passed an amendment to its existing non-compete legislation, effective as of January 1, 2022, prohibiting non-compete agreements (with limited exception) unless certain conditions are met, including: the employee makes at least $100,533 a year (later adjusted for inflation); advance written notice is provided by the employer; the employee falls within certain categories (administrative, executive, or professional, salaried, and exercises intellectual, managerial, or creative independent judgment); the employer has a "protectable interest" (i.e., trade secrets or competitive business or professional information); and a copy of the non-compete is provided again following separation. The amendment also shortened the permissible duration of the agreements from 18 months to 12 months.
- **Nevada** passed legislation effective on October 1, 2021, making non-compete agreements unenforceable if the employee is paid on an hourly basis. The law also provides recovery of attorney's fees for an employee who successfully challenges an unenforceable agreement.
- **Illinois** passed legislation in May 2021, which became effective January 1, 2022, placing several limitations on the enforceability of non-compete agreements, including: a minimum earning threshold of $75,000 a year (with specified future increases); limitations for non-competes when an employee was the subject of a COVID-related layoff or termination; voiding non-compete agreements for certain collective bargaining employees and construction employees; implementing notice and writing requirements; and providing for recovery of attorney's fees and costs to employees who successfully challenge an unenforceable agreement.

These recently enacted laws also suggest a common thread of limiting the impact on lower-wage and hourly workers.

There have also been renewed attempts to pass federal legislation in the past year. The Workforce Mobility Act, a federal bipartisan bill introduced by Sens. Chris Murphy (D-CT) and Todd Young (R-IN), which would eliminate the use of non-compete clauses in employment agreements, with limited exceptions for partnership dissolutions and sales of businesses, is currently working its way through Senate committees. The Freedom to Compete Act was also introduced last summer by Sen. Marco Rubio (R-FL). The Act was also a bi-partisan bill that would void all non-compete agreements entered before the Act and prohibit them going forward, with limited exceptions for certain types of workers. Similar efforts in Congress have historically failed.

If federal legislation or an FTC proposed rule gain steam this year, push back from employers can be expected during the initial drafting and enacting processes, and through legal challenge thereafter. Questions have already been raised regarding whether the FTC has legal authority to enact substantive rules to prohibit "unfair methods of competition," or if only Congress has the power to do so through specific legislation. FTC Commissioner Noah J. Phillips raised such separation of powers concerns during the January 2020 FTC non-compete workshop, also noting that the FTC had only issued a competition rule once in its history. That rule was never enforced and was later withdrawn. Likewise, any federal legislation may raise questions regarding whether the law completely preempts existing state law limitations.

By all indications, the already choppy landscape of restrictions on the enforcement of non-compete agreements is subject to further change. Employers should take heed to closely monitor and carefully re-evaluate their use of non-compete agreements against the same, considering the common law and legislation of each state in which their non-compete agreements may be enforced, as well as the effect of any future federal regulation or legislation.

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STUDENT-ATHLETE SPONSORSHIP DEALS IN 2022...

...WHAT BUSINESSES SHOULD KNOW

J'Naia L. Boyd Rivkin Radler LLP

Since the National Collegiate Athletic Association (NCAA) adopted its Interim Name, Image, and Likeness (NIL) Policy in June 2021, which allows college athletes to receive NIL-based compensation, businesses and athletes alike have capitalized on the new rules by entering into varied sponsorship deals. These collaborations between businesses and athletes have ranged from multimillion-dollar endorsement deals to local shops engaging athletes for social media advertisement. However, with the fluidity of the NIL rules from the NCAA to the state level and the lack of federal guidance, businesses should keep pace with the ever-changing landscape and know whether potential deals meet all NCAA, state and school requirements.

If you are contemplating a student-athlete sponsorship deal, the following information will help you prepare.

IMPORTANT BACKGROUND

On June 21, 2021, the United States Supreme Court made a landmark ruling in *Nat'l Collegiate Athletic Ass'n v. Alston*, where it held that the NCAA violated federal antitrust laws by imposing rules restricting the education-related benefits that student-athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. Nine days later, the NCAA adopted the Interim NIL Policy. The NCAA's Interim NIL Policy provides the following guidance:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
- Individuals can use a professional services provider for NIL activities.
- College athletes who attend a school in a state without an NIL law can engage in an NIL activity without violating NCAA rules related to name, image and likeness.
- State law and schools/conferences may impose reporting requirements.[1]

EVOLVING NIL LANDSCAPE

The NCAA's open-ended Interim NIL Policy will likely transform into more specific rules given the recent adoption of a new NCAA constitution. On January 20, 2022, NCAA member schools voted to approve a streamlined version of the NCAA constitution, which imparts certain NCAA principles and values for member schools to follow. As to NIL, the constitution specifically provides that "[s]tudent-athletes may not be compensated by a member institution for participating in a sport, but may receive educational and other benefits in accordance with guidelines established by their NCAA division," which aligns with the NCAA's current rules forbidding pay-for-play and improper inducement for enrollment at schools. Guided by this principle and others, each division of the NCAA (Divisions I, II and III) will review division-specific legislation and draft rules by August 1, 2022, that will govern their member schools and conferences. Therefore, when crafting sponsorship deals, businesses should be aware of any division-specific NIL rules that may be adopted in late 2022.

Businesses should also heed the various state laws that have recently taken effect. While states like Alabama, Colorado, Florida, Georgia, Illinois, Ohio and Pennsylvania had NIL legislation that went into effect immediately after the adoption of the Interim NIL Policy, new states like Michigan, Arkansas and Nevada have joined the NIL ranks this year. These new laws impose specific requirements and restrictions such as disclosing proposed NIL contracts to school officials; prohibiting athletes from engaging in NIL promotions during practice, competition or other intercollegiate athletic activity; and allowing institutions to require athletes to take courses in or receive education or training in contracts and financial literacy.

As the NCAA rules do not largely apply to high school athletes, businesses should likewise be cautious in navigating the state and high school athletic federation rules concerning those athletes. Several states still have rules prohibiting high school athletes from profiting from their name and likeness. High school students in large college sports states like Texas and Georgia, for example, will lose their amateur status by capitalizing on their athletic fame.

These rules, much like the NCAA's regulations, are also in flux. Since the adoption of the Interim NIL Policy for college athletes, some states have reversed their stance. In New York, high school athletes were previously barred from receiving money or gifts of monetary value from businesses capitalizing on the athletes' athletic ability. However, in October 2021, New York joined states like California by allowing high school athletes to profit from their name and likeness. Next-door neighbor New Jersey also approved an amendment to its rules permitting high school athletes to enter the NIL realm. The bylaw amendment from the New Jersey State Interscholastic Athletic Association took effect on January 1, 2022, and includes certain restrictions on athletes relating to the use of their high school's name or marks and also bans the promotion of adult entertainment products, alcohol, tobacco and cannabis products.[2]

A SEA OF NEW CHANGES

Moving into 2022, businesses engaging college and high school athletes for endorsement and sponsorship opportunities must stay abreast of new NIL rules that have taken shape across the country. Given the varied state laws, school rules and federation bylaws, combined with the impending changes at the NCAA level, businesses should consider reaching out to an attorney before executing a deal with a student-athlete.

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1 *See* Taking Action, Name, Image, and Likeness, NCAA, https://www.ncaa.org/about/taking-action (last visited on January 25, 2022).

2 *See* NJSSIA Name, Image and Likeness FAQs, New Jersey State Interscholastic Athletic Association https://www.njsiaa.org/sites/default/files/documents/2022-01/njsiaa-nil-faqs-final.pdf (last visited on January 25, 2022).

ANTITRUST 2022

The Antitrust Paradox vs. The New Brandeisians

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On July 9, 2021, President Biden signed an *Executive Order on Promoting Competition.* That Executive Order sets forth the Biden Administration's plan for a more aggressive antitrust enforcement policy and reflects the Administration's belief that several industries in the United States have become too concentrated, thereby allowing firms to exercise market power, depress wages and stifle competition.

The Biden Administration's agenda emphasizes new social policy goals with respect to the range of considerations relevant to antitrust enforcement. Since the 1970s, antitrust enforcement has in large part been focused on consumer welfare issues. This consumer welfare standard was advanced by Robert Bork, a former law professor and federal judge. In his seminal treatise, *The Antitrust Paradox*, Judge Bork argued that the intent of the Sherman Act was to protect consumer welfare, not to control the broader economic and corporate power of corporations. Under Judge Bork's theory of antitrust, mergers and trade restraints allow business to lower costs and improve services, thereby benefiting the consumers and improving efficiency. This theory of antitrust and merger enforcement soon gathered support in academic circles and in the federal judiciary. For the last 40 years, antitrust merger enforcement has been focused primarily on potential collusion among rivals. Scrutiny of corporate consolidation has been largely focused on whether a transaction would benefit consumers or conversely result in higher prices or a reduction in product qualities.

Against this backdrop, many contemporary academics have argued that antitrust investigation and enforcement decisions should also take into account a broader array of factors, such as the potential impact of a transaction or conduct on employment, small businesses and macroeconomic metrics. Known in some circles as the "New Brandeisian" approach to antitrust enforcement, the Biden Administration has endorsed this paradigm shift. The so-called New Brandeisians borrow their name from Justice Louis Brandeis's reliance while in private practice on a legal brief in *Muller v. Oregon,* that relied heavily on scientific information and social science as opposed to law. This philosophical shift is playing out initially in the Department of Justice ("DOJ") and the Federal Trade Commission

("FTC"), both of which have statutory oversight over antitrust and merger and acquisition activity. Firms involved in M&A activity need to be mindful of the changing regulatory and enforcement landscape. The Biden Administration has made it clear that federal regulators will adopt a more aggressive approach and will pursue increased scrutiny on antitrust and monopolistic activities in the merger and acquisition space. The new Chair of the FTC, Lina Khan, is a former academic who has advocated strongly for broadening antitrust merger enforcement and moving away from the consumer welfare standard. This philosophical change will have ramifications for businesses and M&A activity for the foreseeable future.

Because the consumer welfare antitrust enforcement standard has been articulated and is well settled in United States Supreme Court precedent, the Biden Administration is introducing its policies in a variety of ways. Executive agencies, most notably the FTC, have been encouraged to use new regulations to promote competition and to protect workers and small businesses. The FTC has also taken steps to identify target industries for scrutiny and to allow staff more flexibility to open antitrust investigations. With the change in philosophical focus, however, there is a degree of uncertainty at the FTC as new guidance is implemented and existing guidance changed. This is evident with respect to the recent withdrawal by the FTC of the Vertical Merger Guidelines and the Statement of Enforcement Principals Regarding Unfair Methods of Competition under Section 5 of the Sherman Act. Unlike the Department of Justice, the FTC is not limited to enforcing the Sherman Act and the Clayton Act, the two principal federal antitrust statutes. The FTC has separate rulemaking authority, as well as an internal administrative quasi-judicial system, to enforce the provisions of the Federal Trade Commission Act ("FTC Act"). This recent withdrawal of long-standing guidance suggests that the FTC may seek to invoke broader authority under the FTC Act.

Of particular note for practitioners and companies looking to pursue a merger or acquisition is the FTC's increased enforcement of its regulatory authority under the Hart-Scott-Rodino Act ("HSR"). Under HSR, certain proposed mergers that meet the multipart statutory test require both parties to a transaction to submit the transaction to federal regulators for prior approval before closing. After filing with the FTC and the DOJ, HSR provides for an initial waiting period (typically 30 days) to allow the agencies to determine if the government wants to investigate the proposed transaction more thoroughly. If FTC or DOJ elects to investigate, it will issue a "second request" to the parties. That second request will seek a substantial amount of data, information and documents from the parties to the transaction. The pre-merger waiting period will not expire in such a case until both parties have "substantially complied" with the second request requirements. This process can be time-consuming and very expensive.

Under HSR, parties to a transaction can request that the initial waiting period of 30 days be shortened. Historically, such "early termination" requests have been granted when neither agency identifies a need for further investigation or when a transaction does not raise competitive concerns. In 2021, the FTC, as part of its increased enforcement philosophy, announced it was "suspending" the grant of early terminations under HSR. The stated reason for the termination was the increase in pre-merger filings due to M&A activity and lack of adequate staffing. The practical implication of this policy shift, however, is to increase delays and the potential for heightened scrutiny of merger activities.

Similarly, in August of 2021, the FTC announced via blog post that it would "adjust" its merger review process to address the increase in pre-merger filings under HSR. FTC has begun sending notifications to parties to proposed transactions advising that the agency has not completed its non-public investigation during the waiting period and parties who choose to close despite HSR having not sent a second request, risk the FTC taking action at a later date. While the FTC has always had the legal ability to challenge transactions even when HSR clearance has been obtained, the FTC's confusing messaging on these issues has led to further ambiguity and uncertainty in the M&A arena.

FTC Chair Khan has noted that the FTC will evaluate potential harms to workers in small businesses as part of its antitrust M&A enforcement authority. Chair Khan has also noted the following initiatives so that the FTC can channel its enforcement resources on areas likely to have the greatest impact: reviewing dominant firms where lack of competition makes unlawful conduct more likely; revising merger guidelines and identifying "ways to deter unlawful transactions"; addressing "gatekeepers and dominant middlemen across the economy" that are exercising market power; addressing the growing role of private equity and other investment vehicles that may distort competition; and confronting contract terms that arise from "market power abuses" and create "consumer protection concerns," such as non-compete clauses.

The FTC has also identified the following areas for increased scrutiny: unlawful mergers in any industry; technology companies in digital platforms; hospitals, pharmaceutical companies and pharmacy benefit managers; labor markets (with a particular emphasis on conduct that may limit wages and worker mobility); exploitation of the COVID-19 pandemic; and so-called "repeat" offenders. Recently, Chair Khan has advanced a new concept of "monopsony" in an effort to focus attention on how large firms, especially in the technology space, use pre-eminent market power to dominate the market as a buyer.

These philosophical and substantive changes in antitrust merger enforcement at the DOJ and FTC must be accounted for by companies contemplating a merger or substantial transaction. Practitioners should note that the FTC may keep merger investigations open beyond the HSR waiting period. Counsel need to account for this potential by drafting carefully drawn contract language and closing conditions. In addition, transaction reviews are likely to be more time-consuming and costly given the FTC's stated intention to investigate a wider scope of topics and to seek additional and more expansive discovery during the second request and substantial completion process.

