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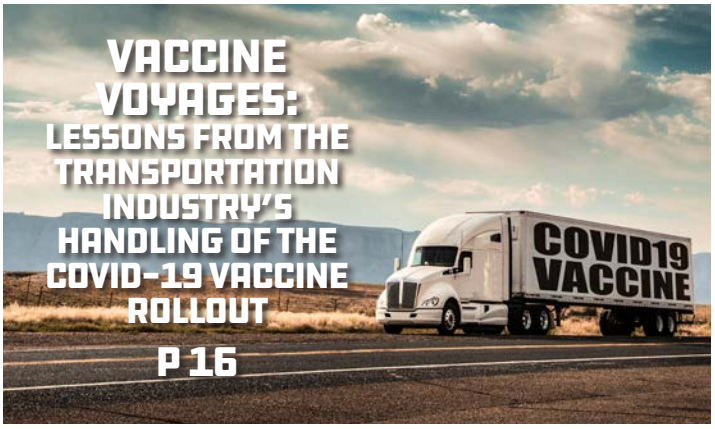

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USLAW offers a comprehensive library of complimentary resources, including webinars, compendia of law, virtual programming and events, and quarterly issues of *USLAW Magazine*. As you peruse the pages of our summer 2021 issue, you will enjoy articles written by member attorneys and USLAW's exclusive corporate partners on topics like statute of limitation concerns in discriminatory failure to hire cases, OSHA's new COVID-19 National Emphasis Program, vaccine rollout, supply chains, and lessons learned by the transportation industry and more. If there is a topic you are interested in reading more about in a future issue, please let us know.

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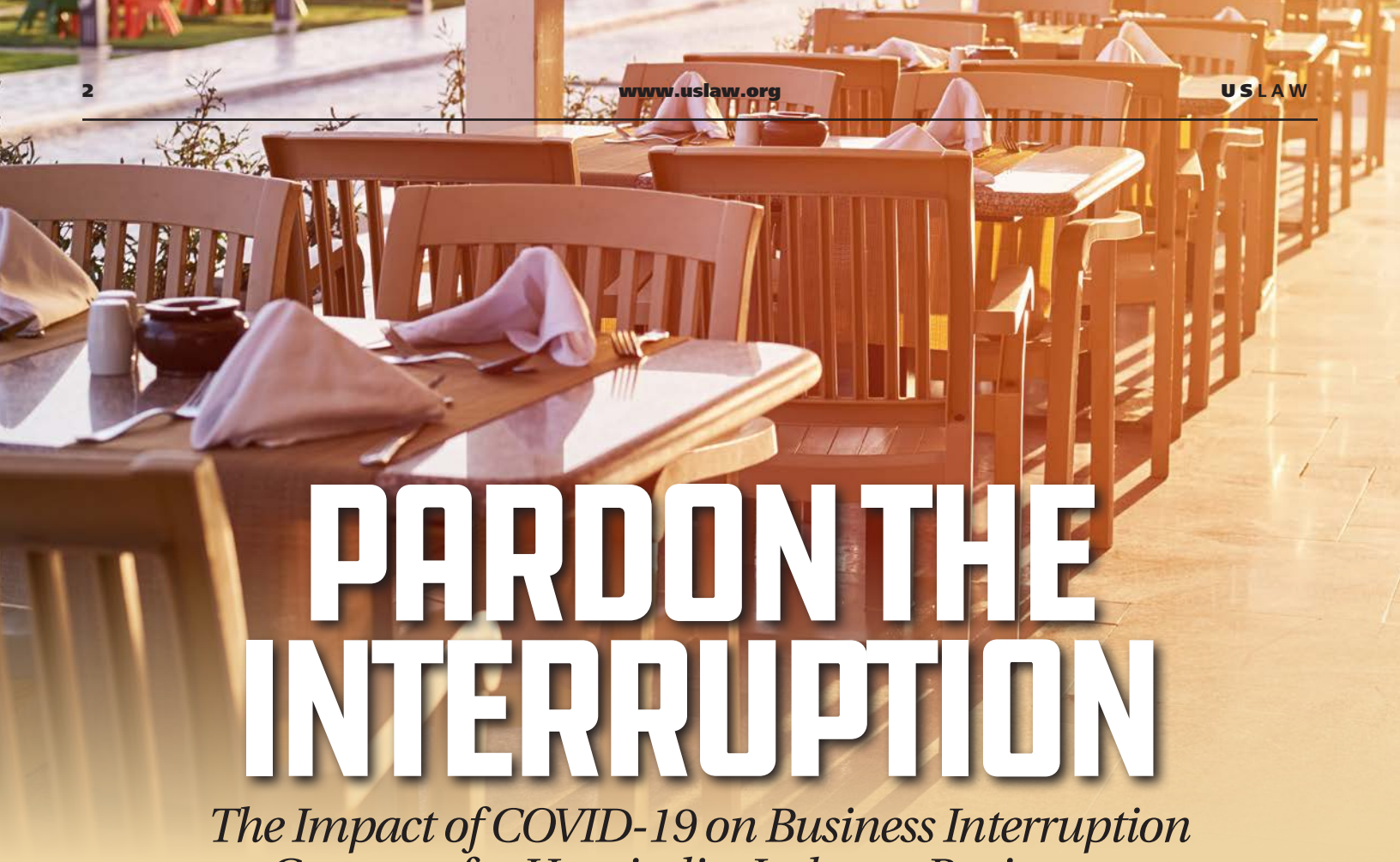

PARDON THE INTERRUPTION

The Impact of COVID-19 on Business Interruption Coverage for Hospitality Industry Businesses

Gillian Woolf and **Jim Carroll** Barclay Damon LLP

In 2019, if you took a poll of businesses in the hospitality industry about the business interruption risks they anticipate and strategically plan for, almost none of them would say "a global pandemic." However, to insurers, pandemics are a well-known risk. In fact, in 2008, a global insurer who underwrites some of the largest risks in the world dedicated an entire publication to this issue because a "pandemic is inevitable." In its report, the insurer predicted a "repeat" of the 1918 pandemic with the two largest GDP reductions in the arts and entertainment and accommodations and food sectors.[1]

To address the rapid spread of COVID-19 in early 2020, governments issued myriad shelter-in-place orders and pandemic restrictions. The hospitality industry, from restaurants to hotels to casinos, was effectively shuttered. These establishments were thought to greatly contribute to the spread of the virus and could not be safely operated and, consequently, suffered significant income losses. These establishments did not even have to have a confirmed case of COVID-19 to be closed; the hospitality industry primarily suffered from pandemic-related restrictions implemented by governmental and civic authorities.

In an attempt to recoup losses incurred as a result of pandemic-related restrictions and closures, businesses in the hard-hit hospitality industry turned to the business interruption coverage in their insurance's property/casualty policies. This type of insurance coverage replaces lost income in the event that the business is halted due to direct physical loss or damage, typically resulting from a fire or natural disaster. However, to these businesses' dismay, their insurers denied coverage for these losses, leaving the businesses reeling. Many have not and will never recover. Searching for a lifeline, hundreds of businesses in the hospitality industry sought relief from courts all over the country. In the overwhelming majority of cases, the courts have sided with the insurers. Many of these cases involve "all risks" policies that automatically cover any risk that the insurance contract does not explicitly omit. In addition to the interpretation of the common business income coverage provision, many cases involve policies that also include a "virus exclusion."

BUSINESS INCOME AND VIRUS EXCLUSION PROVISIONS

Business interruption coverage is premised on the business income policy provision that requires: 1) a covered event causing physical loss or damage to the insured's property, 2) suspension of operations, and 3) loss of business income.

The provenance of virus exclusions stems from the SARS outbreak in 2003. Virus exclusions typically state that the insurer will not pay for loss, damage or both caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease. The exclusion goes on to specifically state that it applies, among other things, to "business income," i.e., business interruption.

A handful of policyholders have successfully argued that COVID-19-related shutdowns caused the closure of their business, caused their business to operate at limited capacity, or caused them to modify floor plans to allow for social distancing, if there is no virus exclusion in the policy. In cases where there is a virus exclusion in the policy, most policyholder claims have been summarily dismissed.

For example, in a COVID-19-related business insurance dispute brought in federal court in California, two separate policyholders, one a salon and the other a restaurant, brought suit against their insurance carrier who previously determined that both losses were not covered.[2] While both policies provided virtually the same coverage for loss of business income, the

restaurant's policy contained a virus exclusion.

Consistent with the majority of rulings on this issue so far, the court dismissed the restaurant's claim, as its policy had a virus exclusion. However, the beauty salon's policy was an all risks policy with no virus exclusion. The court looked at the policy language to interpret the phrase "caused by direct physical loss or damage to property." The main question addressed was: If the COVID-19 pandemic mandated business closures, did those closures result in "direct physical loss or damage to property?"

Insurers typically argue that the phrase "direct physical loss or damage" unambiguously requires some actual, physical damage to the insured premises. In this case, the insurer argued that the presence of the word "physical" precludes any claim for intangible changes to a property, such as the potential presence of a virus or order which disrupts business but does not change the property. The policyholder successfully argued that physical loss is different than physical damage.

While it appears to be difficult to argue that neither the virus itself nor the accompanying governmental orders and restrictions caused physical damage to businesses' properties, businesses have successfully argued that it is possible that these orders caused physical loss. At various points throughout the pandemic, businesses were forced to shutter, rendering their properties unsuitable for their sole purpose—the operation of a business. If a business was not allowed to operate or invite others onto its property, it was "disposed" of in some way. The result very much depends on how an insurance policy defines physical loss, and this varies by jurisdiction. The definition must allow that physical alteration to the property is not necessary to constitute a physical loss.

COVID-19 "HARMS PEOPLE, NOT PROPERTY"

In a contrasting example, the federal court in Massachusetts denied a major restaurant group's claim for business interruption coverage when there was no virus exclusion in the policy.[3] The court analyzed the business income provision with the very same language—that the lost income and expenses were caused by "direct physical loss or damage" to the businesses' properties—but concluded that the virus harms people, not property. The policyholder buttressed this argument by contending that the civil authority clause in the policy (government entity prohibits access) required the insurer to pay for business interruption losses resulting from action of a civil authority. However, the court concluded that the policyholder was not prohibited from carry-out and delivery options.

CHECK THE POLICY LANGUAGE

In a case filed by a tribal casino in state court in Oklahoma, the court determined that the policyholder was entitled to indemnity on business interruption coverage under its tribal property insurance policy (TPIP).[4] The casino, like many other businesses, closed its business operations to implement mitigation protocols and modifications to safely operate. Even though the TPIP all risks policy does not use standard ISO language,[5] the court determined that insurers cannot assign special meaning to the triggering proposition in the casino's TPIP policy. The court accepted the casino's proposition that "loss of use" is sufficient to establish business interruption without physical impairment of the property. The loss was determined to be that the casino property was rendered useless due to the reasonable precautionary measures implemented in response to the COVID-19 pandemic.

This case highlights further distinguishable issues. The policy also included a virus exclusion. Is a pandemic loss different than a virus loss, and should the virus exclusion definition be expanded to include pandemics? Does the business close because of the presence of the virus, or is the closure due to pandemic restrictions? In this case, the court agreed that virus exclusions only apply where there is proof of actual viral presence.

STAY TUNED

In March, a large casino and entertainment company sued its insurers in Nevada state court for denying its business interruption claims for over $2 billion in losses due to the COVID-19 pandemic. The casino alleges that it paid $25 million in premiums to its insurers for all risk insurance and that there was no applicable exclusion for the denial of coverage. It claims that all of its properties were shut down in March 2020 (including its 47,000 hotel rooms) under order of the gaming control board and other civil authorities. Most of the properties reopened with limited operations in May and June 2020. This may be the largest suit filed so far regarding a COVID-19 coverage dispute. Therefore, it is expected that the outcome will have a significant impact on how insurers write coverage for the hospitality industry in the future.

CONCLUSION

Although there appears to be some limited success for policyholders in the arguments regarding the definition of "direct physical loss" in the business income provision of their insurance policies, there has been very little success when the policies contain a virus exclusion. When insurers utilize standard ISO form policy language, the special meaning assigned to "direct physical loss of property" varies by jurisdiction. In the meantime, in an apparent attempt to address virus exclusion and civil authority provision loopholes, insurers are now issuing coverage with exclusions, including a new policy endorsement limiting coverage for certain civil authority orders relating to COVID-19. Do not be surprised to see this or similar endorsements in new policies and renewals or even an expansion of the virus exclusion to specifically exclude direct physical loss or damage due to pandemics. Businesses seeking policies should anticipate additional scrutiny by insurers in business contingencies and risk planning to procure coverage.

Gillian Woolf is a partner at Barclay Damon LLP. She represents primary and excess insurers in insurance coverage litigation arising out of construction, advertising injury, and municipal claims and defends businesses, homeowners, and real estate professionals against claims involving director and officer, premises, and professional liability as well as property-transaction disputes.

Jim Carroll is a partner at Barclay Damon LLP. He serves as trial counsel to many insurance companies and their insureds, routinely advising on errors and omissions policies, and handles insurance coverage disputes and suits against insurance companies.

1 See "Pandemic: Potential Insurance Impacts," Lloyd's, May 2008.

2 See *Kingray Inc. v. Farmers Grp. Inc.*, 2021 U.S. Dist. LEXIS 41300, 2021 WL 837622.

3 See *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 2021 U.S. Dist. LEXIS 43097, __ F. Supp. 3d __, 2021 WL 858378.

4 See *Choctaw Nation of Oklahoma v. Lexington Insurance Company*, Bryan County, OK, CV-2020-00042 (2/15/21).

5 ISO is a national insurance policy drafting organization that develops standard policy forms and then files them with each state's insurance regulators.

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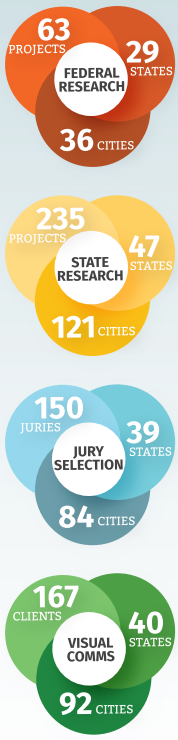

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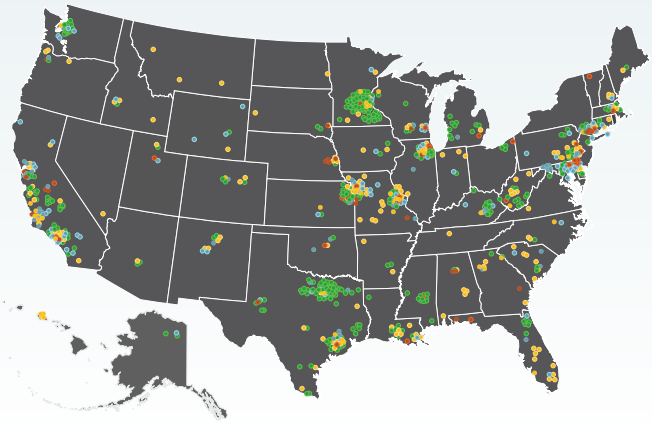

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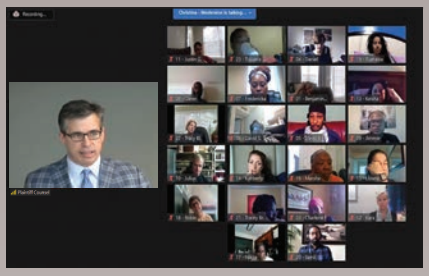

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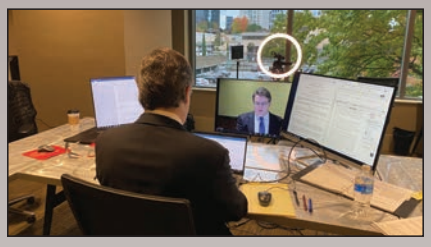

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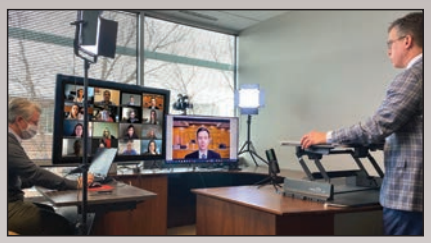

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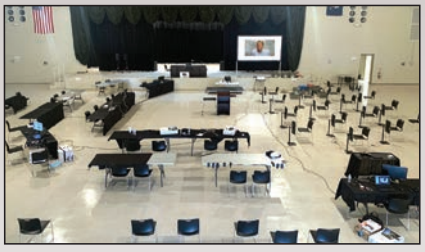

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RESPONDING TO A FEDERAL COURT COMPLAINT WHEN THERE IS AN AGREEMENT TO ARBITRATE COURTS ARE ALL OVER THE MAP

Douglas W. Lytle Klinedinst PC
Howard J. Klatsky Fee, Smith, Sharp & Vitullo, LLP

American employers are, in a reported trend driven by a number of Supreme Court decisions dating back to the early 1990s, increasingly requiring workers to sign mandatory arbitration agreements. According to one commentator, by the early 2000s the percentage of workers subjected to mandatory arbitration had risen from just over 2% (in 1992) to almost a quarter of the workforce. Since that time, workers subject to mandatory arbitration provisions has more than doubled, now exceeding 55%. Given all of this, one might think that in the year 2021, the law would be clear on what federal procedure applies when a defendant is moving to dismiss or stay a case and compel arbitration pursuant to an agreement to arbitrate. Not so. In fact, the federal courts are all over the map.

In *McDonnel Grp., L.L.C. v. Great Lakes Ins. SE, UK Branch*, 923 F.3d 427, 430 n.5 (5th Cir. 2019), the Fifth Circuit reiterated that it has not yet decided whether, under the Federal Rules of Civil Procedure (FRCP), a dismissal based on an arbitration provision is a dismissal for lack of subject matter jurisdiction under FRCP Rule 12(b)(1) or a dismissal for improper venue under Rule 12(b)(3).