While it is unlikely, given the broad scope and judicial endorsement of the consumer welfare standard, that antitrust enforcement will change immediately, the Biden Administration, through both its policy statement, broad rulemaking and FTC enforcement remedies, is taking significant steps to articulate a much broader view of antitrust enforcement. The fact that the FTC is relying substantially on Executive Order(s) calls into question the long-term impact of these initiatives, but the FTC is clearly seeking to change the long-standing antitrust paradigm. Firms and practitioners in the M&A area should take note.

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I'M RESPONSIBLE FOR THE WHOLE VERDICT?

The Changing Face of Joint and Several Liability in Pennsylvania in the Aftermath of the Spencer *Decision*

John Pion and **Bradley Sprout** Pion, Nerone, Girman, Winslow & Smith, P.C.

In March 2021, Pennsylvania's Superior Court issued a decision in *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021), that reinterpreted the Fair Share Act and significantly expanded the application of joint and several liability in Pennsylvania. A year later, it appears that the *Spencer* decision is here to stay.[1] As such, individuals and companies who are or may become involved in multi-defendant tort litigation in Pennsylvania now face increased costs and financial liability, requiring a change in how those cases are investigated, evaluated, and defended.

To illustrate the consequences of *Spencer*, consider the following scenario: Plaintiff is traveling at night in a passenger vehicle on a main roadway near a warehouse complex owned by Defendant A. As Plaintiff approaches the exit for the warehouse complex, he is struck by a truck owned and operated by Defendant B, who fails to see and stop at a stop sign at the exit from the complex. Defendant B claims that he failed to stop because the overgrown landscaping on Defendant A's property obstructed his view of the stop sign and oncoming traffic on the main roadway. After the collision between Plaintiff and Defendant B, Defendant C, who is operating another passenger vehicle, fails to observe Plaintiff's disabled vehicle in the roadway and collides with Plaintiff as well.

Plaintiff brings a lawsuit against Defendants A, B and C, asserting claims of negligence against each Defendant. At trial, the jury finds no negligence on the part of Plaintiff and apportions liability amongst the Defendants as follows: Defendant A – 10%; Defendant B – 45%; Defendant C – 45%. The jury awards Plaintiff $100,000 for his injuries.

Before *Spencer*, the Fair Share Act limited defendants' liability in multi-defendant litigation. Unless a defendant was found to bear 60% or greater liability, the principle of joint and several liability did not apply. Accordingly, a defendant could be held liable only to the extent of the proportionate share of liability as assessed by the jury. For example, in the above illustration, Defendant A's liability to Plaintiff would be limited to 10% of the verdict, or $10,000. If Plaintiff could not collect the remaining $90,000 from Defendants B and C due to a lack of insurance, assets, or the like, Plaintiff was out of luck.

In *Spencer*, the Superior Court reinterpreted the Fair Share Act, holding that the Act does not apply in cases *where a plaintiff bears no comparative fault for his injuries*, reinstating the application of joint and several liability to such cases. With joint and several liability applicable, a plaintiff can recover the entire verdict from any defendant who is found to *bear any causal negligence* for the plaintiff's injuries. Thus, using the above illustration as an example, Plaintiff would be able to recover the entire $100,000 verdict from Defendant A, despite Defendant A bearing only 10% liability for the accident. Essentially, *Spencer* increased Defendant A's exposure by $90,000. Defendant A is then left to chase Defendants B and C for contribution for the amounts Defendant A paid to Plaintiff in excess of its proportionate share of the verdict (which, if Defendants B and C lack sufficient insurance or assets, is likely to be a fruitless endeavor).

In cases in which plaintiffs bear no fault for their injuries, *Spencer* shifts the risk from plaintiffs to the defendant or defendants who can satisfy the verdict. As long as a plaintiff has one deep-pocket defendant against whom the plaintiff can obtain some finding of liability – regardless of how nominal that finding of liability is – the plaintiff is protected in recovering on any verdict that is obtained.

From a plaintiff's perspective, *Spencer* encourages counsel to employ a "shotgun" approach to identifying and naming potential defendants in a lawsuit. Other than increasing the cost and complexity of prosecuting a case, there is little downside to naming as many potential defendants as possible in cases where it appears that a plaintiff will not bear any comparative fault and where the likely principal tortfeasor has insufficient coverage. Doing so only increases a plaintiff's likelihood of achieving full compensation, especially where a primarily liable defendant has questionable or inadequate insurance coverage or assets.

From a defendant's perspective, *Spencer* changes the way in which multi-defendant cases must be investigated, evaluated and defended.

INVESTIGATING AND ARGUING A PLAINTIFF'S COMPARATIVE NEGLIGENCE

The easiest way to avoid the ramifications of *Spencer* is to obtain a finding that a plaintiff was comparatively negligent in causing his injuries. If a plaintiff is found even 1% comparatively negligent, the Fair Share Act and its apportionment rules apply. Thus, from the outset of a claim or lawsuit, it is imperative to evaluate whether the facts support an argument that the plaintiff was negligent. Witnesses to the incident should be interviewed, a statement should be obtained from the plaintiff (if possible), and appropriate experts should be engaged to evaluate potential liability arguments. Although attempting to shift responsibility for an incident to the plaintiff can be a risky strategy in some cases, it is one that could ultimately result in a significant reduction in a defendant's exposure if the ramifications of *Spencer* can be avoided.

INVESTIGATING CO-DEFENDANTS' INSURANCE COVERAGE AND SOLVENCY

The application of joint and several liability – and a plaintiff's ability to recover an entire verdict from one defendant – is most likely to occur in situations where one or more of the defendants do not have adequate insurance coverage or assets to satisfy a verdict against them. Thus, it is important early in a claim or lawsuit to determine the insurance coverage available to the other defendants, either informally among the defendants or through formal discovery procedures. It is also important to conduct due diligence on co-defendants to evaluate their ability to satisfy a verdict if their insurance coverage is inadequate. Even if a co-defendant is solvent and has sufficient liquidity or assets to satisfy a verdict against it, a lack of adequate insurance coverage will likely lead to a plaintiff looking elsewhere to recover the verdict, as it is far easier to recover from an insurance company than it is to execute on another defendant's assets.

SHIFTING THE FOCUS AWAY FROM A DEFENDANT'S PROPORTIONATE LIABILITY WHEN EVALUATING A CASE

Before *Spencer*, one of the key considerations in evaluating a case, and determining the strategy that would be employed in defending a case (whether it be staffing the case, hiring of experts, the extensiveness with which discovery is pursued, etc.), was a consideration of how much liability a defendant was likely to bear in relation to the other defendants. Although that consideration is still relevant, its importance has been diminished in light of *Spencer*. If there is a possibility that a plaintiff will not bear any comparative negligence, then a defendant has to assume that it may be responsible for an entire verdict in evaluating a case and making strategic defense decisions. Such an assumption is even more important if, as noted above, some or all of the other defendants have inadequate insurance coverage or if a particular defendant finds itself with the highest level of insurance coverage or the deepest pockets amongst the defendants.

RESERVING DEFENSE COSTS AND INDEMNITY

Because of the potential for more significant exposure in the event a plaintiff attempts to recover an entire verdict from one defendant, and because of the additional work that is necessary in investigating and litigating claims, reserves for defense costs and indemnity likely need to be increased in cases where a plaintiff may not bear any comparative negligence and, thus, *Spencer* may apply.

CONSIDERATION OF SETTLEMENT THROUGH PRO RATA JOINT TORTFEASOR RELEASES

One way a defendant can mitigate against the risk presented by *Spencer* and the application of joint and several liability is to enter into a *pro rata* joint tortfeasor release. In a *pro rata* joint tortfeasor release, the plaintiff agrees that any recovery against the non-settling defendants will be reduced by the proportionate share of liability that is attributed to the settling defendant. Such an agreement, in turn, extinguishes any claims for contribution that the non-settling defendants would otherwise have against the settling defendant. Accordingly, by entering into a pro rata joint tortfeasor release, a defendant not only gains certainty as to its liability exposure by eliminating the possibility that it is held jointly and severally liable for the entire verdict, but also eliminates the possibility of being pursued for contribution by non-settling defendants who pay more than their proportionate share of any verdict that is rendered.

In summary, as it appears the holding in *Spencer* is here to stay, defendants must adapt the way in which they investigate, evaluate and defend multi-defendant cases where the possibility exists that no comparative negligence will be attributed to the plaintiff.

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[1] There is an argument that the Superior Court's reinterpretation of the Fair Share Act in *Spencer* is dicta, which could provide for future challenges to the Court's decision. However, until that occurs, or until another panel of the Superior Court rules otherwise, the *Spencer* decision will likely continue to be followed by Pennsylvania courts.

Medicare Claim Denials Are Happening to Individuals After Settlement, Study Confirms

By Jayson Gallant Ametros

Ametros sought to answer a question many in the industry have asked. "What happens when a Medicare beneficiary settles their claim with an MSA, and, without reporting proper exhaustion of those funds to Medicare, attempts to use their Medicare benefit to pay for treatment that was included in the WCMSA settlement? Does Medicare have a process of denying those claims?" we asked. The answer is yes - Medicare is systematically denying MSA recipients' claims, and with steady frequency.

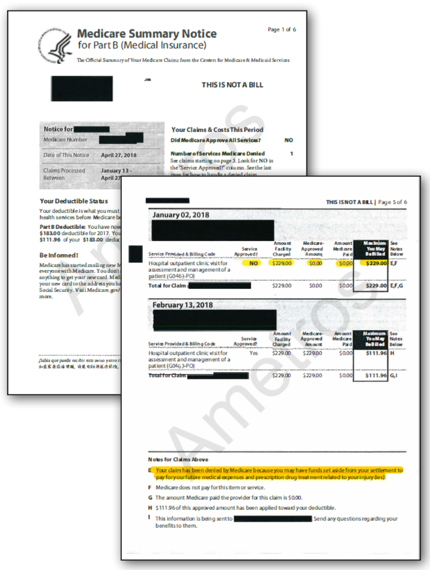
With data provided by ResDac, a CMS contractor, Ametros analyzed data of Medicare beneficiaries who had been denied claims reimbursement because there was a different primary payer that should have been used. The data analyzed was from 2018–2020 and was a limited data set of Carrier Line Files that Medicare produces each year with a data partner. We then looked at other claims data, such as the amount charged and the total number of beneficiaries who had at least one claim denied.

Unfortunately, Medicare claim denials do happen after settlement, despite several misconceptions about the importance of complying with Medicare's requirements. Our findings are published in A Study of CMS Policy on Treatment for Injured Workers with a Medicare Set Aside (MSA). To see the full study, please go to: ametros.com/avoid-medicare-denials/

A LITTLE BACKGROUND

MSAs are among the most complex – and daunting – responsibilities of stakeholders trying to help injured workers settle their claims. Someone who is or will soon be a Medicare beneficiary must ensure Medicare does not pay for medical treatment that should be the responsibility of a third party, including settlement funds. Failure to do so puts the injured worker at risk of jeopardizing future Medicare coverage. Medicare makes it abundantly clear how this scenario can occur.

Medicare states in the WCMSA Reference Guide, "If payments from the WCMSA account are used to pay for services other than Medicare-allowable medical expenses related to medically necessary services and prescription drug expenses for the [workers' compensation] settled injury



Medicare Summary Notice
for Part B (Medical Insurance)
The Official Summary of Your Medicare Claims from the Centers for Medicare & Medicaid Services
Page 1 of 6

[redacted]

THIS IS NOT A BILL

Notice for [redacted]
Medicare Number [redacted]
Date of This Notice April 27, 2018
Claims Processed Between January 13 - April 27

Your Claims & Costs This Period
Did Medicare Approve All Services? NO
Number of Services Medicare Denied 1
See claims starting on page 3. Look for NO in the "Service Approved?" column. See the last page for how to handle a denied claim.

Your Deductible Status
Your deductible is what you must ... health services before Medicare b...
Part B Deductible: You have now ... $183.00 deductible for 2017. You ... $111.96 of your $183.00 deduc...

Be Informed!
Medicare has started mailing new M... everyone with Medicare. You don't ... anything to get your new card. Med... your new card to the address you h... Social Security. Visit Medicare.gov/... more.

[redacted] THIS IS NOT A BILL | Page 5 of 6

January 02, 2018
[redacted]

Service Provided & Billing Code	Service Approved?	Amount Facility Charged	Medicare-Approved Amount	Amount Medicare Paid	Maximum You May Be Billed	See Notes Below
Hospital outpatient clinic visit for assessment and management of a patient (G0463-PO)	NO	$229.00	$0.00	$0.00	$229.00	E,F
Total for Claim [redacted]		$229.00	$0.00	$0.00	$229.00	E,F,G

February 13, 2018
[redacted]

Service Provided & Billing Code	Service Approved?	Amount Facility Charged	Medicare-Approved Amount	Amount Medicare Paid	Maximum You May Be Billed	See Notes Below
Hospital outpatient clinic visit for assessment and management of a patient (G0463-PO)	Yes	$229.00	$229.00	$0.00	$111.96	H
Total for Claim [redacted]		$229.00	$229.00	$0.00	$111.96	G,I

Notes for Claims Above
E Your claim has been denied by Medicare because you may have funds set aside from your settlement to pay for your future medical expenses and prescription drug treatment related to your injury(ies).
F Medicare does not pay for this item or service.
G The amount Medicare paid the provider for this claim is $0.00.
H $111.96 of this approved amount has been applied toward your deductible.
I This information is being sent to [redacted] Send any questions regarding your benefits to them.

or illness, Medicare will deny all [workers' compensation] injury-related claims until the WCMSA administrator can demonstrate appropriate use equal to the full amount of the WCMSA." WCMSA Reference Guide, v3.5, Sec. 17.3. "Medicare may also refuse to pay for future medical expenses related to the [workers' compensation] injury until the entire settlement is exhausted." Id. at Sec. 3.0 and see also Sec. 2.3 and 42 CFR 411.46(a).

Having an MSA can be difficult for injured workers to understand in the context of their injury, which is why professional administration is recommended by CMS, especially since treatment may be needed at any point in the future. Without the help of experts managing their future medical funds, individuals risk receiving denial letters for their treatment, such as the examples to the left.

FINDINGS

"There was a significant growth in denied claims between Q1 of 2018 and Q4 of 2020, which could potentially mean that more beneficiaries with a WCMSA were seeking treatment," according to the study. "There was also a large drop-off right at the beginning of the COVID-19 pandemic, likely because of treatment restrictions to only those with life-threatening issues. Interestingly, despite fewer claims being denied in recent quarters, the dollar amount has remained steady."

We looked at various aspects of the denied claims over the three-year period, including the number of denied claims, total unpaid claims in dollar amounts and the individual number of beneficiaries affected:

WCMSA Denied Claims*

2018	2019	2020	3 YR AVG
35,980	36,060	30,720	34,253

Total Unpaid Claims ($)*

2018	2019	2020	3 YR AVG
$19.2M	$14.3M	$11.8M	$15.3M

Individual Beneficiaries Affected

2018	2019	2020	3 YR AVG
11,570	11,150	12,480	11,733

Average # of Denials per Beneficiary

2018	2019	2020	3 YR AVG
5	5	6	5

Average Cost of Denied Claims

2018	2019	2020	3 YR AVG
$1,729	$2,569	$2,830	$2,376

The average number of denied claims per beneficiary was 5, while the average cost of each denied claim was $2,376. We also looked at the numbers in various states. Of the 16 states included, California had by far the highest number of denials:

1. **2018: 12,600**
2. **2019; 13,720**
3. **2020: 11,640**

Our study indicates, "Almost a third of all denials were in California, the most populous state, which has a robust workers' compensation claim volume. Less populated states like Indiana, Colorado and Maryland also had a substantial amount of denied claims."

We also noted a distinct correlation between states with a large volume of claims and a high number of post-settlement claim denials. Nevertheless, the researchers found Medicare denials were nationwide.

Our data shows that Medicare is actively monitoring claims and that beneficiaries with a WCMSA should use the funds in compliance with CMS' WCMSA guidelines. Otherwise, their claims for related treatments will be denied. This is not isolated to certain states; it is happening across the country to thousands of beneficiaries.

IMPLICATIONS

After a claim settles, it is the injured worker's responsibility to comply with Medicare's guidelines. There are a variety of reasons as to why Medicare would deny a claim:

- Their provider could have billed their Medicare benefit when they should have billed the beneficiary or their administrator directly.
- The injured worker could have been confused as to whether or not they should use their Part B benefit or their WCMSA funds for a particular treatment.
- Or in the case an injured worker exhausted their MSA funds, they may not have adequately provided an accounting of their WCMSA expenses, which would generate the denial letter.

"No matter what the explanation, a consistent number of the injured workers we work with every day when settling these cases will be denied treatment by Medicare because they have not properly set up or used their MSA settlement funds," the study says. "This data should be compelling to stakeholders to ensure that injured workers understand how to handle their WCMSA funds at the time of settlement properly."

"As a workers' compensation defense attorney, it can sometimes be easy to ignore the potential risks of Medicare denying payment of medical expenses for an injured worker because by the time this occurs, the claim has been settled," says Jeremy M. Buchalski, a leader in workers' compensation claims. "However, the risks are real and the failure to appreciate them could affect the ability of employers, carriers and third-party administrators to settle claims in the future. The prospect of Medicare denials may dissuade an injured worker or their attorney from settling at all. Stakeholders in the industry must be cognizant of this risk and seek to prevent it from affecting their ability to resolve claims, which is where professional administration of Medicare Set Aside accounts can be beneficial."

IMPORTANCE OF 'THE MARKER'

One of the misconceptions that injured workers and their representatives may have is that Medicare is unaware of the specifics of the MSA throughout the settlement process and afterward. The reality is CMS tracks MSAs at certain key points.

At settlement, the Responsible Reporting Entity – the party responsible for funding a claim payment – must inform Medicare of the settlement and the amount – including the MSA. Post-settlement, the injured worker must send in annual attestations of their use of the MSA funds. If the amount used exceeds the MSA amount, the beneficiary must also send an 'exhaustion attestation' to receive additional reimbursement for medical treatment from Medicare.

At settlement, the Benefits Coordination & Recovery Center (BCRC), a Medicare contractor responsible for ensuring Medicare gets repaid for conditional payments, places a 'marker' on the injured worker's file. "This is updated if the individual attests they have properly exhausted funds," the study explains. "Until the BCRC receives proper attestation of the funds being exhausted, the Medicare administrative contractor (MAC) will deny any claims related to the injury."

When a physician submits a bill to Medicare, the Medicare Administrative Contractor (MAC) reviews it to see if the marker on the person's MSA account has been removed. If it has not, the claim will be denied.

STAYING IN COMPLIANCE

Failing to follow the rules that are laid out in the WCMSA Reference Guide can become a tremendous expense for injured workers. Not only must the MSA funds be used appropriately, but a variety of complex requirements must be adhered to for claims to be accepted.

The Medicare beneficiary or their representative may find it extremely difficult to stay in compliance with the requirements. While some injured workers choose to manage these accounts on their own, many find it overwhelming. In fact, CMS itself recognized this difficulty when in 2017, it "highly recommended that settlement recipients consider the use of a professional administrator for their funds."

Professional administrators are focused solely on meeting the needs of the injured worker after settlement. Ideally, they get involved in the process pre-settlement to ensure those needs are properly addressed.

Professional administrators:

- Ensure funds are spent in accordance with CMS guidelines.
- Protect an individual's eligibility for future Medicare benefits by considering Medicare's interests.
- Ease the burden of compliance from the beneficiary.

Changes during the last decade have made professional administrators an affordable option. Many employers and insurers pay the fee as part of the settlement agreement.

SUMMARY

The volume of Medicare denials over the last few years emphasizes that it's critical for employers, insurers, and representatives of these individuals to ensure injured workers have the necessary knowledge to be compliant with CMS' MSA requirements after settlement.

Settling a workers' compensation claim should start a new chapter for an injured worker – even when an MSA is included. This resolution can happen only if and when the account is set up and managed strictly according to the government's rules and regulations. Properly informing injured workers settling with an MSA of their obligations to Medicare after settlement and turning to experts in the field, such as a professional administrator, are the best and most painless ways to prevent claim denials.

Jayson Gallant, a strategic account executive at Ametros, has an extensive background with managing business partnerships and educating the industry. He supports strategic initiatives for our national carrier, TPA and employer partners. He also supports Ametros' product development initiatives and works alongside Ametros' industry partners.

GOOD COMPANY STORIES: *How Jurors Assess Corporations, and What That Means for Your Litigation*

Alexander C. Jay, Ph.D. and **David Metz** IMS Consulting

Consultants often emphasize the need for a "good company" story to help jurors see the case in a favorable light. But what exactly does such a story entail, and why is it so important?

The answers can be found in the psychology behind human social perception. Namely, when it comes to judging other people, humans rely on two fundamental dimensions: warmth and competence.[1] Someone's "warmth" relates to their perceived morality, trustworthiness or friendliness, and we use judgments of others' warmth to determine whether that person is a potential ally with good intentions or a potential threat with bad intentions. We then use judgments of others' "competence" to determine the extent to which someone has the capacity to act upon and achieve their goals – be they constructive or harmful.[2]

Because it is more important to know whether someone is a friend or foe than whether they can achieve their goals, warmth is considered "primary." As the primary dimension, warmth sets the tone or direction of someone's impression ("I like them" vs. "I don't like them"), and competence serves to amplify that tone ("I really like them" vs. "I really don't like them").[3]

These tools are so fundamental to our social-judgment toolbox that people will apply them even to more abstract social entities – like corporations. Unfortunately for corporations, people frequently presume them to lack morality or trustworthiness (i.e., to be low in "warmth"), and to have a high capacity to achieve their immoral goals (i.e., to be high in "competence").[4] Taken together, corporations are stereotyped as having bad intentions and the ability to pursue them. One can imagine why this is a hurdle for corporate litigants needing jurors on their side.

WHY YOU CAN'T RELY ONLY ON JURY SELECTION

Ideally, biases like these would always be eliminated from the venire. But in the real world, traditional procedural safeguards such as voir dire and jury selection are under-equipped to weed out biased preconceptions of corporations, as peremptory challenges are limited, and often only the most obviously biased jurors can be caused out.

A good company story is, therefore, essential to make lemonade with the seated jurors you end up with. Left unabated, lingering negative preconceptions can exert a powerful influence on jurors' decision-making process and final case judgments.

HOW JURORS' PERCEPTIONS INFORM THE CASE STORY THEY HEAR

It is understood among legal-psychology scholars that jurors create stories to make sense of the evidence and arrive at what they believe is the correct verdict. Therefore, the side best able to streamline its case into a compelling, memorable story will have the advantage. In addition to their own experiences, perceptions of the parties' warmth and competence can be one of the first filters through which jurors assess the evidence and judge what story makes the most sense.

Consider, for example, a defendant accused of putting a defective product on the market that jurors presume or perceive as untrustworthy. Claims that the defendant "puts profits over consumer safety," as well as evidence suggesting it took shortcuts in product testing, will align with jurors' negative perceptions and be more readily adopted as a result. That is, jurors' initial negative evaluation of the defendant's warmth makes it a light lift to accept the plaintiff's evidence as true and to embrace the plaintiff's narrative.

Litigants' perceived competence adds an interesting twist. Consider a data security company that is suing the manufacturer of data storage devices because the devices were breached and customers' data was stolen. Our research has shown that jurors will, in fact, take issue with the security company plaintiff for failing to protect its customers' data; from jurors' perspective, a data security company ought to be uniquely adept at securing data, regardless of whether the manufacturer's devices were ultimately to blame for the breach. Jurors expected high competence, and they were let down. In this experiment, simply changing the identity of the plaintiff from a data security company to a non-security company significantly increased the odds of a plaintiff verdict, despite the fact that the evidence pattern remained static.

So, while jurors presuming your corporation has high competence might seem like a positive starting point, keep in mind that they can be sensitive to positive-expectation violations, which can weigh heavily in jurors' liability and causation inferences. Did the defendant's ineptitude produce the breach of contract? Did the plaintiff fail to take obvious precautions and injure themselves? These are the types of questions jurors will be answering as the case unfolds and they piece together the most compelling version of events.

HOW JURORS' PERCEPTIONS INFORM THEIR VERDICTS AND DAMAGE AWARDS

Perhaps most importantly, jurors' perceptions of a party's warmth and competence are directly related to verdicts and damage awards, in that they inform jurors' appraisals of a company's motives. A party with high perceived warmth and competence, for instance, will enjoy the benefit of jurors motivated to deliver a successful outcome to that party. Indeed, each combination can have unique effects. (See table below.)

FACTORS TO CONSIDER IN CRAFTING YOUR STORY

Perceptions of warmth and competence are malleable, demanding a strong "good company" story. But corporations must also consider what other factors will impact jurors' perceptions and how to adjust their company story to account for those factors.

One obvious factor is reputation. A highly visible company will be readily known, and its reputation may be polarizing in the panel. Jurors with a negative perception of that company's morality or trustworthiness, for example, will not be receptive to a company story that simply states, "We are a good company doing good things for people." A similar problem exists if a company tries to oversell just how good it is. Such an attempt is likely to be perceived by jurors as disingenuous – confirming their beliefs that it is not trustworthy – and backfire. Instead, a company story that addresses the concerns of the jury head on, admitting some flaws while emphasizing that jurors don't truly know who you are as a company, is likely more palatable, and would increase jurors' willingness to consider your version of events.

Another factor is that jurors' attitudes do not exist in a vacuum but rather in the context of the case and the parties involved. Jurors' perceptions of a plaintiff's warmth and competence will be relative to their perceptions of the defendant's warmth and competence. Simply put, jurors don't have to like you absolutely; you just don't want them to like you significantly less than your adversary.

It is also important to anticipate how your company story might interact with what jurors are going to learn during trial. If your story heightens their perceptions of your company's competence, you are creating an expectation of competent behaviors. So, if there is compelling evidence to the contrary or a company witness who comes off as anything but competent, you will have contributed to your own fall from grace.

There are a multitude of unique factors to account for in any given case, but the examples listed above should convey the need to craft your story with a conscious effort toward considering how it jives with the circumstances of the case and with jurors' existing knowledge of your company.

DISCOVERING HOW JURORS WILL FEEL ABOUT YOU

It is difficult to know how jurors will perceive your company in terms of warmth and competence absent direct measurements. That is why pre-trial jury research is your best bet to assess these important variables, identify opportunities, and shore up vulnerabilities. A carefully crafted community attitude survey can elucidate how jurors in the venue perceive your company and the issues underlying your case. A jury research project, such as a focus group or mock trial, can go further, assessing how representative jurors' perceptions of your company inform their views of the evidence and witnesses, whether your company story is proving effective, and what elements will make it even more persuasive at trial. Close consideration of your case facts and company reputation is an essential start toward a potent "good company" story, but the only real way to know how jurors feel about you is to ask them.

Jurors' Perceptions of the Party's Warmth	Jurors' Perceptions of the Party's Competence	COMMON RESULT
HIGH	HIGH	• Very well-liked • Jurors motivated to help this party
LOW	LOW	• Strongly disliked • Jurors motivated to hurt (or, at a minimum, not help) this party
HIGH	LOW	• Liked, but pitied – seen as well-intentioned but lacking capacity • Can be beneficial if party's character was a key point of contention, with less focus on competence • Jurors motivated to help this party, but will be sensitive to the party's incompetence contributing to the alleged harm
LOW	HIGH	• Strongly disliked, sometimes to the extent it is seen as something of a supervillain: Nefarious intentions and the capacity to follow through • Jurors motivated to punish this party; if defendant, runs the risk of outsized damage awards

[1] Fiske, S. T., Cuddy, A. J., & Glick, P. (2007). Universal dimensions of social cognition: Warmth and competence. Trends in Cognitive Sciences, 11, 77–83. doi: 10.1016/j.tics.2006.11.005

[2] Fiske, S. T., Cuddy, A. J., Glick, P., & Xu, J. (2002). A model of (often mixed) stereotype content: competence and warmth respectively follow from perceived status and competition. *Journal of Personality and Social Psychology, 82*(6), 878-902. doi: 10.1037//0022-3514.82.6.878

[3] Wojciszke, B., Bazinska, R., and Jaworski, M. (1998). On the dominance of moral categories in impression formation. *Personality & Social Psychology Bulletin, 24*, 1245–1257.