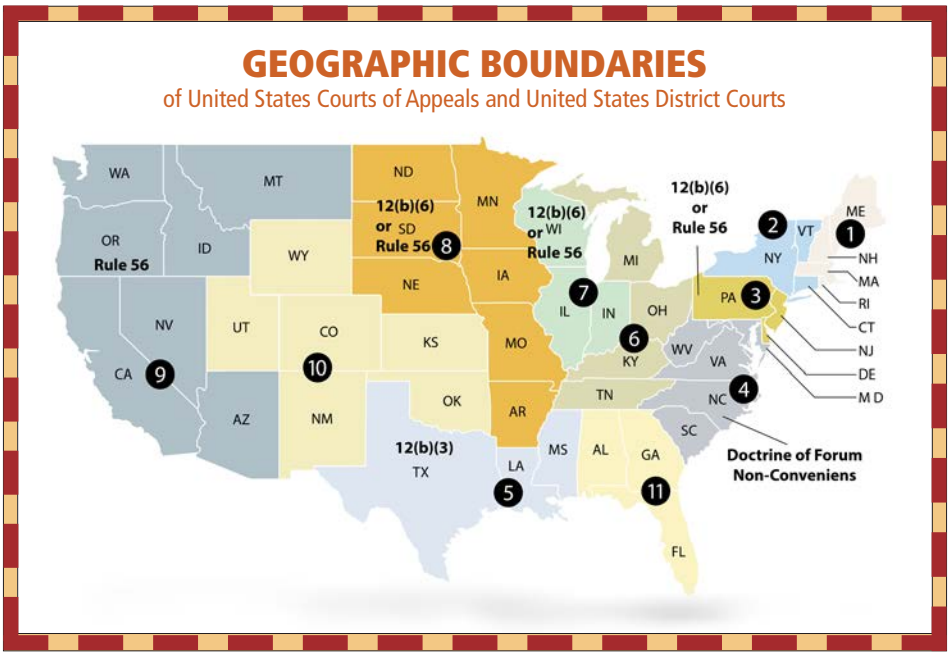
The Northern District of Texas, however, seems pretty certain that Rule 12(b)(3) is the correct basis for a motion to dismiss or stay an action based on an arbitration agreement. Recent rulings by Northern District of Texas courts find that an arbitration clause implicates forum selection and claims-processing rules and thus, such motions are governed by Rule 12(b)(3) rather than Rule 12(b)(1). *Predmore v. Nick's Mgmt.*, 2021 U.S. Dist. LEXIS 22123, at *3 (N.D. Tex. Feb. 4, 2021); s*ee also, Gezu v. Charter Communs.*, 2021 U.S. Dist. LEXIS 23692, at *23 (N.D. Tex. Jan. 7, 2021).

In *Neutra, Ltd. v. Terry (In re Acis Capital Mgmt., L.P.)*, 604 B.R. 484, 514-16 (N.D. Tex. 2019) ("Neutra"), the Northern District of Texas explained why Rule 12(b)(3) applies when a party seeks to stay or dismiss a pending lawsuit and compel arbitration. Challenging the denial of its motion to compel arbitration, Neutra Ltd. argued that arbitration agreements implicate the court's subject matter jurisdiction. It relied on *Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014), in which the Fifth Circuit held, "a district court lacks subject matter jurisdiction over a case and should dismiss it pursuant to Federal Rule of Civil Procedure 12(b)(1) when the parties' dispute is subject to binding arbitration."

The court in *Neutra* noted that before *Gilbert*, the Fifth Circuit had not definitively decided whether Rule 12(b)(1) or Rule 12(b)(3) was the proper rule. It then pointed to an order by a Fifth Circuit panel denying a petition for rehearing in *Ruiz v. Donahoe*, 784 F.3d 247 (5th Cir. 2015), wherein Circuit Judge Owen—who had authored the opinion in *Gilbert* just one year before—wrote "[a]lthough in *Gilbert* we spoke in terms of subject-matter jurisdiction, we used the term imprecisely." In *Ruiz*, the Fifth Circuit explained that subject matter jurisdiction can be raised at any time and cannot be waived by the parties, whereas contractual arbitration provisions are waivable and do not affect subject matter jurisdiction. Accordingly, under *Ruiz*, "agreements to arbitrate implicate forum selection and claims-processing rules not subject matter jurisdiction."

The court in *Neutra* followed the reasoning in *Ruiz*, and expressly noted that the Federal Arbitration Act, 9 U.S.C. §§ 3-7, authorizes courts to issue orders compelling parties to arbitrate, orders compelling witnesses to appear in arbitrations, and orders staying proceedings pending arbitration. By contrast, when a court lacks subject matter jurisdiction (the contention for a motion under Rule 12(b)(1)), a court has no power to issue a stay order or any order besides an order dismissing the case. Thus, dismissals based on arbitration agreements cannot be dismissals for lack of subject matter jurisdiction under Rule 12(b)(1).

Other circuits, on the other hand, are certain that neither FRCP 12(b)(1) nor FRCP 12(b)(3) can serve as the basis for a motion to dismiss or stay an action based on an agreement to arbitrate. See 2 Moore's Federal Practice - Civil § 12.24 (2020), citing C*ity of Benkelman v. Baseline Eng'g Corp.*, 867 F.3d 875, 880 (8th Cir. 2017) ("motion seeking [dismissal] to compel arbitration is not properly construed under Rule 12(b)(3)"; holding that the correct procedure is either FRCP 12(b)(6) or FRCP 56); *Munger v. Cascade Steel Rolling Mills, Inc.*, 332 F. Supp. 3d 1280, 1287-88 (D. Or. 2018) (analyzing *City of Benkelman*, and concluding FRCP 56 is the correct procedure.)



In *Munger v. Cascade Steel Rolling Mills, Inc.*, 332 F. Supp. 3d 1280, 1287-88 (D. Or. 2018), the district court in Oregon (Ninth Circuit) denied a motion to dismiss under Rule 12(b)(6) reasoning that a plaintiff is unlikely to plead the arbitration clause in the Complaint, and when that is the case, a defendant who seeks to rely on the arbitration agreement cannot present that agreement as a matter outside the pleadings. Thus, by process of elimination, the court in Munger said "[t]hat leaves a motion for summary judgment under Rule 56 as the best vehicle to enforce a valid and binding arbitration clause." See also, *Wilson v. Starbucks Corp.*, 385 F. Supp. 3d 557, 560 (E.D. Ky. 2019) and *FCCI Ins. Co. v. Nicholas Cnty. Library*, 2019 U.S. Dist. LEXIS 42156, at *13 (E.D. Ky. Mar. 15, 2019) (both concluding that if the court must consider matter outside the pleadings, only a summary judgment motion is proper).

As in the Fifth Circuit, the Oregon district court in *Munger* seemed to lament the fact that the Ninth Circuit had not yet expressly ruled on what procedure was appropriate: "Without further direction from the Ninth Circuit, I join the Seventh and Eighth Circuits and hold that enforcement of an arbitration clause is not jurisdictional and thus not properly the subject of a motion to dismiss under Rule 12(b)(1)."

As the *Munger* court noted, significant conflict exists among the various circuits as to the applicable procedure:

> **Fourth Circuit** – treats an arbitration clause as a forum-selection clause enforced under the doctrine of forum non conveniens; *BAE Sys. Tech. Sol. & Servs. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 470 n.4 (4th Cir. 2018).
>
> **Fifth Circuit** – FRCP 12(b)(3) applies; *Ruiz v. Donahoe*, 784 F.3d 247 (5th Cir. 2015).
>
> **Seventh Circuit** – FRCP 12(b)(3) applies; *Auto. Mech. Local 701 v. Vanguard Car Rental*, 502 F.3d 740, 743 (7th Cir. 2007).
>
> **Eighth Circuit** – FRCP 12(b)(6) or FRCP 56 apply; *City of Benkelman, NE v. Baseline Eng'g Corp.*, 867 F.3d 875, 881 (8th Cir. 2017).

Until the Supreme Court addresses this issue further, or until there is an amendment to the rules, litigants and their counsel must pay close attention to the latest opinions from the federal circuit court and the particular district court where a case is pending and would do well to check how the judge in the particular case has ruled most recently. This is certainly one issue where engaging a USLAW affiliate firm with local knowledge can pay off.

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Howard J. Klatsky is a senior partner with Fee, Smith, Sharp & Vitullo, LLP (working out of the Dallas office) and is head of the firm's Commercial Litigation and Commercial Transactions Sections.

RIPPLE EFFECT: SEC LAWSUIT AGAINST CRYPTOCURRENCY COMPANY MAY PROVIDE GUIDANCE FOR CRYPTO INDUSTRY

Nikhil A. Mehta and **Eric M. Fogel** SmithAmundsen

On December 22, 2020, the Securities and Exchange Commission (SEC) filed a high-profile enforcement action against a major cryptocurrency company. The SEC complaint alleges violations of federal securities laws by defendant Ripple Labs, Inc. ("Ripple"). Founded in San Francisco in 2012, Ripple is a well-established company, and its founders are regarded as pioneers in the crypto industry.

The SEC complaint alleges that Ripple sold its cryptocurrency, named XRP, as an unregistered security. The SEC argues that XRP is a security, and not a commodity or other type of asset, because it was generated, distributed, and sold by Ripple in a "centralized fashion."

IS XRP AN "INVESTMENT CONTRACT" (AND THUS A SECURITY) UNDER U.S. SECURITIES LAWS?

The outcome of the Ripple case will largely depend on whether XRP is an "investment contract" under U.S. securities laws, thus making it subject to registration requirements under the Securities Act of 1933. The U.S. Supreme Court's decision in SEC v. W.J. Howey Co. provides that an investment contract exists when there is "an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others." SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

In the Ripple case, the SEC has focused heavily on the final prong of the Howey test – a "reasonable expectation of profits derived from the efforts of others." In particular, the SEC has alleged that purchasers of XRP reasonably expected their profits to be derived directly from the efforts of Ripple, including Ripple's alleged efforts to develop, control, and manage secondary markets for XRP, develop use cases for XRP, and to facilitate the implementation of XRP with banks or other financial intermediaries.[1]

The SEC has already indicated that bitcoin and Ethereum are not securities due to their decentralized nature, which is a hallmark of blockchain applications. The bitcoin blockchain is a distributed ledger that maintains a permanent and immutable record of all transactions. There is no central entity that mints or distributes bitcoin. Instead, transactions are verified, and bitcoin is mined by a series of "nodes," which is a widely distributed network consisting of hundreds of thousands of individuals across the world. Since there is no central entity whose efforts are a key factor in developing or distributing bitcoin, it is not considered to be a "common enterprise with profits derived from the efforts of others." Therefore, it is not deemed to be a security under the Howey test.[2]

Ripple, on the other hand, is viewed differently by the SEC, which has taken the position that the development and distribution of XRP was conducted by Ripple in a centralized way. One of the examples given by the SEC is that Ripple, by itself, minted the entire supply of XRP when it was first launched.[3]

Ripple has asserted seven affirmative defenses, which include its two main de-

fenses that (1) XRP is not an investment contract and not a security, and (2) that the SEC violated due process by failing to warn Ripple, as a market participant, about its violations of securities laws. Essentially, Ripple has argued that the SEC had a "duty to warn" Ripple of any alleged violations, particularly given the SEC's awareness of XRP dating back to at least 2013. The SEC has targeted this affirmative defense in recent court filings, seeking to strike it. Ripple has filed its own motion to dismiss and has successfully defended a series of discovery motions by the SEC which sought to collect extensive financial records of Ripple's founders. In addition, Ripple recently won a motion allowing it to review the SEC's internal discussions about XRP and whether the SEC actually believed it was an investment contract. This development may hurt the SEC's case against Ripple and XRP.[4]

CRITICISMS OF THE RIPPLE LAWSUIT

Many observers from the crypto and business communities have been critical of the SEC's lawsuit against Ripple. Some worry that it could cripple a nascent industry that seeks to make technology, finance, and money itself accessible to more people. Others point out that the lawsuit was hastily conceived, given that it was filed one day before Chairman Jay Clayton resigned from the SEC. In fact, only three of the five SEC commissioners approved filing the Ripple lawsuit, the minimum threshold for an SEC action to proceed. Still others point out that the case does not seem to involve any harm to investors, that the SEC has known about XRP since 2013, and that XRP is a legitimate technology with a market capitalization of approximately $25 billion. Some argue that it would make more sense for the SEC to wait and pursue a more clear-cut case under the Howey test in order to develop more case law on this issue. Former SEC Chair and current Ripple defense attorney Mary Jo White said: "There's no way to sugarcoat it. [The SEC is] dead wrong legally and factually."[5]

IS THERE A MUTUALLY BENEFICIAL OUTCOME ON THE HORIZON?

As a major crypto case brought by the SEC, the Ripple lawsuit may have a significant impact on the future regulation of not only cryptocurrencies, but also blockchain and financial technology (FinTech) applications, which operate using similar technologies. Moving forward, it may make sense for the SEC to implement reasonable, measured regulations for cryptocurrency, blockchain, and FinTech companies. Also, Congress could provide a framework for the regulation of cryptocurrencies and other digital assets, but this may be unlikely in today's political environment. For now, the SEC is likely to lead the way in balancing the interests between a regulatory framework that protects investors yet is suitable for crypto companies seeking to develop legitimate new technologies. A balanced regulatory framework would ideally benefit the crypto industry by providing a roadmap for future compliance, and predictability about permitted activities.

While the outcome of the Ripple lawsuit is uncertain, the parties have engaged in settlement discussions. The newly appointed SEC Chair, Gary Gensler, is considered an authority on cryptocurrency, which he taught about at MIT.[6] Gensler may take an interest in the Ripple case and any resulting regulatory framework, potentially leading to a more balanced approach by the SEC moving forward.

REGULATORY UPDATES AND FUTURE OUTLOOK

While the SEC seeks to protect the public and ensure compliance with securities laws, it also seems to understand the potentially significant benefits associated with blockchain technology. In a recent "Risk Alert," the SEC advised investment advisers, broker-dealers, and national securities exchanges of the advances in distributed ledger technologies while recommending best practices for maintaining compliance with securities laws.[7]

Recently, Dawn Stump, Commissioner of the U.S. Commodity Futures Trading Commission (CFTC) explained the implications of the Ripple lawsuit and confirmed that the CFTC is closely monitoring it. "The question of whether XRP is a security will be crucial. I am watching the outcome of this case closely because it will help to establish the scope of the SEC's authority in the digital assets space," Commissioner Stump said.[8]

Commissioner Stump also commented on the balanced approach recommended by SEC Commissioner Hester Peirce. "I am encouraged by [Commissioner Peirce's] attempt to create a safe harbor that recognizes both 'the need to achieve the investor protection objectives of the securities laws, as well as the need to provide the regulatory flexibility that allows innovation to flourish.' I look forward to working with Commissioner Peirce, incoming SEC Chairman Gary Gensler, and the other Commissioners at the SEC and CFTC in applying the agencies' authorities to develop sound public policy with respect to digital assets," Commissioner Stump added.[9]

Moving forward, cryptocurrency providers and vendors must stay up-to-date on the rapidly developing laws and regulations in this space and should consult with experienced cryptocurrency or securities counsel. If you have any questions, please contact SmithAmundsen's cryptocurrency group at (312) 455-3033.

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WHAT THEY DON'T KNOW MAY HURT THEM

Statute of Limitations Concerns in Discriminatory Failure to Hire Cases

Michael A. Secret Flaherty Sensabaugh Bonasso PLLC

As of January 2021, there were an estimated 6.9 million job openings in America, with 5.3 million employees hired for the previous calendar year.[1] As many employers will tell you, hiring and firing is a full-time job. This daunting process can be a breeding ground for employment suits, as discriminatory "failure to hire" actions can arise when a qualified candidate is not hired for discriminatory or otherwise illegal reasons. The question then presents itself: how long does a potential employee have to bring such a suit against his would-be employer? After all, there are no laws that require an employer to hire prospective employees that belong to a protected class. Invariably, an employer will choose to hire applicants who fall outside of a recognized protected class, and that is not, on its face, unlawful. No employer can tell how a potential employee will construe the reason for his or her termination. This is especially true in the COVID-19 era, as fewer job interviews are taking place in-person, leaving both the employer and the applicant unable to gauge the motives of each other fully. So how is a potential employer to know when it has inadvertently exposed itself to liability potentially decades after the statute of limitations has run?

DOES THE DISCOVERY RULE APPLY TO THE STATUTE OF LIMITATIONS?

In the instance of "failure to hire" cases, it has been consistently held that the date on which the employer's hiring decision is made known is the reference point from which the limitations period is calculated. However, the vast majority of states apply some form of the "discovery rule" to the statute of limitations for certain actions. In general, the discovery rule tolls the statute of limitations until the plaintiff discovers or reasonably should discover his or her injury. The quintessential example of the discovery rule is a doctor leaving a

sponge in a person during surgery that is not discovered until years afterward. The statute of limitations on the patient's cause of action against the doctor is tolled until the person knows or should know of the doctor's mistake. You can see how one could apply this line of thinking to discriminatory failure-to-hire cases. After all, if someone is rejected from a job by a one-line email, how is that person supposed to know whether the motive behind the employer's decision was discriminatory?

To no one's surprise, the states are not uniform in applying the discovery rule to discriminatory failure to hire cases. In 2010, the Supreme Court of New Jersey demonstrated how the discovery rule could be applied in a similar situation in *Henry v. New Jersey Department of Human Services*.[2] In *Henry*, the plaintiff, a black woman, secured a full-time entry-level nursing position at Trenton State Hospital in April of 2004. She claimed that she was given an entry-level position and not reclassified into a high-level position due to her race. In November of 2004, the plaintiff transferred to the New Jersey Juvenile Commission. In the Spring of 2006, the plaintiff learned that Trenton State Hospital had immediately hired a white nurse with the same credentials into a high job classification. She also learned through a union representative "that racism was very widespread throughout Trenton State with allegations of impropriety only then being presented to him." The plaintiff filed suit in 2007 under the New Jersey Law of Discrimination ("LAD"), one year after the deadline to file suit had passed. The lower court dismissed the plaintiff's claims, finding that the cause had accrued upon the alleged "discrete act" of "disparate treatment" that occurred in 2004. On appeal, the Supreme Court of New Jersey noted that "[a]t the heart of the discovery rule is the fundamental unfairness of barring claims of which a party is unaware." Furthermore, the Court noted nothing new about applying equitable principles to toll the statute of limitations in claims under the LAD as it had been in other areas of law, citing cases where the Court had applied the discovery rule to retaliation claims and Title VII cases. The Court remanded the issue back to the lower court to allow the plaintiff to argue her case with the discovery rule now applicable.

However, the majority of states take a much stricter approach in applying the discovery rule to failure to hire cases in opposition to *Henry*. In *Metz v. Eastern Associated Coal, LLC*, a West Virginia case, the plaintiff was a mine worker who bid on a position as a mechanic trainee.[3] The mine rejected his application for this position on July 23, 2012, but he did not learn until January 15, 2014, that the basis for his rejection may have been because of his age. The plaintiff brought a discrimination claim in December of 2015, outside the two-year statute of limitations for employment discrimination claims in West Virginia. The lower court certified two questions to the West Virginia Supreme Court of Appeals: (1) does the statute of limitations begin to run from the date the plaintiff learns of the adverse employment decision? and (2) does the discovery rule toll the statute of limitations until the plaintiff discovers the alleged discriminatory motive underlying his failure to be hired for a position? The Court answered the first question in the affirmative. Regarding the issue of the discovery rule, the Court rejected the second question, emphasizing that West Virginia jurisprudence had held that "[t]he 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition to its application" and should not be applied to employment actions. The Court then went on to hold that there was no basis for applying the discovery rule to discriminatory failure to hire cases because "the plaintiff not only knows of his injury—the non-attainment of employment—but he or she unequivocally knows the identity of the entity who caused his injury."

While there is no uniform application of the discovery rule to failure to hire cases, the majority of state and federal courts side with the logic behind *Metz*. The Third, Fourth, Fifth, Sixth, and Tenth Circuit Courts of Appeals all have held that the statute of limitations begins to run on the date of the adverse employment action and not when the potential employee learns of the possible discriminatory animus behind the decision. The rationale behind the majority's view is that a plaintiff does not need to know all of the facts that would support his claim for the "countdown" of the statute of limitations to commence. Rather, the plaintiff knows that he was injured and that his potential employer caused the injury.