[4] Aaker, J., Vohs, K. D., & Mogilner, C. (2010). Nonprofits are seen as warm and for-profits as competent: Firm stereotypes matter. *Journal of Consumer Research, 37*, 224–237. doi: 10.1086/651566

Dr. Alexander Jay has nine years of experience in jury research and the legal field. He uses this knowledge and experience in developing themes and recommendations for trial based on mock trials and focus groups.

David Metz is an expert in marketing and storytelling and uses this expertise to help clients better understand the juror audience and the messaging required to persuade them.

COLLATERAL SOURCE: CONSTANT CONFUSION

Katherine L. Vojas and **Jeffrey E. Atkinson** Lashly & Baer, P.C.

The Collateral Source Rule is a factor in one of the first questions all defendants and their insurers ask when a claim is received or a lawsuit is filed: "How much will this cost?" Application of the Collateral Source Rule can make an enormous impact on bottom-line dollars and cents, which in turn can mean the difference between settling or going to trial. Pleading, proving and recovering medical expenses are inextricably tethered to the Rule.[1]

Some variation of the Rule exists in every state and jurisdiction. Initially the creation of the courts, the Rule, in fact, is an exception to the general principle that damages in tort actions should be compensatory only. The theory of the Rule is a simple one: wrongdoers should not benefit from a reduction of damages due to payments made wholly independent of the wrongdoer. In practice, the Rule prohibits the reduction of a plaintiff's economic damages against a defendant because a "collateral source" paid those expenses on the plaintiff's behalf. Consequently, the Rule prevents defendants from introducing evidence at trial that the plaintiff's damages were covered in whole or in part by another.

In practice, the Rule often results in a windfall for a plaintiff, albeit one typically created by actions society encourages — the plaintiff's maintaining of insurance or employment. Nevertheless, defense attorneys frequently argue that their clients should not have to pay for compensatory damages never actually incurred by the plaintiff. In some cases, this windfall can be in the hundreds of thousands of dollars.

UNCERTAINTY IS THE ONLY CERTAINTY

An evolving issue in this realm is whether the Rule applies to government payments, specifically, Medicare and Medicaid. While the programs are funded in part through payroll taxes, as Medicare and Medicaid are heavily subsidized by state and federal governments and are essentially available to everyone under the programs' broad mandates (the elderly or poor), does the theory behind the Rule survive? Should defendants be on the hook for medical bills they are ultimately helping pay with their own tax dollars? Or should all the cards be on the table for the jury to decide how to assess damages?

Unfortunately, there is little case law exploring the intersection between the

Rule and Medicare/Medicaid. Adding to the confusion, state statutes and court decisions vary by jurisdiction. To date, states have applied a spectrum of approaches – each with varying degrees of liability for defendants.

Most states hold the Rule applies to Medicaid and Medicare, treating those payments the same as private insurance payments. In these states, evidence that Medicaid or Medicare paid for the relevant medical bills cannot be introduced, and the award cannot be reduced due to such payment. Further, in these states, juries only see the total billed amount for medical expenses, not the discounted amount after contractual write-offs.[2] While the approach favors the underlying theory of the Rule, the heavy discounts typically applied by Medicare/Medicaid give plaintiffs the largest potential windfall in their claims against defendants.

On the opposite end of the spectrum, some states, including Delaware, New Jersey and Michigan, do not extend the Rule to Medicare and Medicaid. In these jurisdictions, while continuing to recognize the underlying principle of the Rule that a defendant should not benefit from a plaintiff's collateral sources, courts are unwilling to apply the Rule to these government programs. The admission of medical bills is modified, with their admission limited to the amount paid by Medicare or Medicaid. This modified Rule minimizes the windfall to plaintiffs by prohibiting plaintiffs from recovering the total amount billed, an amount never actually incurred by the plaintiff, while recognizing the government's claims for reimbursement.[3] This modified Rule is also philosophically consistent with Medicare's set-aside policy requiring certain defendants to earmark money for future medical care rather than Medicare bearing the future burden. This modified rule, limiting plaintiffs' medical expense damages to discounted insurance amounts is a growing trend, even outside the context of Medicare and Medicaid.

MEDICARE VS. MEDICAID: DISTINCTIONS OCCUR

Further complicating the distinction, a number of states apply the Rule to Medicaid, but not Medicare. For example, Colorado statutes allow the reduction of a verdict by a collateral source amount. "Gratuitous" medical care, like Medicaid, is covered by statute and set off from an award. However, Medicare is treated differently from Medicaid, barring a set off for any collateral benefits arising out of a contract paid by the plaintiff that contains an expectation of receiving a future benefit. This "expectation of receiving a future benefit" includes Medicare and private insurance.

Similarly, in Louisiana, the Rule is not applicable when a plaintiff has paid no consideration for his benefits. Because Medicaid is free for its recipients, plaintiffs cannot recover any amounts for medical care paid for by Medicaid, billed or paid. However, Medicare recipients can recover the write-off since they paid consideration for it.[4] Louisiana courts have held, "where plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefit he receives, we hold that the plaintiff is unable to recover the 'write-off' amount."

Allowing a reduction of an award where the medical care was gratuitous preserves the Rule's theory that the defendant should not benefit from a plaintiff's foresight and expenditures incurred through insurance premiums. States like Louisiana and Colorado emphasize the value of the plaintiff paying consideration for the benefit by differentiating the two government services, even if such payment is only through involuntary taxes paid throughout a plaintiff's working years. As a result, a defendant may be responsible for significantly different verdict amounts depending on whether the plaintiff is enrolled in Medicaid versus Medicare.

APPLYING THE INCONSISTENCY

The imbalance between states that apply the Rule to Medicare and Medicaid and states that do not becomes clear when considering medical liens. Although Medicaid and Medicare possess what is known as a "super lien" on awards related to medical payments, the lien is often only for a percentage of the gross medical charges. Typically, the medical write-off will not be recoverable. As a result, a hospital may accept $5,000 as a "payment in full" for a plaintiff's $50,000 medical bill and write off the $45,000 difference. In this scenario, Medicaid has a $5,000 lien, even if the plaintiff recovers millions. Moreover, if a plaintiff does not obtain an award, the plaintiff is not required to make any payment to the hospital. Some states combat this inequality by allowing the defendant to introduce the "actual cost" of medical care.

Additionally, some states have capped lien recovery via statute. For example, in Illinois, the total recovery for medical lienholders is capped at 40% of the amount awarded if there are multiple lienholders and at one-third if there is only one such lienholder.[5] Thus, even where a lien exists, a plaintiff likely will never be responsible for the full amount of their medical care. However, defendants in a state that considers such liens as collateral sources without actual or reasonable cost limitations will be on the hook for the entire amount of medical care billed.

CONCLUSION

The Collateral Source Rule is a complex area of the law that varies greatly by jurisdiction. The Rule becomes even more complex as courts and legislatures analyze how the rule intersects with other areas of the law. States use a spectrum of approaches to decide whether Medicaid and Medicare are collateral sources. Some states even distinguish between the two programs. As a result, a defendant in one state may be found liable for the full amount of gross medical charges that a plaintiff would never be responsible for, while the same defendant would not be responsible for any of the same charges in another.

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3 See, e.g., *Mann v. Varney Construction*, 23 S.W. 3d 231 (Mo. App. 2000).

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5 770 ILCS 23/10

FLAMETHROWING DRONES IN MY BACKYARD?

Emerging Trends in Drone Regulation and Litigation

Shane O'Bryan Middleton Reutlinger

Utility companies in China clear debris from power lines with flame throwers attached to drones.[1] In Australia, Alphabet's subsidiary, Wing, has had great success using drones[2] to deliver packages in suburban locations.[3] In Kentucky, according to one judge at least, you can shoot drones out of the sky with impunity.[4]

Many industries in the United States use drones to perform a variety of tasks that were impossible or impractical before the advent of this technology, and drone use will only increase in the future. This article will discuss current commercial drone use, and the legal framework surrounding drone use in the United States.

COMMERCIAL DRONE USE IN THE UNITED STATES

Many industries successfully use drones in the U.S., while others are still working through technological limitations, and, sometimes more significantly, regulatory and legal uncertainties surrounding drone use. The following are just some of the industries in the United States that are utilizing drones at an ever-increasing rate:[5]

- **Agriculture** - To map fields, disperse seeds, spray crops, and monitor crop health.
- **Construction** - To survey sites, monitor progress, perform inspections, maintain security, and to lift and stack materials.
- **Utilities and Telecommunications** - To inspect power and telecommunication lines, towers, pipelines and other facilities, detect leaks, and help with storm restoration.
- **Insurance** - In 2019, insurance companies used 17% of all commercial drones. The drones are used to inspect properties prior to policy issuance, as well as damaged properties during the adjusting process.
- **Maritime** - Security purposes, inspection of vessels, and to deliver items to ships at sea.
- **Mining** - Photography to collect data on mineral stockpiles.
- **Public Safety** - First on the scene at accidents for early assessment, to provide high resolution photographs and video of dangerous areas or situations without exposing officers to risk, and many other uses.
- **Real Estate** - Surveying, inspecting and photographing property.
- **Transportation and Logistics** - Delivery of packages.
- **Warehousing** - Indoor drones to monitor inventory and transport packages between warehouses.
- **Legal** - Accident scenes vehicle and product inspections.

The above list encompasses just some of the many commercial uses of drone technology in the United States. Some of the industries listed above have had great success in utilizing drones to streamline their operations.

Other industries, however, have taken more time to fully utilize drone technology in the United States. In particular, the transportation and logistics industry. In 2016, it was thought that by 2021 drones would revolutionize the package delivery business - regularly delivering packages to our doorsteps within a couple of hours - or sooner- of placing an order. As of 2022, this revolution has not been realized. Part of the challenge is to create technology and an infrastructure to safely and efficiently deliver packages to consumers in a variety of population settings.[6] Regulatory and legal hurdles, however, are major factors in the delay.

REGULATORY ISSUES SURROUNDING DRONE OPERATION IN THE UNITED STATES

There are legitimate concerns about airspace safety given the potential number of drones that could inhabit the skies in the future with the continued expansion of commercial use.[7] Therefore, companies using drones to deliver goods will have to adhere to guidelines and regulations from multiple agencies in the U.S. – from federal law and the Federal Aviation Administration (FAA), to state and local laws, some of which will not be uniform.[8]

Prior to 2016, companies were required to obtain a special waiver from the FAA, a Section 333 Exemption, in order to fly drones for commercial purposes. In 2016, drone industry growth took off when the regulations were relaxed through the issuance of 14 C.F.R 107 ("Part 107"), which relaxed the rules for flying drones weighing less than 55 lbs.

Even though drone use in the transportation industry is in its relative infancy, several large transportation companies have already have received FAA certification allowing them to participate in drone delivery with a limited number of pilots and drones.

In addition to the companies receiving the required certification from the FAA, each pilot must obtain a license, and the companies must comply with the requirements of Part 107, which are quite onerous in the delivery context. Specifically, without obtaining a Part 107 Waiver, a drone is required to: (1) remain in the line of sight of the pilot in control;[9] (2) be operated by a live pilot who is not simultaneously operating another drone;[10] (3) not be operated from a moving vehicle;[11] (4) not be operated at night;[12] and (5) not be operated over human beings, including people in vehicles, unless authorized by Part 107.[13] In addition, there are FAA regulations governing the airspace a drone can operate in, and drones cannot normally be flown within five miles of an airport.[14] And although waivers of the FAA 107 requirements are approved, the FAA requires that each operator applying for a waiver provide significant evidence of its ability to safely operate.[15] Fortunately, Congress has recently passed the 2018 FAA Reauthorization Act, which streamlined the process for companies to apply for waivers to fly in controlled airspace. Observers believe this will provide a framework to significantly speed up regulatory approvals in the commercial drone delivery field.

However, the FAA does not have exclusive jurisdiction over every aspect of drone use. Operators must obtain airspace authorizations from local governments before they begin sending drones carrying packages through the air. In addition, state law governing privacy, trespass, and law enforcement operations still apply to drone use.[16] Moreover, each state has its own legislative rules for drone operation– Kentucky, for example, prohibits flight paths over certain properties like prisons and railroads, while other states prohibit drone operation near critical infrastructure, oil refineries and chemical facilities.[17] Therefore, drone operators will need ensure that they inquire at all levels of government for needed authorizations.

LEGAL LIABILITY ISSUES SURROUNDING DRONE OPERATION

In addition to the ever-evolving regulatory environment, legal issues surrounding the operation of drones, from invasion of privacy and trespass claims, to negligence and product liability, are still being fleshed out.

In 2018, the Uniform Law Commission ("ULC") released a model tort law titled the Uniform Tort Law Relating to Drones Act ("Model Act"). The Model Act primarily addresses tort trespass actions relating to drone operations that substantially interfere with a person's use and enjoyment of their property. The Model Act will be submitted by the ULC to several states as a possible uniform approach to tort legislation involving drones. Of course, states are free to adopt some, all, or none of the provisions of the Act into their particular statutory scheme.

In addition to trespass and invasion of privacy claims, improper operation of drones has led to negligence actions against drone operators. For example, a sorority at the University of Southern California hired an event organizer to host a party. The event organizer hired a drone operator to take photographs. The drone operator crashed the drone into the plaintiff's head. She sued the sorority and the event planner for negligence and premises liability. With regard to commercial drone operators in the transportation industry, negligence actions would likely result from accidents involving drones that cause damage as a result of a drone contacting people or property, or unintentionally dropping a delivery load and causing injury or damage.

In addition, as drone use proliferates, product liability claims against manufactures will begin to appear. Some areas of potential liability may be related to automated and pre-programed flight operations, allowing the drone to operate without the direct input of controls by the operator. Other areas of exposure may involve injury caused by the propellers on the drone in the event of a collision. Some manufactures equip drones with programs to immediately shut off propellers if a collision occurs. What if that technology fails? Likewise, will all drone manufactures be held to that "safety" standard? What about parachutes? Should manufactures equip drones with parachutes to protect people on the ground in event of a failure?

As drone use becomes more prevalent in the future, particularly in the transportation industry, tort litigation surrounding drone use will increase. And although I do not foresee a time when flame throwers are used on drones in the United States, just think of the liability issues that would open up.