WHAT ARE THE POLICY CONCERNS?

Of course, employment laws do not exist in a bubble. Law begets policy just as much as policy begets law. Those representing the plaintiffs would argue that the refusal to toll the statute of limitations would lead to the filing of frivolous complaints based on incomplete knowledge to avoid being barred by the statute of limitations. It is unlikely for an employer to freely admit the discriminatory reasons for the failure to hire in a public forum and may pressure the plaintiff to hamstring their claims to file now and formulate a position on the employer's discriminatory intent later.

However, the majority of circuits reject this view, with most taking a very narrow view of the purpose of the statute of limitations. It is the current view of the majority that employers should not be forever subject to lawsuits as it is always possible for a plaintiff to claim that they only recently discovered the employer's discriminatory motives. This encapsulates the purpose of the discovery rule, as memories erode, and evidence is eventually lost. The majority sees the potential for great harm in allowing a plaintiff to bring a claim so long after the discriminatory act. This would likely call for a more nuanced application of the discovery rule that the majority is hesitant to enact.

CONCLUSION

In sum, the application of the discovery rule in failure-to-hire cases has generally been pro-employer. The majority holds the position that the discovery rule is inapplicable in such a context, but a minority of jurisdictions will apply it to employment cases. An employer needs to know the jurisdiction's laws where they operate and ensure that its communication of rejection is as short and direct as possible. The wordier the rejection, the more room a rejected employee has to construe discriminatory intent years and years down the road. As outlined above, the statute typically begins running when the communication of rejection is sent.

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1 https://www.bls.gov/news.release/jolts.nr0.htm
2 *Id.*, 204 N.J. 320, 9 A.3d 882 (2010).
3 *Id.*, 239 W. Va. 157, 799 S.E.2d 707 (2017)

Breaking Down OSHA's New COVID-19 National Emphasis Program

GUIDANCE FOR EMPLOYERS TO AVOID OSHA CITATIONS

Brett Adair and **Melisa C. Zwilling** Carr Allison

Shortly after taking office, President Biden directed the Occupational Safety and Health Administration (OSHA) to promulgate an Emergency Temporary Standard (ETS) to address COVID-19 issues in the workplace. The deadline given to accomplish this task was March 15, 2021. Instead of issuing an ETS, however, on March 12, 2021, a National Emphasis Program – Coronavirus Disease 2019 (NEP) was released. NEPs are programs that, for an established period of time, focus OSHA's resources on identified hazards in specific industries. The COVID-19 NEP sets out OSHA's initiatives to reduce or eliminate employee exposure to the virus in industries that place the largest number of employees at risk.

Recently, on May 13, 2021, the Centers for Disease Control and Prevention (CDC) announced that fully vaccinated individuals no longer need to wear face masks or physically distance except in healthcare and a few other settings. This announcement came as a surprise to many and with an important caveat. It does not apply to the extent that it conflicts with federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance. According to CDC data, as of May 17, 2021, only 37 percent of Americans have been fully vaccinated. As such, a majority of the workforce would still be subject to the requirements of the NEP issued by OSHA.

The COVID-19 NEP has two main focuses. The first is targeted toward employers in an expansive list of industries and involves efforts those employers must make to protect employees. Increased OSHA workplace inspections will take place to enforce adherence to safe practices. These inspections are serious business. In 2020, OSHA conducted inspections at 369 private workplaces related to COVID-19 practices under OSHA's General Duty Clause and levied $4.2 million in fines.

The second focus is on employee outreach and compliance assistance. OSHA will be particularly involved in preventing retaliation against workers who raise concerns about safety. From April 2020 to March 2021, OSHA and its state counterparts received nearly 65,000 complaints about COVID-19 workplace safety issues. The Biden administration has provided significant additional funding for OSHA to hire additional inspectors and facilitate the increase in enforcement efforts and employee education.

TARGETED EMPLOYERS

The NEP is aimed at employers with workers who have an increased risk of exposure to COVID-19. Those employers are broken down into two categories depending on the type of inspection OSHA will conduct. Programmed inspections are performed at randomly selected employers based on scheduled, objective selection criteria. Unprogrammed inspections are conducted at specific worksites in response to allegations of hazardous working conditions. This category of inspection will be used to focus on allegations that an employer had inadequate environmental controls in place as well as employee exposure to individuals with confirmed or suspected cases of COVID-19.

There are two lists of the industries targeted for programmed inspections.

Healthcare Industry Employers
- Physicians' Offices
- Dentists' Offices
- Home Health Services
- Ambulance Services
- Hospitals
- Nursing Care, Assisted Living and Continuing Care Retirement Facilities

Non-Healthcare Industry Employers
- Meat and Poultry Processing
- Supermarkets and Grocery Stores
- Food and Beverage Stores
- Department and General Stores
- Warehouse Clubs and Supercenters
- General Warehousing and Storage
- Certain Temporary Help Services
- Restaurants
- Correctional Institutions
- Building Construction
- Manufacturing Facilities
- Transportation Systems

WHAT SHOULD EMPLOYERS IN TARGETED INDUSTRIES DO?

All employers should be prepared for an OSHA inspection, but employers in the targeted industries should be especially prepared. Employers should consider implementing as many of the guidelines noted by OSHA in its recent publication entitled Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace as possible. Some of the safety measures outlined by OSHA are noted below.

Employer Processes and Policies
- A hazard assessment process should be implemented to identify how and where employees might be exposed to COVID-19.

- A plan for how an employer will handle an outbreak of COVID-19 or another infectious disease within the workplace should be prepared.
- The negative impact of quarantine should be minimized through remote working options and/or favorable sick leave policies.
- Though the COVID-19 vaccine is currently free, employers should be prepared to pay for them in the future.
- Employers must ensure that employees are aware of their right to raise concerns about safety without fear of reprisal. A policy should be in place that allows for such complaints to be received and handled by a specific individual on behalf of the employer.

Face Coverings and Other Personal Protective Equipment (PPE)

- Adequate, securely fitting face coverings should be provided to employees at no cost.
- Visitors and customers who enter the workplace should be asked to wear a face covering unless consuming food and/or beverages on site. While the May 13, 2021, CDC guidance indicates that fully vaccinated individuals no longer need to wear face coverings in most settings, determining which visitors and customers are fully vaccinated and which are not would be virtually impossible for employers.
- Additional PPE that is appropriate for a particular work setting should be required and provided by the employer.

Physical Distancing

- The number of people in one place at the same time should be limited through remote working and/or flexible work shift options.
- Flexible meeting and travel options should be adopted, including the postponement of all non-essential meetings and events.
- The physical space between unvaccinated employees and co-workers as well as unvaccinated employees and customers should be maintained at a minimum of 6 feet. When appropriate physical distancing cannot be maintained, physical barriers should be installed.

Employee Training

- Employers should actively encourage sick employees to stay home and have a process for separating employees who become sick at work.
- Proper respiratory etiquette and hand-washing techniques should be emphasized among the workforce. Sanitizer and other hygiene supplies should be provided for employee use.

Workplace Sanitization

- Employers should establish and maintain enhanced workplace cleaning and disinfection procedures.
- Supplies should be provided for employees to sanitize individual workspaces before beginning work, in appropriate situations.

Ventilation Systems

- Ventilation systems should be operating properly and provide for acceptable indoor air quality based on occupancy. The circulation of fresh, outdoor air should be increased whenever possible.
- Central air filtration should be increased to the highest-rated filter possible. Filters should be inspected periodically to ensure they are within service life and installed appropriately.
- When safe ventilation cannot be provided, a reduction in building occupancy should be considered.

OSHA INSPECTIONS

Having a general knowledge of how COVID-19 related inspections will be conducted would benefit employers. Typical OSHA inspections include an opening conference upon entry to the worksite, a request for documents and review of the same, a walk-through of the worksite, witness interviews, then a closing conference. We recommend contacting your employment counsel as soon as OSHA arrives and asking the OSHA inspector to coordinate the inspection through counsel, even if it takes several hours for him or her to travel to your location. The NEP provides additional, specific guidance on the COVID-19 inspection process aimed at protecting the health of the OSHA inspector as well as employees. Whenever possible, OSHA will perform on-site inspections, although remote inspections are an option if needed for safety. The NEP also provides that, in an effort to help protect employees from retaliation, OSHA will distribute anti-retaliation information during inspections, increase outreach opportunities and promptly refer all allegations of retaliation to the Whistleblower Protection Program.

EMPLOYEE PROTECTION FROM RETALIATION

A significant portion of the NEP is focused on ensuring that workers who report or make allegations concerning COVID-19 related unsafe working conditions are protected from retaliation by their employers. Federal and state OSHA offices saw a dramatic increase in the number of complaints during 2020, with a large percentage of those concerning COVID-19. Monetary settlements or merit awards for whistleblowers almost doubled during 2020. That trend is expected to continue upwards.

IS AN ETS COMING?

An ETS is a special rulemaking ability granted to OSHA that allows OSHA to make rules without having to go through the extensive rulemaking process. With an ETS, OSHA is able to skip the typical requirements for notice, public comment, and public hearings. Even though a COVID-19 ETS has yet to be issued, a draft was sent to the White House for review. Given the recent CDC guidance, however, that draft is likely to require additional revisions before issuance. Hopefully, OSHA will clarify, among other issues, how an employer can implement differing rules for vaccinated and non-vaccinated individuals without making distinctions in the workplace based on vaccination status.

MOVING FORWARD

Without a doubt, the landscape surrounding COVID-19 in the workplace will continue to evolve rapidly. In the meantime, employers are left trying to figure out how to comply with conflicting obligations and rules from OSHA and the CDC. Many are choosing to simply stay the course and are taking a wait-and-see approach. Ideally, the wait will not be long. Given how quickly guidance from various federal agencies is being revised, employers should be in frequent contact with employment counsel to ensure compliance to the greatest extent possible

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LEVERAGING A SETTLEMENT TEAM FOR OPTIMAL CLAIM OUTCOMES

Johnny Meyer Ametros
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"Before anything else, preparation is the key to success." That statement, by Alexander Graham Bell, speaks volumes when applying it to resolution of long-standing workers' compensation claims. Payers want to resolve claims and eliminate these financial liabilities. Injured workers would prefer not to be in the workers' compensation system and move on with their lives, and all parties want to close claims. However, settling these claims can be easier said than done. It is important to develop strategies to address open claims with a sense of urgency as the complexity of resolution and dollars both increase over time.

Many injured workers report that their claim professionals will periodically speak with them about settlement. However, filled with fear of the unknown, these workers typically respond 'no' and the conversation ends. Successful claim resolution involves many steps and requires many special needs; needs that cannot be met by the claim professional alone.

The most effective method to close workers' compensation claims is to use a team approach, especially with unbiased third parties to help alleviate all stakeholders' concerns. The combination of structured settlement professionals working in concert with professional administrators can be vital in bringing claims to closure.

"My perspective on workers' compensation settlements has evolved and matured over the years from my days of representing parties in cases to being a regulator overseeing a state system," shares Paul Sighinolfi, senior managing director of Ametros. "I have become a fan of both structures and professional administration. These settlement tools bring certainty, stability, and security to the injured worker post-settlement, something he or she likely would not have without them."

STRUCTURED SETTLEMENT ADVANTAGES

Injured workers who settle their claims may choose to receive their money upfront in a lump sum or in payments structured over time. Research has shown time and again that those who opt for structured payments see their money extend much further than those who elect a single payment.

Structured settlements can be set up creatively to meet the injured worker's specific needs. The payments can be designed annually, semi-annually, quarterly, monthly, or in lump sums for many years after the resolution of the claim. Future needs, such as medical care, lost income, home modifications, retirement planning, or expenses associated with a family providing attendant care for the injured worker can be incorporated into a payment plan as well.

The future payments can be funded through an annuity, a specific product from a highly rated and trusted life insurance company. The injured worker receives the payments income tax-free. There are no administration, management, or transactional fees paid by the injured person, nor any consultation fees. If public benefits are affected by an injured worker's assets, an appropriate allocation could be made to a Special Needs Trust so the person's quality of life can be improved with the settlement funds.

Involving a structured settlement consultant early in the claim process adds significant value to the overall outcome. The structured settlement consultant can identify opportunities to move the claim towards resolution. Also, by learning about all the issues involved, they can act as a resolution expert in helping guide the claim through the settlement process — working through all barriers that arise.

The structured settlement consultant will walk through every step of the claim resolution process with all parties and will participate in mediations, settlement forums, and arbitrations, as requested.

A settlement consultant can assist with the following:

- Prepare settlement proposals – meeting the injured party's specific needs
- Offer settlement tools best suited for the claim-specific facts
- Evaluate government benefits and find ways to maintain those benefits while the injured party receives long-term payment streams
- Coordinate professional administration for Medicare Set-Asides

PROFESSIONAL ADMINISTRATION

Professional administrators are neutral in the claim process and can help smooth the path to settlement by supporting all stakeholders involved, both before and after settlement, and especially for the injured worker, who becomes the administrator's member upon settlement. After the claim has settled, the claim has closed and the nurse case manager, claims professional, and others associated with the workers' compensation system are gone, professional administrators continue to provide ongoing support to the injured workers by handling a variety of tasks, including:

- Setting up accounts in the individual's name and Social Security number
- Acting as their health care advocate by helping them manage and pay any health care bills, such as treatments and prescriptions
- Help select medical providers
- Review bills
- Apply potential discounts on medical treatments and medications
- Handle reporting requirements to Medicare to ensure compliance and protection of future Medicare benefits

While these and other services occur after the claim has settled, educating the injured worker and all parties in advance will help ensure these claims successfully get through the resolution process. As Bell said, "preparation is the key to success." That is why it is critical to enlist the help of a professional administrator as soon as a claim is identified as a candidate for closure.

SETTLEMENT TEAM EARLY INVOLVEMENT

The key to successful settlement is leveraging the expertise of the settlement team early in the claim process.

"Partnering with our preferred professional administrator early in the claim is incredibly helpful to the settlement process," explained Brian Annandono, Certified Structured Settlement Consultant (CSSC) from Arcadia Settlement Group. He added, "genuine teamwork helps make each proposal relevant and meaningful. And our ability to overcome barriers along the way — together — helps the case move forward smoothly toward a successful resolution."

Injured workers who have relied on the workers' compensation system for months or years may fear changes to their current benefits, even if they dislike the system. They have concerns about running out of money, for example, and remaining compliant with Medicare — which they would need if they exhausted their funds.

When resolving a claim that involves future medical funds, the combination of professional administration with a structured settlement has proven to be an incredibly effective settlement tool. More importantly, these tools ensure the injured worker receives the best possible outcome for their post-settlement dollars and ensure Medicare's interests are protected, resulting in no loss of future medical treatment to the Medicare Beneficiary. The tax-free payments and long-term security obtained through a structured settlement, in conjunction with the significant savings and support a professional administrator provides on post-settlement medical expenses, is a beneficial way to provide an extra layer of security for the individual when it comes to preserving their settlement funds and maintaining Medicare benefits. Much of the success of early settlement team involvement stems from the depth of knowledge of technical settlement strategies and soft skills like understanding and empathy for injured parties.

"Partnering with professional administration early in the settlement process helps demystify the fears of managing these unique future needs," related Cassie M. Barkett, Esq., associate general counsel for Arcadia. She added, "It is important to be able to take at least one major worry off the table during the negotiation process."

FUTURE COSTS & SAVINGS OPPORTUNITIES

The fear of running out of money is often one of the reasons injured workers shy away from settlement. Injured workers who transition from being in the workers' compensation system to self-managing their own medical needs may be surprised to learn that medical providers and pharmacies expect to be paid at full price. The person typically has no leverage to negotiate a discount, often resulting in the settlement dollars being depleted prematurely.

For example, the potential network savings offered through professional administration on prescription drugs typically ranges from 40% to 60% off the retail price. Demonstrating these actual, real-time savings on their own medications can be a significant negotiating tool to bridge the gap of financial disagreements over the value of a claim.

What this means, for example, if there was $100,000 allocated over the individual's lifetime for a certain prescription, through a professional administrator's network, the same prescription may be reduced to $40,000 after all the potential discounts are applied. The injured worker is then left with an additional $60,000 that would be in the account as excess for other expenses, or it could be left to their family or estate. Leveraging this tactic addresses the main concern that typically arises with the claimant and their attorney; is the settlement money enough?

A major benefit of structuring a settlement is that it ensures injured workers will have funds available for their future needs. It safeguards the person from spending most or all the money, only to find out they do not have enough for medical care, let alone living expenses.

For example, the MSA portion of the settlement totaled $120,000 which could be paid $5,000 annually for 20 years (which equates to $100,000) along with $20,000 in upfront cash. The payer funded the future payments at a cost of $75,000. As a result, the payer saves $25,000 by utilizing a structured settlement to fund the MSA, and the injured worker receives payments annually for 20 years ensuring protection of MSA funds.

CONCLUSION

Injured workers reluctant to settle their claims typically fear the many unknowns that await them. They fear running out of money, or not knowing where to go for advice, or failing to comply with Medicare or other government program requirements. Early team intervention and education, employing all opportunities available, can assist the injured party in making informed decisions. A strong settlement team working together with all stakeholders (early) can result in a smooth and successful settlement and post-settlement process.

Johnny Meyer, director of strategic partnerships for Ametros has over a decade of experience cultivating and maintaining relationships among business partners, developing strategies and business plans with partners, and executing against metrics and milestones to drive growth and revenue.

Alisa Hofmann, CWCP, CMSS, WCSS is the director of workers' compensation and Medicare practices at Arcadia Settlements Group and currently works on the Business Development team. She has been handling and overseeing workers' compensation claims for 27 years with various national carriers. Alisa maintains her adjuster licenses and holds Life, Health & Accident Licensing as well.

VACCINE VOYAGES

Lessons from the Transportation Industry's Handling of the COVID-19 Vaccine Rollout

Brendan T. Vandor and **Rodney L. Umberger, Jr.** Williams Kastner

Last year, amid the haze of confusion and instability caused by the COVID-19 pandemic, industry experts, policymakers and stakeholders at every level of the supply chain did know one thing for certain: distributing a vaccine to the U.S. population was going to require a logistical effort that would be unprecedented in terms of its scale, magnitude and urgency.

The rollout of the first vaccine doses began with fits and starts: Pfizer, for example, was forced to slash the number of vaccines it expected to produce before 2021 by 50% due to supply chain challenges. Now, however, more than six months after the distribution of the first doses of the vaccine, Operation Warp Speed has seen clear successes, and the Biden Administration has easily surpassed his original goal of administering 100 million doses of the vaccine within his first 100 days in office (having achieved the mark on Day 58). This article will briefly examine what lessons the transportation industry—even the parts of it not directly involved in the distribution of the vaccine—can learn from the initial vaccine rollout, and what steps American business, government, and consumers can take to implement some of those lessons as the rollout continues.

EXISTING STRUCTURE

During a typical year, the Centers for Disease Control and Prevention distributes about 75 million vaccine doses to health departments and private providers around the country, according to the Kaiser Family Foundation. Recent pandemics also helped shape the nationwide vaccination distribution infrastructure. During the 2009-10 H1N1 pandemic, for example, the U.S. government distributed 124 million does of the H1N1 vaccine.