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5 Grant J. Guillot, *A Multi-Industry Examination of Drone Use: How the Regulatory Environment and Public Perception Issues Shape the Ability of End Users to Leverage Uncrewed Aircraft Systems,* Journal of Drone Law and Policy, Volume 1 (2020).
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9 14 C.F.R. § 107.31.
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"Pulp Fiction" and Beyond: THE FUTURE OF NFT LITIGATION

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As the market value of non-fungible tokens ("NFTs") continues to soar, legal practitioners will soon face the contractual, copyright and trademark issues that accompany this new technology. This article explains how a recent headline-grabbing case over rights in the 1994 film "Pulp Fiction" is a harbinger of NFT-related litigation to come.

WHAT IS AN NFT?

In its simplest terms, an NFT is a digital certificate of authenticity, recording ownership of an asset. The underlying asset is usually digital, but it can also be physical. Much of the value in NFT technology lies in the fact that it records identifying information (like ownership) on the blockchain. The blockchain is a digital ledger that cannot be modified, ensuring security in transactions. In addition to recording ownership, an NFT may also contain a "smart contract" – including terms and conditions that automatically govern later sales of the NFT and provide royalties for the original creator beyond the first sale.

THE TARANTINO-MIRAMAX LAWSUIT

In November 2021, Quentin Tarantino, the award-winning director of the cult classic "Pulp Fiction," announced he would be selling seven NFTs related to the film. Each NFT would include "uncut first handwritten scripts" from the film with "exclusive custom commentary" by Tarantino, as well as a unique work of art inspired by the film that will be visible to the public. In response, Miramax, the film's distributor, filed suit in California federal court to stop Tarantino from auctioning off NFTs based on "Pulp Fiction," alleging breach of contract, copyright infringement, and trademark infringement. Citing its own broad rights in the film, Miramax argued Tarantino did not have the rights required to create and sell the NFTs. The NFT auction continued as planned in January 2022, with court dates set for February 2022 and beyond.

The outcome of this suit will likely turn on the language in a 1993 agreement between Tarantino and Miramax, in which Tarantino granted to Miramax: "all rights . . . in and to the Film . . . now or hereafter known including without limitation the right to distribute the Film in all media now or hereafter known . . . ." In this agreement, Tarantino reserved a limited set of rights to himself, including "print publication (including without limitation screenplay publication . . . in audio and electronic forms as well, if applicable)." Tarantino argues the creation and sale of the "Pulp Fiction" NFTs fall within his print publication rights – specifically his screenplay publication rights. Miramax counters that the NFTs fall within its broader, forward-looking rights, which govern "all media now or hereafter known." In other words, this case will turn on contractual provisions drafted well before the invention of the technology now at the heart of the dispute, leaving courts to use traditional copyright and trademark concepts to find a solution.

COPYRIGHT LAW

Miramax claims Tarantino infringed upon its copyrights in "Pulp Fiction" under the federal copyright statute. The copyright dispute turns upon whether the creation of NFTs in this instance constitutes "publication" under U.S. copyright law, as Tarantino's rights under the contract are limited to the publication of the screenplay. Generally, distribution of a copyrighted work to a small group, for a limited purpose, and with limitations on distribution does not constitute publication. Miramax argues that is how Tarantino's sale of NFTs should be classified: as a one-time transaction of screenplay pages. Tarantino, on the other hand, argues his sale of NFTs should be treated as a "publication" because purchasers of the NFTs are free to share their NFTs with the whole world if they wish.

Copyright law is an area ripe for complications when addressing NFTs, as different rights might apply to the NFT itself and the work underlying the NFT. The holder of a copyright controls many rights relating to the work in question, including the right to copy, sell and prepare derivative works. Before selling or purchasing NFTs, it is crucial to identify which rights are being granted or transferred to avoid legal complications down the road. For instance, let's say the NFT in question is a piece of digital artwork. In one scenario, the person creating and selling the NFT is the artist of the underlying work itself, who at the time of selling possesses all of the exclusive copyright rights, including the right to sell, reproduce, and distribute the work. As such, the seller can pass on as many of these rights as she wants to a buyer. In another scenario, the person creating and selling the NFT is not the artist of the work itself, but a person who previously purchased the digital artwork from the original artist. The seller in this case will only be able to pass onto the buyer rights that he himself acquired from the original artist. More difficulties can arise under this scenario, as the seller may not properly possess the rights to reproduce or sell derivative works of the original, which suggests he may lack the rights to properly create and sell an NFT. Note that in both of these cases, as with physical artwork, members of the public with no ownership rights in the work may still be able to access or view the digital artwork online.

TRADEMARK LAW

Miramax also argues that Tarantino has infringed on its trademarks in "Pulp Fiction." Federal trademark cases are governed by the Lanham Act, which prohibits the unauthorized use of a trademark in a way that is likely to confuse consumers. In the Tarantino-Miramax case, for instance, Miramax alleges that Tarantino's creation and sale of "Pulp Fiction" NFTs without authorization will cause consumers to believe that Miramax created or endorsed the sale, creating confusion and misappropriating Miramax's goodwill with the public.

As with copyrights, determining which trademark rights have been allocated to the seller and buyer is critical, as the proper ownership of an NFT could turn on the breadth of rights granted in a trademark license. Federal and state trademark dilution statutes may also impact NFTs in cases where a widely recognizable trademarked phrase or image is used. Under these laws, parties can sue if a similar phrase or image is used to "dilute" the original trademark, either by rendering it less distinctive or by harming its reputation.

CONCLUSION

The creation and sale of NFTs will create new legal issues, complicated by high financial stakes, the fast pace of the digital world, and the new concepts and evolving technology involved. The Tarantino-Miramax case will be among the first indicators of how courts will treat these issues. NFTs will inevitably follow the same process that all emerging technologies follow in the realm of intellectual property law, as courts enlarge existing concepts in copyright and trademark law to encompass NFTs. At the same time, practitioners will catch up and begin to add specific rights language into future contracts.

As the Chair of JSH's Commercial Practice Group, Alex LaCroix focuses his practice on business litigation and products liability. His current and former clients include some of the nation's most successful product manufacturers, Amazon sellers and musicians (making him JSH's resident Amazon/NFT lawyer).

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GDPR'S CHILDREN DATA REGIME

The best interest of the child v commercial interests

Alexander Dittel Wedlake Bell LLP

If you are operating an online or offline service in Europe or the U.K. that will likely be accessed by children, you are required to comply with a separate regime for the processing of children's personal data. Personal data is not limited to personally identifiable information but includes any obscure online identifier, which means the regime is far-reaching.

The General Data Protection Regulation (GDPR) anticipates specific protection for children because they may be less aware of the risks and consequences of the processing of their personal data, and they may not know their data protection rights. Unless a child has reached the age of digital consent, which is 16 in Ireland and 13 in the U.K, parental consent is required for the processing of children's personal data.

However, the parental consent requirement is only one small aspect of what is required. A person remains a child until they reach the age of 18, and even if they can provide GDPR-compliant consent before then, that does not mean their personal data can be treated like that of an adult. While the GDPR does not tell us much more about the children data regime, the recent regulatory guidance which draws on international law paints a rather complex picture.

The U.K.'s Information Commissioner's Office (ICO) issued its Age Appropriate Design Code (Code). The Irish Office of the Data Protection Commissioner (DPC) issued its Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing (Fundamentals). The Code became effective in September 2021 and the Fundamentals in December 2021. While the ICO is an influential regulator representing a mature online economy, the DPC will act as lead authority for all data processing in Europe carried out by the many U.S. 'big technology' companies that have their main establishment in Ireland.

MAIN OBJECTIVES

Children's personal data must be processed fairly, respecting children's best interests. The Fundamentals go even further by saying that the best interests of the child must always be the primary consideration in all decisions relating to the processing of their personal data. The best interest principle is not only a substantive right but also a fundamental legal interpretative principle under international law.

Children must be supported in exercising their basic rights. The United Nations Convention on the Rights of the Child 1989 (UNCRC) guarantees children the right to access information, the right to develop their own opinion, freedom of expression, the right to play and engage in recreational activities appropriate to their age and much more.

Children must be protected from harms such as online grooming, social anxiety, self-esteem issues, access to harmful or inappropriate content, loss of privacy due to constant monitoring and other harms. Any processing of personal data that gives rise to a risk of such harms will likely not be compliant with the GDPR.

WHAT ARE THE LIMITS OF THE REGIME?

The rules are far-reaching, but they are limited to the processing of personal data. There is a separate legislative effort to address online harms. The U.K. Online Harms Bill aims to improve U.K. citizens' online safety by moderating content, monitoring and taking down illegal and harmful content. The equivalent EU law, the Digital Services Act, has similar aims.

Unlike these laws, the Code and Fundamentals are not intended to moderate content. Nevertheless, they may indirectly impact content, for example, where personal data is processed to suggest content to young audiences.

The Code promotes a risk-based approach. If you determine that the risk is low, minimal safeguards may suffice to comply with the Code. For example, the ICO considers digital news media is not a core concern for children online. The ICO expressly wishes to avoid perverse outcomes, such as requiring adult services to become child friendly. While the Fundamentals do not seem to offer such leeway, they are expressed to be 'entirely consistent' with the Code.

WHICH SERVICES ARE IN SCOPE?

While the Code focuses on online services such as social media, marketplaces, search engines and connected toys, the Fundamentals also apply to offline environments, such as the products and services of educational providers, sports and social clubs and communities, and health and social support providers.

The rules apply only if the service is likely to be accessed by children under the age of 18. Even if not aimed at children, your services could be in scope.

KEY STEPS

A simplified approach would consist of the following steps:

STEP 1 – Are children likely to access your products and services? Look at your stats and evidence on user behavior, conduct surveys and map your audiences. It will likely not suffice to just say that your services are not intended for children.

STEP 2 – What are the risks to children? Are they capable of understanding how their data is processed? Larger organizations will be expected to carry out consultations with their audiences, the public and third sector. A data protection impact assessment (DPIA) will likely be required, and experts will advise on the likely risks for each age group.

STEP 3 – What changes are required to your UI (user interface), service features and product development to best support children's needs? Creativity is in order, but any approach will likely be limited to what is technically possible and the availability of relevant third-party services, such as consent management platforms designed to collect reliable parental consent..

KNOW YOUR AUDIENCE

Children have various competing rights, and the need for each child's protection varies depending on the child's age and maturity. The need for choosing between the child's empowerment or restriction will often arise. Organizations must demonstrate how their approach reflects the assessment and analysis of the best interests given the child's age and developmental capacity.

Ideally, an organization can tailor its services to its audiences. However, if it is unable to determine which user is an adult or a child, it may have to implement a floor level of protection suited to its youngest audiences that will apply to everyone equally. This could come at the cost of commercial exploitation of personal data that may be crucial for the commercial viability of the service.

COMMERCIALIZATION OF DATA

The Fundamentals are quite strict in that they support a prohibition of profiling or targeting of children of any age for commercial purposes based on a digital record of their actual or inferred characteristics. Such activity will likely not be in the child's best interest but rather for the organization's benefit. According to the Fundamentals, with the exception of measures to protect children's welfare or where there is an overriding public interest, there will be a very limited range of circumstances where the profiling of children and the use of automated decision-making concerning children will be legitimate and lawful under the GDPR.

In contrast, the Code will not prevent organizations from using behavioral advertising that the ICO recognizes as an important income stream. However, such advertising must comply with regulatory codes (such as those of the U.K.'s Advertising Standards Authority) that protect children. If based on cookies, advertising must be off by default for child users.

Much data processing for commercial purposes is based on legitimate interest. However, according to the Fundamentals, any legitimate interest will fail if it interferes with, conflicts with or negatively impacts, at any level, the best interests of the child. By contrast, there is no such suggestion under the Code.

Furthermore, the challenge is that organizations cannot circumvent their GDPR obligations by mandating a minimum age to access the services. According to the Fundamentals, shutting children out could deprive them of their rights or force them *underground*. Therefore, age assurance or in high-risk cases, full age verification, will be needed to help organizations classify their users and protect child audience segments. However, even in those cases, the Fundamentals mandate that children's service experience must not be downgraded.

PARENTAL CONSENT

When it comes to parental consent, reasonable efforts must be taken for verification. Emerging technologies offer some hope of maintaining a frictionless user journey, and there certainly is demand for more. The Fundamentals refer to the age verification methods endorsed by the Federal Trade Commission, including:

- Signing a consent form.
- Using a payment card.
- Calling a toll-free number.
- Video conference with trained personnel.
- Providing a copy of ID verified against official database.
- Answering a series of knowledge-based challenge questions aimed at parents.
- Facial recognition ID verification.

According to the Fundamentals, personal data collected for verification must only be used for this purpose and must be deleted afterward.

CONCLUSION

Pursuing your commercial interests is not prohibited, but the best interest of the child must be the primary consideration. Some traditional data monetization activities such as profiling are explicitly discouraged by the Fundamentals and will have to be recalibrated.

Compliance with the legal regime will necessarily involve specialist advice, assessments and some creativity, but according to the Fundamentals, this is the price of doing business with children.

Start with a DPIA, involve all relevant teams, and put your heads together. You may be surprised at how much relevant knowledge there is among your staff who are parents. A child-oriented DPIA should also include a Child Rights Impact Assessment.

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CALCULATING DAMAGES IN REPRESENTATIONS AND WARRANTIES CASES

Ephraim Stulberg and **Yvonne Kitkarska** MDD Forensic Accountants

INTRODUCTION

When done right, mergers and acquisitions ("M&A") can be a great way for companies to scale their businesses and create value through synergies, to enter new markets or to gain access to transformative new technology. When done poorly, however, M&As can result in drastic overpayments for assets that are not nearly as valuable as believed and for synergies that can prove elusive. Certainly, the past couple of years and the economic stresses related to COVID have only magnified both of these aspects of M&A.

One of the main risks in M&A is information asymmetry: the vendor knows much more about its business than the acquirer. While the acquirer is able to perform due diligence, time pressures to close the deal mean that this process can sometimes be imperfect; issues are sometimes missed. This is where Representations and Warranties (R&W) insurance can come into play.