Currently, however, the U.S. is attempting to distribute some 510 million doses of the COVID-19 vaccine to its adult population. The all-encompassing project is easily the largest-scale vaccination distribution effort in this country's history and has required a relaxation of government regulation of the transportation industry. Notable examples include loosening borders and customs controls; allowing companies involved in the distribution of the vaccine to rely on waivers of certain FMCSA regulations, such as the hours-of-service requirement for drivers; and the FAA's decision to permit larger quantities of dry ice to be transported by air (since cold temperature control is perhaps the most important requirement of vaccine distribution).

CHALLENGES

Not surprisingly, the massive COVID-19 vaccine rollout has placed strains on every level of the supply chain economy, and especially on participants in the national transportation network who are not directly involved in the rollout. General freight forwarders continue to be worried that their cargo will not be a priority and may be delayed in favor of transporting vaccines, which in turn could force them to raise rates and potentially lose existing or potential customers who would no longer be able to afford to ship with them.

Competitors of the large delivery services companies—Pfizer is partnering primarily with DHL, FedEx, and UPS to distribute its vaccines—as well as companies in business with those competitors, are finding themselves adversely affected by the rollout effort (though additional vaccines are expected to be approved over the next few months, which could result in increased competition for vaccine distribution services). Time will tell if the singular focus of DHL, FedEx, and UPS on vaccine distribution (FedEx Express executive Richard Smith was quoted as saying, "There will be no higher priority shipments in our network than these vaccine shipments; they will be the highest priority"[1]) will impact the ability of those companies to continue providing all of the services they did pre-vaccine rollout.

Opportunities also exist for smaller businesses and subcontractors to participate in the rollout. Boyle Transportation and XPO Logistics have both played central roles in transporting the vaccines to airports and other transfer locations. Other transportation companies, however, may not have the large volume capacity to participate in the vaccine rollout and/or do not have the resources to ensure that their company can pass the strict vetting, regulatory, training and certification requirements to be able to serve as potential partners in the vaccine distribution effort.

LESSONS AND AREAS FOR GROWTH

Directly entering the COVID-19 vac-

cine rollout distribution network may be too late for some transportation companies who would otherwise be interested. But there are valuable lessons to be taken from the rollout for all members of the transportation industry, and opportunities for growth abound.

1. **ANTICIPATE FUTURE NEEDS**
First, the supply chain needs of the vaccine rollout effort are not going anywhere soon and potentially will increase in the coming months if, for example, booster shots for already-vaccinated individuals are required in the fall.[2] Transportation companies should also be poised to assist the rollout effort in ways that may not necessarily be apparent now. For example, the U.S. has experienced dry ice shortages for years, likely due to a decrease in ethanol production occasioned by fewer cars on the road.[3] The vaccine rollout has placed further stress on dry ice production due to the Pfizer vaccine's requirement that it be stored in packages containing dry ice. Savvy actors should be on the lookout for other production shortages that may occur during this pandemic or in future pandemics or national emergencies and be ready to pivot their business models to adapt to these emergency conditions.

2. **LOOK WITHIN**
Perhaps more urgently, transportation companies should be prepared for pharmaceutical manufacturers to recruit truck drivers—whose dwindling numbers continue to be of concern to the nation's transportation needs—to take higher-paying jobs transporting pharmaceutical loads. Such recruitment could be particularly enticing for drivers whose incomes were adversely affected by low demand and/or falling rates during the pandemic. A related but equally important issue is the vaccination of truck drivers themselves and how the government can partner with the transportation industry to ensure that as many truck drivers as possible receive the vaccine. Transportation leaders might also look to partner with organizations already working on the issue, such as the American Trucking Association, to lobby their representatives to pursue innovative solutions in the effort to vaccinate drivers and transportation workers, such as setting up vaccination stations at truck stops or weigh stations.

3. **PURSUE PUBLIC-PRIVATE PARTNERSHIP**
Furthermore, the vaccine rollout has demonstrated that, even at its most united, any supply chain network is often at the mercy of local political trends and decision-making. Data is still being collected on how many doses of the vaccines were wasted due to a failure in communication between municipalities and their state government regarding the demand for vaccines, for example, or poor marketing of available vaccine doses in rural areas lacking the infrastructure to efficiently administer the vaccines. Transportation industry members should leverage this opportunity for education and take steps to partner with local governments and public stakeholders to raise awareness of common supply chain logistical issues.

4. **FOCUS ON RISK AND SECURITY**
Whatever happens in the coming months and years, the national supply chain is unlikely to return to pre-pandemic conditions. Supply chain risk is now front and center for many businesses in a way it was not before COVID-19, and businesses in every sector of the economy are likely to take steps to ensure that their supply-chain networks can be adaptable and robust in the face of another national and/or global emergency.

Finally, the vaccine rollout has demonstrated the importance of security in the transportation of the high-value vaccine doses. In the early stages of the pandemic, the transportation industry experienced a high number of thefts of personal protection equipment (PPE) that was being transported on a massive scale to healthcare workers across the globe.[4] The transportation of the vaccine doses has demanded an unprecedented focus on tracking, surveillance, and extra staffing for purposes of thwarting theft as well as cyberattacks. Whereas a typical freight shipper may only track the truck that the freight travels on, the vaccine rollout has required the tracking and tracing of each individual package of vaccine doses. According to Pfizer's website, the company tracks the location and temperature of each vaccine shipment using GPS-enabled thermal sensors that upload data to control towers, which monitor product integrity 24/7.[5] The lessons from this unique experience with COVID-19 are clear: moving forward, security will likely be seen as more and more of a necessity in transportation, and businesses and consumers will expect a greater level of attention to be paid to ensuring that transportation security systems are strong and up-to-date.

CONCLUSION

Operation Warp Speed declared that the eventual objective of the vaccination program was to leave the U.S. government and commercial infrastructure better able to respond to pandemics and public health crises in the future. This article submits that, while the vaccine rollout has placed significant stressors on certain aspects of the national supply chain, it has already taught us important lessons that the transportation industry as a whole should use to be better able to respond to changing conditions moving forward.

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1 https://www.fedex.com/en-us/coronavirus/stories.html
2 https://www.cbsnews.com/news/moderna-covid-vaccine-booster-shots/
3 https://www.supplychaindive.com/news/hand-sanitizer-ethanol-covid-fda-supply-chain-red-river-biorefinery/591411/
4 https://market-insights.upply.com/en/covid-19-vaccine-distribution-an-unprecedented-logistics-challenge
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Autonomous Does Not Mean Impervious

Lauren Eichaker, Ph.D., CAISS S-E-A

The benefits of automated vehicles have long been touted: decreased roadway congestion, positive environmental impacts, economic relief, and most prominently, increased safety. The Center for Disease Control (CDC) estimates that in the U.S. alone, more than 32 thousand people are killed and 2 million are injured each year in vehicle crashes. Nearly every big name in the auto industry has pledged to have some level of smart vehicle within the decade with Volvo paving the way with its Vision 2020 campaign. In 2016, Hakan Samuelsson, president and CEO of Volvo, said, "Our vision is that by 2020, no one should be killed or injured in a new Volvo car." Auto manufacturers, government entities, and independent nonprofit scientific and educational organizations have been utilizing injury data to follow trends in vehicle crash outcomes. But how are we collecting and processing this data and what does it mean for the future of automated vehicles?

Crash injury data is out there. Research databases contain data about real-world crashes; by compiling them into cohorts, researchers can use statistics and injury scaling methods to find patterns in occupant injury, pre-crash scenario, and post-crash events. For example, the National Highway Traffic Safety Administration (NHTSA) has the Crash Injury Research Engineering Network (CIREN), which is a database that has data from severe vehicle crashes and describes injuries in terms of injury severity using the Abbreviated Injury Scale (AIS).

The AIS was created, managed, and copywritten by the Association for the Advancement of Automotive Medicine (AAAM). It is available in dictionary form and provides a link between injury descriptions and a numerical coding scale. AIS serves as an international standard tool for ranking the severity of injury. It is consensus derived, and anatomically based. In this way, when analyzing the outcomes of crash scenarios, the AIS may be used to study injury outcomes in an objective manner.

AIS development dates back to the mid-1960s and is the standard for injury coding for crash investigation teams, many of which are funded by the U.S. Department of Transportation as well as many university and industry-based research teams around the world. AIS severity values are guided by available evidence data rather than only from mortality data. There are six severity scores in AIS:

AIS Code	Description
1	Minor
2	Moderate
3	Serious
4	Severe
5	Critical
6	Maximal
9	Unknown

It is important to note that maximal does not indicate "fatal." For example, a herniated disc with no nerve root damage would have

a severity score of two. A penetrating skull injury involving the brain stem and cerebrum could carry a severity score of six. Multiple injuries may be followed using the Maximum AIS (MAIS) and the Injury Severity Score (ISS) methods. The MAIS is the highest (i.e., most severe) AIS severity code in a patient with multiple injuries. The ISS is frequently used within the clinical setting, and while regularly used in vehicle accident scenarios, AIS is applicable to many injury scenarios.

Being able to utilize the AIS requires a good working knowledge of human anatomy and medical terminology; the dictionary specifies when descriptions for clinicians and/or imaging validation are necessary for coding specific injuries. For quality control and to support the future of AIS, AAAM offers in-person and online training opportunities. AAAM additionally offers specialized certification through a testing program for which successful candidates receive a certification as AIS specialist (CAISS) (http://www.aaam.org). Re-certification requires re-examination, not just continuing education.

Analyses of patterns in injury outcomes utilizing AIS and vehicle crash features show that programmed responses to crash-imminent scenarios and rigorous testing are needed to provide insight into how increased safety for automated vehicles may be accomplished.