This article provides a brief overview of R&W insurance, and discusses some of the issues we have encountered as forensic accountants and business valuators in quantifying losses under this type of insurance coverage.

WHAT IS R&W INSURANCE?

R&W insurance provides indemnity for "losses" related to overpayment by the acquirer resulting from breaches of representations and warranties as set out in the purchase agreement for the acquisition.

These types of policies are becoming increasingly popular, and in recent years somewhere between 60% and 80% of private M&A transactions have been reported as using R&W as a tool to mitigate risk.[1] Combined with heightened overall levels of M&A activity in 2021, and the fact that roughly one in five policies will see a claim,[2] it is important to understand how financial losses are assessed under these policies.

In our experience, claims under R&W policies often involve three levels of accounting and valuation expertise and analysis:

- Determining whether there has been a breach of a representation or warranty.
- Quantifying the breach.
- Determining the impact of the breach on the purchase price.

DETERMINING WHETHER THERE HAS BEEN A BREACH

According to a study by one insurer, the most common type of claimed breach relates to financial statement inaccuracies; this has been our experience as well. The first level of financial analysis when we are called into these types of cases is therefore to determine whether or not there has been a breach of the representation with respect to the financial statements. Are they prepared in accordance with GAAP or IFRS, as represented in the purchase agreement? Sometimes the answer is black-and-white, but often it is not. Many aspects of financial reporting allow for estimates and professional judgment. Examples include:

- Estimates as to when (or in what percentage) revenue should be recognized.
- Estimation of reserves for doubtful accounts.
- Estimation of obsolete inventory.

Most policies also contain exclusions for any breaches which were known to the purchaser prior to closing. We have experienced instances in which claimed misrepresentations were explicitly documented in the Quality of Earnings due diligence reports prepared for the purchaser prior to the transaction.

QUANTIFYING THE BREACH

If we have determined that there likely has been a misstatement in the financial statements, the next step is to quantify that misstatement and its impact on both the balance sheet and (more importantly) the income statement for the period that was analyzed by the purchaser in arriving at its purchase price.

Many times, an incorrect accounting policy, if applied consistently to a relatively stable business, will have a minimal impact on the reported financial results in the 12 months prior to the transaction (the period that often forms the basis for the purchase price). This is an important fact that is often overlooked in these cases.

For example, suppose the target company had a policy of recognizing revenue earlier than it ought to, and revenue reported each month is $10M. If the business is stable, and the value was determined based on the trailing twelve months ("TTM") ended November 2021, then what this means is that while the revenue reported in November 2021 ought to have been reported (say) in December 2021, it also means that the revenue reported in November 2020 (i.e. the month prior to the beginning of the 12-month period) ought to have been reported in December 2020. Because the business is stable, there will be no net impact from this incorrect accounting policy on the income statement for the TTM used to determine the purchase price.

MEASURING THE LOSS FROM THE BREACH

Based on our experience quantifying losses under R&W coverage, there are two main types of misrepresentations: one-time misrepresentations and long-term misrepresentations.

ONE-TIME MISREPRESENTATIONS

These types of misrepresentations generally relate to the balance sheet. M&A transactions typically will set a target level of "net working capital," based on an overall understanding of the subject company. If issues with this calculation are discovered following the closing, the economic loss to the purchaser is generally equal to the amount of the misstatement.

LONG-TERM MISREPRESENTATIONS

Long-term misrepresentations will tend to involve the income statement. For instance, in one case we were recently involved in, the seller had represented to the purchaser that it was not subject to a particular type of property tax. This turned out to be incorrect, and as a result the purchaser was liable to pay this additional, unexpected amount every year for the foreseeable future. In that case, the loss to the purchaser is equal to the present value of the ongoing annual tax liabilities.

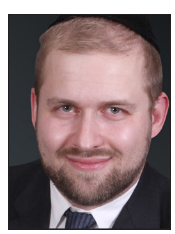
How does one value these sorts of long-term misrepresentations? One shorthand approach might be to simply apply the acquisition multiplier to the value of the annual misstatement. For instance, if the deal multiplier was 10 times the seller's TTM EBITDA, and the value of a misrepresentation (such as the unreported property tax issue) is $1M per year, then one might reasonably conclude that the value of the misstatement is $10M.

This approach can be appropriate in some cases, but sometimes it can lead to incorrect results, when the cash flows associated with the misrepresentation in question have different characteristics (term, riskiness or growth forecast) than the acquired business as a whole. If the transaction multiple incorporates a large amount of revenue growth that is not relevant to, say, property taxes, then one would apply a lower multiple to the property tax misstatement.

In order to perform a proper analysis of these longer-term misrepresentations, it is therefore generally very beneficial to obtain a copy of the valuation model used by the acquirer in the transaction in order to understand how the transaction multiplier was arrived at and to reverse engineer the impact of the particular misrepresentation on business value.

CLOSING

This article has only scratched the surface of the types of issues that, in our experience, can arise from post-acquisition M&A disputes. We can only imagine what new issues we will begin to see as 2022 progresses.



Ephraim Stulberg, CPA, CA, CBV, CFF is a partner in the Toronto office of MDD Forensic Accountants. He specialises in the areas of business valuation, economic loss quantification and investigative accounting.

Yvonne Kitkarska, CPA, CBV manages the Montreal office of MDD Forensic Accountants.

[1] See various statistics cited here:
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https://www.canadianunderwriter.ca/insurance/2021-set-to-be-record-year-for-ma-insurance-report-1004211797/

[2] https://www.aig.com/business/insurance/mergers-and-acquisitions/mergers-and-acquisitions-claims-reports

WHAT IS AN INVENTION?

Canada's Approach to Patentable Subject Matter

Dr. Angela Keuling Parlee McLaws LLP

Can I patent an app? What about a new rapid test for COVID-19? Creativity and innovation can take on many different forms, but not all innovative creations are considered to be "inventions" that are eligible for patent protection. Although patent protection is available worldwide, different countries have different criteria for what they consider to be patentable subject matter. Canada has a unique approach to subject matter eligibility, resulting in both opportunities and challenges for inventors, particularly in the software and biotechnology fields.

HOW DOES CANADA DEFINE AN "INVENTION"?

Under the Canadian *Patent Act*, an "invention" is defined as any new and useful art, process, machine, manufacture or composition of matter (or any new and useful improvement thereof). In addition, the *Patent Act* prohibits patenting "any mere scientific principle or abstract theorem." Canadian court decisions have also clarified some exceptions to patent-eligible subject matter, including methods of medical treatment. Many forms of innovation fall within these boundaries of patentable subject matter. For example, diverse inventions, including computer hardware, medical devices, pharmaceuticals, manufacturing processes and a wide variety of consumer products, are all potentially patentable in Canada.

However, other forms of innovation are more difficult to categorize. Two areas that have been particularly controversial are software and diagnostics. Many computer-implemented inventions involve an abstract theorem, such as an algorithm, that has been implemented in a specific way by a computer. New diagnostic methods often are based on a newly discovered scientific principle, such as a correlation between a biological marker and a disease state, rather than new laboratory techniques. For these types of innovation, drawing the line between invention and a mere scientific principle or abstract theorem can be challenging.

DETERMINING PATENT ELIGIBILITY – LOOKING TO THE CLAIMS

Every patent or patent application includes at least one claim that defines the scope of patent protection. In Canada, to determine if a patent is directed to eligible subject matter, the first step is to look at the claims.

As set out by the Supreme Court of Canada, the language of the claims should not be interpreted literally, but rather should be "purposively construed" to understand how the claims would be read by a skilled person within the same technical field (*Free World Trust v Électro Santé Inc*, [2000] 2 S.C.R. 1024 and *Whirlpool Corp v Camco Inc.*, [2000] 2 S.C.R. 1067).

Purposive construction includes determining whether claim elements are "essential" or "non-essential." Essential elements are those that must be part of the claimed invention, while non-essential elements may be varied or even omitted. This determination of "essential" or "non-essential" requires answering two key questions:

1. Would it be obvious to a skilled person that substituting or omitting an element would not affect how the invention works? If yes, then that element is non-essential.
2. Is it clear from the wording of the claims that the inventor intended an

element to be essential, regardless of the answer to question #1? If yes, then that element is essential.

Canadian courts have held that purposive patent construction is the starting point for any determination of the validity or infringement of a patent. In addition, in *Canada (Attorney General) v. Amazon.com, Inc*., 2011 FCA 328, the court confirmed that analysis of patent subject matter eligibility must also be based on purposive construction of the claims.

THE PREVIOUS APPROACH AT THE CANADIAN PATENT OFFICE

Following the *Amazon* decision, the Canadian Patent Office released subject matter-eligibility guidelines that were purportedly based on the court's analysis. However, the Patent Office applied its own "problem-solution" approach to claim construction. According to this approach, "essential" elements are only those required to provide a solution to an identified problem. Those elements not required for the particular solution were designated "non-essential" and were effectively omitted from consideration.

The "problem-solution" test was used by the Patent Office for several years and led to frustration for many applicants. For computer-implemented inventions and diagnostic methods, physical elements such as computer hardware components and standard laboratory techniques were often found to be "non-essential," resulting in claims being rejected for being patent ineligible. For example, a step of taking measurements with a physical sensor may be considered non-essential if the sensor measurement step alone was considered conventional by the examiner.

However, in 2020, Canada's Federal Court issued a welcome rejection of the Patent Office's approach in *Yves Choueifaty v Attorney General of Canada*, 2020 FC 837, concluding that the "problem-solution" method was not the proper legal test for patent eligibility.

THE NEW APPROACH AT THE CANADIAN PATENT OFFICE

Following the *Choueifaty* decision, in November 2020, the Canadian Patent Office issued a new practice notice on patentable subject matter that confirmed that the "problem-solution" approach should no longer be applied. The practice notice outlined a new test as follows:

1. Purposive construction: The first step is to construe the claim in question to determine the subject matter defined by the claim and to identify elements as either "essential" or "non-essential."
2. Assessment of patentable subject matter: The next step is to assess the subject matter defined by a claim for patent eligibility. To be patent eligible, the subject matter "must be limited to or narrower than an actual invention that either has physical existence or manifests a discernable physical effect or change and that relates to the manual or productive arts." The "actual invention" may consist of a single element or a combination of elements that cooperate to provide a solution to a problem.

Although this test arguably still diverges from the case law in considering the "actual invention," the new approach is less restrictive than the Patent Office's previous guidelines and is generally more favorable to applicants. Since the issuance of the new practice notice over a year ago, many patent applications have been allowed that would likely have been refused under the old "problem-solution" framework.

STRATEGIES TO PATENT ELIGIBILITY IN CANADA

Although the Canadian Patent Office's new approach is an improvement over previous guidelines, applicants of inventions that don't easily fall within one of the statutory categories of "invention," such as software and diagnostics, still need to carefully consider the wording of the claims to avoid (or overcome) potential rejections for ineligibility.

Often, including at least one physical element, or an element that produces a discernible physical effect or change, can render a claim as a whole patent eligible. The element should not be arbitrary but should interact with other essential elements of the claim to achieve a desired result. For example, a computer-implemented invention may be patent eligible if the claim includes an application step that applies the results of computer processing steps in a physical process e.g., drilling for oil based on the results of processing seismic data on a computer. Similarly, a diagnostic claim that includes a step or device for collecting a biological sample on which the diagnosis is based may also be considered patentable subject matter.

In addition, based on a recent decision of the Patent Appeal Board (Commissioner's Decision No. 1583 *Qiagen Redwood City, Inc.* (Re), 2021 CACP 30), computer-implemented inventions that include elements that improve the functioning of the computer, such as improvements to the computer's processing efficiency, may also provide patent-eligible claims.

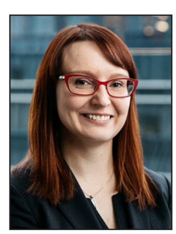
COMPARISON WITH THE UNITED STATES

The overall principles of patent eligibility in the U.S. share many similarities with the Canadian approach. The four statutory categories of inventions in the U.S. are: processes, machines, manufactures, and compositions of matter. Non-patentable "judicial exceptions" are abstract ideas, laws of nature, and natural phenomena. However, the U.S. has seen considerably more case law on the subject than Canada. The U.S. courts have established a subject matter-eligibility test based on *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014) and *Mayo v. Prometheus*, 566 U.S. 66 (2012) that differs from the purposive construction framework used in Canada.

While the majority of inventions that are considered patentable subject matter in the U.S. would also likely be patent eligible in Canada, distinctions between the approaches followed in each country may warrant consideration when devising patent strategies, particularly in the software and diagnostic fields.

CONCLUSION

The definition of "invention" in Canada is broad and encompasses a wide array of innovations. The new Canadian Patent Office guidelines are more flexible than in the past, and strategic drafting and amendment of the claims can lead to patents being granted in traditionally difficult spaces, including software and diagnostics. Based on these changes, there is increased confidence that these types of inventions are patent eligible in Canada, and we recommend applicants in these industries who have previously passed on including a Canadian patent in their portfolio reach out to a Canadian Patent Agent to explore filing in Canada.



Dr. Angela Keuling is a registered Canadian Patent Agent and Trademark Agent at Parlee McLaws LLP. Her previous experience in intellectual property management in the biotechnology industry and at a government research organization helps her to develop and implement effective IP strategies aligned with commercialization pathways and business needs.

FACES of USLAW

Pictured: Presenters Hanson Bridgett Managing Partner Kristina Lawson and the Samantha Wolff, Chair of the firm's Women's Impact Network.

Helping hands. Hanson Bridgett is committed to giving back to their community in many ways, including co-sponsoring a luncheon hosted by an education-focused charity and a film screening by a charity that helps victims of trafficking, both of which were attended by firm attorneys and employees. The firm also hosted a holiday marketplace at its San Francisco office to support women-owned small businesses, and the firm's employees participated in a holiday gift drive for families in need.

Roetzel's Moriah Cheatham Williams named a *30 for the Future* award recipient. Attorney Moriah Cheatham Williams was recently honored as "30 for the Future" award recipient by the Greater Akron Chamber. The 30 for the Future Award honors young professionals who live and/or work in the Greater Akron Region, are trendsetters in their industries, and make an impact on the region through dynamic leadership and community service.

BARCLAY DAMON LAUNCHES TWO NEW PODCASTS

Cyber Sip and the *Labor & Employment Podcast* are the latest podcast series released under the Barclay Damon Live umbrella. These programs join *Barclay Damon Live: The Cannabis Counselor*, which launched in March 2021.

Kevin Szczepanski, co-leader of the firm's Cybersecurity Team, hosts Cyber Sip, which has biweekly episodes covering hot topics in the cybersecurity industry. Offering listeners practical tips on improving their organization's cybersecurity, Cyber Sip will explore this critical topic in a variety of industries, including health care, finance, insurance, labor and employment, and real estate.

Ari Kwiatkowski hosts the Labor & Employment Podcast, which has weekly episodes for employers covering a wide range of timely topics pertaining to labor and employment issues in the workplace. The Labor & Employment Podcast provides listeners with important updates regarding ever-evolving state and federal labor and employment laws. The podcast explores labor and employment issues in different sectors, including health care, higher education, and manufacturing to name a few.

Barclay Damon Live podcasts are available on Barclay Damon's website, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts.

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Nicole J. Benjamin of **Adler Pollock & Sheehan, P.C.** has been elected as a member of The Federation of Defense & Corporate Counsel (FDCC).

Hamza Chaudary of **Adler Pollock & Sheehan, P.C.** has been elected to the board of governors of Leadership Rhode Island for a three-year term.

Susan Leach DeBlasio, senior counsel at **Adler Pollock & Sheehan**, was elected vice chair of the board of directors of the Quonset Development Corporation. DeBlasio was appointed to the board of directors in 2016 by former Governor Gina Raimondo. DeBlasio's term as vice chair will end on December 31, 2023. The Quonset Development Corporation (QDC) is a quasi-state agency, established as a special purpose subsidiary of the Rhode Island Commerce Corporation (formerly the RI Economic Development Corporation).

Baird Holm Partner Kara Stockdale was selected to serve on the board for the Immigrant Legal Center, a metro Omaha-based 501(c)(3) nonprofit that offers legal clinics for immigration services.

Amy L. Lawrenson of **Baird Holm** in Nebraska was selected to serve as the president of the board of directors for Girls Inc. of Omaha. Girls Inc. of Omaha inspires all girls to be strong, smart and bold, through direct service and advocacy.

Baird Holm Managing Partner Christopher R. Hedican and Partner Kenneth W. Hartman were inducted as Nebraska State Bar Foundation 2021 Fellows. Lawyers are invited to become Fellows based on their integrity and character, distinction in the profession or the community, contributions to the profession or the community and their contributions to the Bar Foundation.

Baird Holm Partner AriAnna Goldstein was elected to Bio Nebraska's Board of Directors. Bio Nebraska is a non-profit tasked with promoting, connecting and catalyzing the biosciences in Nebraska in an effort to make Nebraska the best state for bioscience organizations to grow and thrive. Goldstein's three-year term started January 1, 2022.

Connell Foley LLP partner John P. Lacey has been appointed by New Jersey Governor Phil Murphy to the State Commission of Investigation (SCI). Established by then-Governor Richard Hughes, a former Connell Foley partner himself, the SCI is an independent agency formed to investigate waste, fraud and abuse of government tax dollars. Lacey will serve as a Commissioner on the SCI for a term of four years while maintaining his legal practice with Connell Foley. A former federal prosecutor and chair of Connell Foley's White Collar Criminal Defense Group, Lacey has decades of experience handling internal investigations, particularly those involving claims of fraud, financial crimes, corruption and other complex issues.

Dysart Taylor Cotter McMonigle & Brumitt, P.C. director David M. Buffo has been elected as managing director of the firm by his peers. He will serve at least a two-year term and succeeds Amanda Pennington Ketchum, who was the firm's first woman managing director.

Lisa A. Bail of **Goodsill Anderson Quinn & Stifel LLP** in Hawaii has been re-elected to represent Hawai€ at the American Bar Association House of Delegates. Her three-year term begins with the 2022 ABA Annual Meeting in August. Partner Chris St. Sure also serves as the Young Lawyer's Division delegate to the ABA House of Delegates. The House of Delegates is the association's governing, policy-making body. It is designed to be representative of the legal profession of the United States. Bail also serves on the ABA Nominating Committee, which elects the officers of the association and the members of the Board of the Governors.

firms ON THE MOVE
(Continued)

Noel M. Cook a partner at **Hanson Bridgett LLP** in San Francisco has been elected to The International Trademark Association (INTA) Board of Directors effective Jan. 1, 2022; his term runs through December 31, 2024. INTA is the largest international trademark-related organization in the world.

Jones, Skelton & Hochuli partner Georgia Staton was named the 2021 "Trial Lawyer of the Year" by the Phoenix chapter of the American Board of Trial Advocates (ABOTA). ABOTA is an invitation-only, national association of experienced trial lawyers and judges.

Jones, Skelton & Hochuli associate attorney Annelise Dominguez has been named to the board of directors for Los Abogados, Arizona's Hispanic Bar Association. She will also be co-chairing the association's membership committee. The Los Abogados Hispanic Bar Association was founded in 1976 by a group of Latino lawyers and law students to create a space for community and the empowerment of Latinos in the legal profession.

Jones, Skelton & Hochuli associate attorney Cory Tyszka has been named president of the Maricopa Chapter Arizona Women Lawyers Association (AWLA). The Arizona Women Lawyers Association promotes and encourages the success of women lawyers by providing members with information and support, fostering connections among women lawyers, and monitoring and celebrating the successes of its members.

The National Conference of Bar Presidents (NCBP) recognized **Klinedinst** CEO and President Heather L. Rosing as the recipient of the 2022 NCBP Fellows Award. The award recognizes Rosing's service to bar organizations, including her launch of the California Lawyers Association, and her commitment to public service.

Poyner Spruill LLP attorneys Dr. Amy Clay, Grace S. Pennerat, and Rebecca M. Williams are now Title IX investigators and decision-makers. As qualified Title IX investigators and decision-makers, they are available to conduct impartial, objective, and thorough investigations into allegations of Title IX sexual harassment or serve as independent decision-makers in these matters for public and private schools, colleges, or universities.

Moses Suarez, partner and co-chair of **SmithAmundsen**'s Health Care group, was appointed a member of the Illinois Supreme Court Committee on Jury Instructions in Civil Cases. Kristin A. VanOrman of Strong & Hanni in Utah has been named national representative for the Utah Chapter of American Board of Trial Advocates.

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CARR ALLISON

DYSART TAYLOR COTTER McMONIGLE & BRUMITT, P.C. Attorneys & Counselors

FRANKLIN & PROKOPIK A PROFESSIONAL CORPORATION ATTORNEYS AT LAW

VERDICTS

Carr Allison (Birmingham, AL)

Shaun Decoudres and Grant Smith Earn Summary Judgment

Shaun Decoudres and Grant Smith of Carr Allison's Birmingham, Alabama, office earned a summary judgment in the United States District Court for the Northern District of Alabama. They represented a landlord/management company that had been sued by a tenant for breach of contract, fraudulent misrepresentation/suppression, conversion and violation of the Alabama Uniform Residential Landlord and Tenant Act. Summary judgment was granted for the landlord/management company on all counts, and the case was dismissed.

Carr Allison (Tallahassee, FL)

Chris Barkas and Kyle Weaver score five Daubert victories

Carr Allison attorneys Chris Barkas and Kyle Weaver scored a substantial victory in the United States District Court for the Middle District of Florida. Plaintiff's treating physicians and retained experts intended to offer the expert opinion the accident caused the plaintiff's injuries. Barkas and Weaver filed five Daubert motions to preclude the physicians from offering their opinions on causation focusing on each physician's lack of knowledge about the plaintiffs' medical history, the dynamics of the accident and the fact the physicians were simply guessing rather than offering reliable and admissible expert testimony. The Court agreed and entered an Order granting all five Daubert motions, which precluded any of the five physicians from offering causation opinions. Daubert motions are factually and legally intensive and require careful planning, set-up in depositions and skilled drafting, but the outcomes can dramatically alter the direction and value of cases. Please contact Chris (cbarkas@carrallison.com) or Kyle (kweaver@carrallison.com) to discuss the motions or to obtain a copy of the Order.

Dysart Taylor (Kansas City, MO)

Lee Brumitt Secures Win for Client Accused of Missouri Merchandising Practices Act Violations

Dysart Taylor director Lee Brumitt secured a jury verdict in favor of his client, an apartment management company, against claims that it violated the Missouri Merchandising Practices Act (MMPA) based on alleged deceptive practices in the leasing and termination of a lease.

The plaintiffs in this case, two tenants who leased an apartment which began experiencing HVAC problems, claimed that the management company misrepresented the apartment unit as "energy efficient," terminated the lease early based on false pretenses, and retaliated against the plaintiffs for complaining and for organizing a tenants' union.

Brumitt successfully argued that his client terminated the plaintiffs' lease prior to the contract expiration date because of major, necessary repairs needed in the unit. The evidence at trial was that the plaintiffs were the first occupants of their apartment and there was no basis for the management company to know that the apartment's HVAC system would not deliver the amount of heat desired by the plaintiffs.

The plaintiffs' last demand of $535,000 prior to trial included alleged damages consisting of total reimbursement for paid rent, excessive utility bills, and furnishings purchased for the apartment; emotional distress; attorney's fees under MMPA; and any punitive damages.

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

Fourth Circuit affirms District Court's Grant of Summary Judgment to Six Flags confirming there was no negligence in the operation of a water slide

A unanimous three-judge panel of the U.S. Court of Appeals for the Fourth Circuit affirmed the U.S. District Court for the District of Maryland's grant of summary judgment to Six Flags. Six Flags had been sued by a guest of its Maryland waterpark who alleged negligence in the operation of a waterslide. The guest also sued the ride manufacturer for negligence and product liability. Working together, counsel for Six Flags and counsel for the co-defendant were able to demonstrate that the guest's retained expert had no sound basis nor methodology for his opinions against either of them. The District Court granted the defense motion to exclude that expert applying well-established law to do so. It then found that, as a matter of established law, the claim for negligence failed. Six Flags had demonstrated conclusively that it had not deviated from the required maintenance and operational requirements at the time of the alleged injury. Accordingly, the District Court entered summary judgment in Six Flags' (and, on slightly different grounds, the slide manufacturer's) favor. The guest appealed the grant of summary judgment but did not preserve his challenge to the exclusion of his expert. After full brief-

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(Continued)

ing, the Court of Appeals first found that the guest had waived the issue of the exclusion of his expert but also noted that it agreed with the District Court's rationale and also holding there was no abuse of discretion in the exclusion of the expert. The Court of Appeals then agreed with the District Court's rationale and reasoning and affirmed the grant of summary judgment. Six Flags was represented by David A. Skomba, Tamara B. Goorevitz, and Miranda D. Russell throughout the proceedings. The case is *Elkharroubi, et ux. v. Six Flags America, et al.*, 2022 WL 152416 (decided Jan. 18, 2022, Per Curiam, unpublished).

Hanson Bridgett LLP (San Francisco, CA)

Hanson Bridgett Attorneys Get Trial Win for Cannabis Client

Hanson Bridgett LLP earned a great result for their client, Vista Distribution, Inc. a cannabis distribution company. Partner Andrew Stroud and Associate David Casarrubias achieved a significant victory after a four-day trial in Ukiah, California. The jury returned a unanimous verdict in favor of the firm's client in a breach of contract action filed against them.

After just one hour of deliberations, the jury found that Vista Distribution had not entered into the alleged contract at all. The firm also managed to get Vista's CEO dismissed from the action before trial, and a Directed Verdict granted against the owner of the Plaintiff LLC for lack of standing.

Stroud is recognized as one of Sacramento's top civil litigators. He has served as outside litigation counsel for three California Governors: Governor Gray Davis, Governor Arnold Schwarzenegger and Governor Jerry Brown. As litigation counsel, Stroud has represented the State of California in many complex and high-profile actions, including the challenge to Proposition 8, which ultimately led to the legalization of same sex marriage in California. He has represented both regional and national companies in commercial and business litigation as well.

Casarrubias focuses on litigating a variety of business disputes and has a robust practice representing government agencies throughout California in complex class actions and other multiparty litigation. His experience also includes writs, appeals, and law and motion in both state and federal court. Casarrubias maintains an active pro bono practice and serves on Hanson Bridgett's Pro Bono Committee.

Jones, Skelton & Hochuli (Phoenix, AZ)

Supreme Court Punts on the Issue of Whether Agent's Dismissal with Prejudice on Notice of Claim Grounds Precludes Vicarious Claim

Banner v. Gordon | Arizona Supreme Court | JSH Attorney Eileen GilBride

The Supreme Court avoided answering the questions posed in this case: does an involuntary dismissal with prejudice of an agent or employee constitute an adjudication on the merits, regardless of the grounds for the dismissal; and does an involuntary dismissal with prejudice of an agent preclude a purely derivative vicarious liability claim against the principal?

In *Banner v. Gordon*, plaintiffs sued physicians and Banner for the death of their son. The plaintiff failed to serve the physicians, public employees of the State of Arizona, with the requisite notices of claim. The trial court therefore dismissed them "with prejudice." *DeGraff v. Smith*, 62 Ariz. 261 (1945), holds that an involuntary dismissal with prejudice constitutes an adjudication on the merits. Likewise, Rule 41(b), Ariz.R.Civ.P., states that an involuntary dismissal operates as an adjudication on the merits.

Because the physician/agents were dismissed with prejudice, Banner moved to dismiss the vicarious liability claim against it. *Law v. Verde Valley Med. Ctr.*, 217 Ariz. 92 (Ct. App. 2007), holds that a dismissal with prejudice of an agent or employee requires dismissal of the vicarious liability claim against the principal.

The trial court denied Banner's motion and Banner filed a special action with the court of appeals. In a split decision, the court of appeals majority held that the vicarious liability claim against Banner survived the agents'/employees' dismissal because Banner is a "private employer" that should not "take advantage of" the notice of claim statute. Dissenting Judge Brearcliffe would have dismissed the vicarious liability claim based on the dictates of Rule 41(b), *DeGraff,* and Law. Banner sought Supreme Court review.

The Supreme Court granted review stating that the issues were of statewide importance. When it finally issued its decision, however, the Court avoided the substantive issues entirely. It held that the judgment in favor of the agents/employees was not "final" because it lacked Rule 54(b) language – the language that makes a judgment in the middle of a case appealable. And because the judgment was not final (even though it was entered "with prejudice"), it did not preclude the vicarious claim against Banner.

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(Continued)

The court did, however, vacate the court of appeals' opinion which had held that vicarious liability claim against Banner survived the agents'/employees' dismissal because Banner is a "private employer" that should not "take advantage of" the notice of claim statute. As such, the resolution of the issue of whether an agent/employee's dismissal with prejudice on notice of claim grounds precludes a vicarious claim against the principal will have to await another day.

Roetzel & Andress (Akron, Ohio)

Roetzel's Appellate Team Obtains 7-0 Decision from Ohio Supreme Court

State ex rel. Grendell v. Walder, 2022-Ohio-204 (Feb. 1, 2022)

Roetzel & Andress attorneys Stephen W. Funk and Emily Anglewicz of its Appellate Law team recently obtained a 7-0 decision from the Ohio Supreme Court in a writ of mandamus action filed on behalf of Judge Timothy J. Grendell, the Administrative Judge of the Geauga County Court of Common Pleas, Juvenile and Probate Divisions.

The writ of mandamus action raised significant public policy issues relating to a county auditor's duty to issue a warrant to pay for court-related expenditures, and it is one of the first cases to interpret and enforce a recent amendment to Ohio Revised Code 319.16 that was adopted by the Ohio General Assembly in 2021.

Sweeny, Wingate & Barrow (Columbia, SC)

Barrow and Gottschall Obtain Relief for Trucking Client

Sweeny, Wingate & Barrow attorneys Mark S. Barrow and Brandon R. Gottschall, who were retained after default had been entered against a trucking company and driver in a bodily injury action, obtained an order granting relief from default. The matter involved a low-speed accident and a plaintiff who, after the entry of default, sought more than 20 times the medical costs. The court granted the motion for relief from default over opposition from the plaintiff.

Traub Lieberman (Hawthorne, NY)

Traub Lieberman Team Obtains Motion to Dismiss in Second Third-Party Complaint

Traub Lieberman attorneys Lisa M. Rolle and Erin O'Dea obtained a motion to dismiss in favor of a wall systems installation company ("Installer") in a second third-party complaint brought before the Supreme Court of the State of New York, New York County. In the underlying suit, the plaintiff alleged she was injured by a falling object on the subject premises and brought a suit against the construction company affiliated with the site. The construction company then impleaded the wall systems manufacturer ("Manufacturer"), which was allegedly contracted to install a wall system at the premises. In turn, the Manufacturer impleaded Traub Lieberman's client, alleging that the Installer was contracted to perform the installation work.

In the motion to dismiss, the Traub Lieberman team asserted that given the underlying plaintiff's injury occurred in July 2011, the statute of limitations—both for claims of negligence and breach of contract—had since expired. The Court agreed with the Traub Lieberman team on the basis that claims arising from defective construction accrue on the date of completion of work, therefore confirming that the statute of limitations had run out. The second third-party complaint was dismissed in its entirety.

Wicker Smith (Ft. Lauderdale, FL)

Wicker Smith Earns Defense Verdict in Employment Case

Civil litigation defense firm, Wicker Smith O'Hara McCoy & Ford P.A., congratulates Fort Lauderdale partners Jason A. Glusman and Carlos "Charlie" Garcia on a directed verdict six days into a jury trial in a heavily contested employment discrimination/civil conspiracy/tortious interference case. This case had been ongoing for 11 years and was picked up by Wicker Smith's Fort Lauderdale office five years ago to try this jury case on behalf of three managers of a Florida supermarket chain.

Following her administrative separation due to reported failures to follow proper policies and procedures at the workplace, Plaintiff filed suit against two department managers and a store manager, claiming they had conspired to have her fired. The judge granted Wicker Smith's motion for directed verdict, agreeing with the argument that Defendants were, at all times, acting in the scope of their employment and in their employer's best interest

DIVERSITY, EQUITY AND INCLUSION

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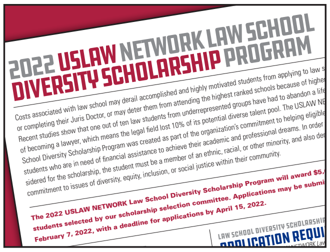

USLAW NETWORK launches law school diversity scholarship program

Applications are now being accepted for the USLAW NETWORK Law School Diversity Scholarship. The program is part of the NETWORK's commitment to helping eligible, diverse law students who need financial assistance to achieve their academic and professional dreams.

The scholarship program will award $5,000 to eight students selected by the program's scholarship selection committee. Applications will be accepted through April 15, 2022. To be considered for the scholarship, the student must be a member of an ethnic, racial, or other minority, and also demonstrate a commitment to issues of diversity, equity, inclusion, or social justice within their community. For more information, visit USLAW.org.

Connell Foley's Michael Rolek Spearheads Newly Passed Diversity Bill for USATF

On December 5, 2021, USA Track and Field (USATF) passed 10 amendments, collectively referred to as the "Diversity Bill," that were prepared and submitted by Connell Foley associate Michael Rolek, together with his pro bono client The Garden State Track Club (GSTC) and Chuck Schneekloth, president and founder of GSTC. Passage of the Diversity Bill was a multi-year endeavor involving the support of USATF leadership, Olympians and various long-term USATF members and volunteers.

The purpose of the Diversity Bill is to promote diversity and increase engagement and accessibility to USATF's local governing bodies. The premise behind the initiative is that if more USATF members with diverse backgrounds become involved with the sport at a local level, then the USATF will become stronger, new ideas will germinate and the sport will grow.

Rolek and Schneekloth originally submitted the amendments in July 2019. Prior to the Bill's passage, Rolek was appointed to the 10-person USATF Associations Task Force on Inclusion and Engagement to further investigate issues of diversity/engagement/inclusion at a local level and develop the language in the proposed amendments. In December 2021, the proposed amendments were approved by the USATF Law & Legislation Committee and accepted by the USATF membership, officially making the amendments part of the USATF Bylaws and Operating Regulations.

Hanson Bridgett receives top diversity award third year in a row

Hanson Bridgett LLP received the 2021 Platinum Diversity Award from the Contra Costa County Bar Association (CCCBA). The award honors law firms that embrace diversity awareness and implement comprehensive, targeted actions. This marks the third year in a row earning the highest of four levels of recognition.

"We are humbled to receive this high honor again," said Jennifer Martinez, who was named the firm's first chief diversity, equity and inclusion officer. "Last year, the firm began or expanded even more initiatives to promote diversity, equity and inclusion internally within our firm and externally in the legal profession itself. I will continue to look inward at increasing our efforts, while also working closely with firm leadership to do even more in the community in the coming years. There is always more than can be done."

Diversity has been a core value since the firm's founding in 1958. The firm is committed to the advancement diversity and equity in the legal profession—including sponsoring law school recruitment receptions, workshops and fellowships for students of color to create necessary pipelines and opportunities in addition to internal committees and initiatives.

The firm has also been named to Seramount's Best Law Firm for Women for the past 12 straight years and received Minority Corporate Counsel Association's; 2021 George B. Vashon Award. Additionally, the firm achieved Mansfield 4.0 Certification Plus status in 2021.

Earlier this year, Hanson Bridgett launched a new cycle of its Anti-Racism Boot Camp, which it initially started in 2020. In the year ahead, the first is asking all firm employees to make a pledge committing to attending a minimum number of hours of programming through the Anti-Racism Boot Camp. Anticipated programming for the 2022 year will include education and community-building experiences, including small group moderated discussions, book club/author events, academic panels, movie nights, and more direct hands-on training.

Pierce Couch promotes diversity in the legal field

Pierce Couch partners Jessica Dark and Hailey Hopper met with members of the Latinx Law Student Association and the Black Law Students Association at the University of Oklahoma (OU) College of Law. They provided the groups with information about Pierce Couch's insurance defense practice, its efforts to promote diversity in the legal field and discussed their experience as litigators. Both Dark and Hopper graduated from OU Law in 2012 and appreciated the opportunity to speak with their fellow Sooners.

Hinckley Allen announces Social Justice Project

Hinckley Allen announces Social Justice Project, an initiative of its Diversity, Equity & Inclusion Committee. The Social Justice Project was created to ensure the long-term commitment and support of the firm to social justice issues through financial support and involvement with certain organizations in the firm's respective communities. One component of the Social Justice Project is the establishment of the Hinckley Allen Social Justice Fund. Its purpose is to provide grants and financial support to worthy organizations in the firm's local communities that are committed to promoting social justice causes. To make the contributions toward social justice truly impactful, the firm will provide financial contributions to these organizations and offer non-financial support through volunteer work by Hinckley Allen employees and via other non-financial contributions.

SmithAmundsen in Illinois has launched two programs as part of its ongoing diversity, equity and inclusion (DEI) initiatives.

The firm is creating a pipeline management strategy that focuses on support, advocacy, mentoring and visibility for diverse members of the firm to thrive and ascend to partnership and leadership. This strategy will complement the mentoring program already launched in early 2022 with the assistance of an outside consultant. The mentoring program, led by a task force, hits the ground running with mentor training. The task force will be filled with a number of associates who will assist and provide feedback and institution of the program.

The firm also honors Dr. Martin Luther King Jr. and his legacy through a special firm initiative supporting educational opportunities for African American students in the firm's communities to promote diverse, inclusive and equitable workplaces. The firm has pledged to donate a percentage of the billable value for the hours billed on Dr. Martin Luther King Day 2022, to educational programs supporting college-bound African American high school students in the communities where the firm's offices are located

pro bono
SPOTLIGHT

100 Percent Pro Bono Participation Achieved by Barclay Damon Attorneys, Paralegals


In 2021, for the fifth year in a row, every one of Barclay Damon'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. A new accomplishment last year: the law firm's pro bono program also achieved participation by all full-time paralegals.

"As a firm, Barclay Damon is deeply committed to our core values, which include providing exceptional pro bono service in our communities. Now to have 100 percent of our talented paralegal corps join our attorneys to serve our pro bono clients is humbling and fills us with pride," said Corey Auerbach, the firm's outgoing pro bono partner. "We are determined to continue this level of service to ensure our pro bono clients receive the deserved benefits of our representation."

Jen Leonardi is the firm's new pro bono partner, effective January 1, 2022.

Through its multi-award-winning pro bono program, Barclay Damon dedicated more than 2,500 hours of time valued at more than $800,000 to pro bono efforts in 2021, 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, community building, and economic development, among others.

Learn more about Barclay Damon's pro bono program at barclaydamon.com/pro-bono.

Hanson Bridgett LLP in San Francisco has participated in three tenants' rights clinics hosted by one of its pro bono partner organizations and taken on many new pro bono matters to assist clients in need in the areas of immigration, estate planning, leasing and business advice.

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about USLAW NETWORK

2001. The Start of Something Better.

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

Fast forward to today.

The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client's legal success. Now as a diverse network with more than 6,000 attorneys from nearly 100 independent, full practice firms across the U.S., Canada, Latin America and Asia, and with affiliations with TELFA in Europe, USLAW NETWORK remains a responsive, agile legal alternative to the mega-firms.

Home Field Advantage.

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

A Legal Network for Purchasers of Legal Services.

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

USLAW IN EUROPE.

Just as legal issues seldom follow state borders, they often extend beyond U.S. boundaries as well. In 2007, USLAW established a relationship with the Trans-European Law Firms Alliance (TELFA), a network of more than 20 independent law firms representing more than 1,000 lawyers through Europe to further our service and reach.

How USLAW NETWORK Membership is Determined.

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

USLAW in Review.

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

The USLAW Success Story.

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

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

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

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the complete

USLAW SOURCEBOOK

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

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

VIRTUAL OFFERINGS

USLAW has many ways to help members virtually connect with their clients. From USLAW Panel Counsel Virtual Meetings to exclusive social and networking opportunities to small virtual roundtable events, industry leaders and legal decision-makers have direct access to attorneys across the NETWORK to support their various legal needs. Moving forward, we will promote a hybrid virtual approach to our future live events.

EDUCATION

It's no secret – USLAW can host a great event. We are very proud of the timely industry-leading interactive roundtable discussions at our semi-annual client conferences, forums and client exchanges. Reaching from national to more localized offerings, USLAW member attorneys and the clients they serve meet throughout the year at USLAW-hosted events and at many legal industry conferences. For 2022, we are re-focusing on in-person meetings where and when possible and will continue to be creative with virtual event offerings. CLE accreditation is provided for most USLAW educational offerings.

A TEAM OF EXPERTS

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

S-E-A AMERICAN LEGAL RECORDS AMETROS Settle well. ARCADIA The Structured Settlements Company IMS Consulting & Expert Service MARSHALL INVESTIGATIVE GROUP MDD FORENSIC ACCOUNTANTS

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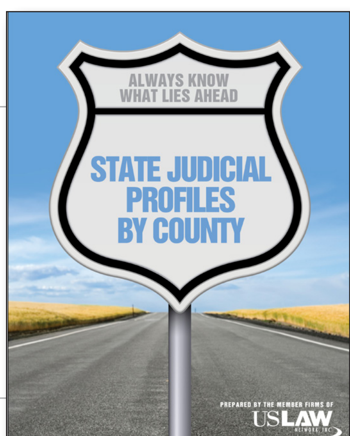
We are pleased to offer a completely customizable one-stop educational program that will deliver information on today's trending topics that are applicable and focused solely on your business. We focus on specific markets where you do business and utilize a team of attorneys to share relevant jurisdictional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

COMPENDIA OF LAW

USLAW regularly produces new and updates existing Compendia providing multi-state resources that permit users to easily access state common and statutory law. Compendia are easily sourced on a state-by-state basis and are developed by the member firms of USLAW. Some of the current compendia include: Retail, Spoliation of Evidence, Transportation, Construction Law, Workers' Compensation, Surveillance, Offer of Judgment, Employee Rights on Initial Medical Treatment, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal. We've also added several COVID-19-specific compendia that focus on civil immunity, general liability, force majeure and more. Visit the Client Resources section of uslaw.org for the complete USLAW compendium library.



STATE JUDICIAL PROFILES BY COUNTY

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

USLAW MAGAZINE

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

USLAW CONNECTIVITY

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

USLAW MEMBERSHIP DIRECTORY

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

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