If a vehicle identifies a crash-imminent scenario, how should it act to mitigate injuries? Researchers have used techniques of injury epidemiology and injury scaling to describe that automated vehicles could respond to a pre-crash scenario using smart braking and steering to better align energy-absorbing structures and optimize reactive technologies to mitigate injuries. Additionally, airbag deployment timing via automated vehicle behavior implementation has the potential to optimize safety technologies to mitigate injuries.

Given the possibility that vehicles can be programmed with actions that improve occupant protection in a crash-imminent scenario, further testing needs to be conducted to determine the responses of the automated vehicles and the resulting AIS in various scenarios. Through expertise in data, cutting-edge robotic testing platforms, and vehicle dynamics testing, S-E-A and other testing and research facilities will continue to improve upon the safety of vehicles and stand poised to evaluate not just today's technology but more importantly, tomorrow's.

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WHEN AN EMPLOYEE TRANSITIONS

What Every Employer Should Know

Dena DeFazio and **Michael Sciotti** Barclay Damon LLP

A familiar scene: An employee has informed their supervisor that they are transgender and intend to transition at work. The employer and their counsel scramble; they have no idea how to support the employee or how to meet obligations under federal and state law.

If your organization and its counsel have not yet encountered this scenario, you undoubtedly will; a significant portion of the U.S. population identifies as transgender, and younger generations identify as more gender expansive than previous generations. According to a 2020 study by the Williams Institute, approximately 4.5 percent of the United States' adult population—or 11,343,000 people—identify as lesbian, gay, bisexual, transgender, or queer (LGBTQ+),[1] and 1,397,150 of those people identify as transgender. These numbers will only continue to grow, as demonstrated by another Williams Institute study estimating that 1,994,000 youth 13 to 17 years old in the United States—approximately 9.5 percent of that population—identify as LGBTQ+, with 149,750 of these youths identifying as transgender.

Last year, the United States Supreme Court extended federal antidiscrimination protections to the LGBTQ+ community in the landmark decision *Bostock v. Clayton County, Georgia*, which held that Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on sexual orientation and gender identity. This interpretation of "on the basis of sex" bars employers from discriminating against LGBTQ+ employees with regard to any term, condition, or privilege of employment.

State-level antidiscrimination protections for LGBTQ+ employees are more complicated. Currently, 22 states and the District of Columbia have explicit statutory protections that bar discrimination based on sexual orientation and gender identity.[2] However, 27 states have no protections in place for sexual orientation and gender identity, and one state—Wisconsin—only has antidiscrimination protections in place for sexual orientation. According to the Williams Institute, this leaves approximately 3.6 million LGBTQ+ workers in the United States without state-level statutory protections against employment discrimination based on sexual orientation and gender identity.

As the LGBTQ+ workforce continues to grow, employers need to be ready to anticipate the needs of employees who intend to transition at work to ensure the creation of a workplace that is safe, supportive, and complies with the law. Workplace transitions can be fraught with problems if employers fail to identify ways to anticipate and support employees' needs. Employer preparations should include developing new and revising old policies and procedures to ensure that the organization is adequately prepared when an employee inevitably tells management they will be transitioning.

The most important transition-related policy and procedure that an employer can develop is gender transition guidelines. These guidelines should clearly delineate responsibilities and expectations for transitioning employees, their supervisors, colleagues, and other staff. The guidelines will need to be flexible enough to be tailored to meet a transitioning employee's individual needs, while also being specific enough to provide a consistent framework that eliminates confusion and the potential for mismanagement (or worse). Gender transition guidelines should, at minimum, address who will assist the transitioning employee with managing their workplace transition; what the employee can expect from management; management's expectation for staff, the transitioning employee, and others in facilitating a successful and supportive transition; and the general procedures for implementing transition plans. Employers should take proactive steps by preparing these guidelines prior to being

advised of an employee's intent to transition. The guidelines can be presented in a formal or informal manner, so long as the necessary parties (such as human resources) have access to the documents and feel adequately prepared to utilize them.

In addition to well-established gender transition guidelines, the key to a successful and supportive workplace transition is creating and implementing a workplace transition plan. Once an employee has provided notice of their intent to transition, a support team should be created to work collaboratively with the employee to develop a workplace transition plan. Employees should be given the freedom to shape the overall process in creating the plan, and employers will need to actively listen to the employee's wants and needs to tailor the plan accordingly. Workplace transition plans should, at the very least, address the following topics:

1. Identify the various stakeholders with whom the employee may need to engage at some point during the transition process. Stakeholders can include, for example, supervisors, colleagues, clients, and vendors.
2. Prepare a communication plan that addresses when and how the various stakeholders will be informed of the transition. The employee should determine the timeline for sharing the information, and information related to the employee's transition should be considered confidential.
3. Identify any materials that will need to be changed to reflect the employee's transition, including, for example, directories, websites, identification badges, email addresses, and telephone listings. An employee should be permitted to change their name at work prior to when any official legal name change (if any) occurs, with exceptions being made for instances where records are required by law to reflect a person's legal name, such as payroll and insurance documents. Employers should be sure to identify and explain the instances where the employee's legal name must be used and the reasons for the use. The support team should also identify any external materials and information that will need to be changed, such as professional licenses and directories.
4. Identify when the employee's workplace transition will begin, when workplace materials will be changed, when changes to any external professional information will occur, and when the employee's legal name change (if any) will take effect.
5. Identify any workplace benefits that may be available to the employee to support their transition, such as medical benefits and time off policies, among others.
6. Identify key points of contact for the employee, management, and support team.
7. Determine whether there are, and develop a plan to address, any urgent issues that need to be dealt with.

Similar to gender transition guidelines, workplace transition plans need to be flexible documents and tailored to the transitioning employee's individual needs. Employers should also remember that these plans are living documents and will likely change as the employee works through the details of their transition.

In addition to developing gender transition guidelines, employers will also need to review their various other policies and procedures to ensure they are in alignment. For example, employers should review their nondiscrimination and antiharassment policies for consistency with their gender transition guidelines and compliance with federal and state laws. These policies should include gender identity and expression as classes protected from workplace discrimination. All employees generally remain subject to these policies, and any complaints or concerns raised by any employee, including the transitioning employee, must be handled consistent with these policies.

Employers should also review any policies that may be in place regarding access to locker rooms and facilities. Consistent with OSHA guidance, these policies should ensure that employees are able to access gender-segregated facilities consistent with their gender identity. Employers should consider the necessity of any gender-segregated grooming or dress codes that are currently in place and should opt for gender-neutral policies whenever possible. If a determination is made that gender-segregated grooming and dress codes are truly necessary, these codes must be applied consistently to all employees and should be based on an employee's gender identity.

Finally, employers will also need to review their confidentiality policies to ensure they can adequately maintain confidentiality regarding an employee's transition. It is important to note that employees should not be required to advise employers of any medical decisions, and any disclosure of this information may be a violation of federal and state laws. Policies and procedures, such as gender transition guidelines, should direct employees to utilize the same policies and procedures for medical care or recovery-related time off requests for any transition-related medical needs. Physician notes regarding time off should explain the workplace-related implications—such as the amount of time off required and any return-to-work restrictions—but should not include any diagnosis or treatment-related information.

Each of these steps is crucial for employers in creating a workplace atmosphere that is safe and supportive for transitioning employees, the LGBTQ+ community, and the workforce at large. They are not, however, the only steps employers must take. Employers must also be aware of unconscious bias—for example, moving a transitioning employee to a position that does not involve direct client interaction—and should regularly provide all employees with information and training on gender identity and gender expression. Utilizing senior management to demonstrate support for the transitioning employee, as well as the larger LGBTQ+ community, can go a long way in creating an atmosphere in which all employees are welcomed, supported, and able to thrive.

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[1] Understanding the language applicable to sexual orientation, gender identity, and gender expression is key to creating a safe and supportive workplace; helpful definitions are available from many sources. See, e.g., The Human Rights Campaign's Glossary of Terms.

[2] For a list of the states with and without antidiscrimination protections, see the Williams Institute's April 2020 brief, LGBT Protections from Discrimination: Employment and Public Accommodations.

"FLORIDA MAN" STRIKES AGAIN: $1000 AN HOUR ATTORNEYS' FEES

Christopher Barkas and **Kyle Weaver** Carr Allison

If you spend any time on social media, you've no doubt heard of "Florida Man." The @_FloridaMan Twitter account details the colorful exploits of the Sunshine State's most famous citizen. Among his, shall we say, "highlights" are: "Florida Man breaks INTO jail to hang out with friends," and our personal favorite, "Florida Man charged with assault with a deadly weapon after throwing alligator through drive-thru window." No need to belabor the point, as we are sure you now understand that aside from the natural beauty and (mostly) desirable climate of our fair state, it can be a strange place to live.

The strangeness and uniqueness of our state does not stop with Florida Man's antics, and frequently spills over into Florida's courts. Unlike @_FloridaMan, the headlines emanating from Florida's courtrooms are no laughing matter. Many Florida litigants are surprised to learn just how strange Florida is when confronted for the first time with Florida's Proposal for Settlement ("PFS") statute. The statute can result in defendants paying $800 to $1,000 an hour for the plaintiff's attorneys' fees after trial, and fee judgments (in addition to the jury verdict) exceeding $500,000.

IN 1986, FLORIDA MAN (WITH A MULLET) ENACTED TORT REFORM MEASURES THAT EVENTUALLY PRODUCED FLA. STAT. § 768.79.

Traditionally, parties to a lawsuit pay their own attorneys' fees whether they win or lose a lawsuit. This is the "American Rule." Florida Man, ever mindful of his need to be different, altered the "American Rule," with Section 768.79. The Statute requires the party which rejected an offer to settle to pay the offering party's post-offer attorneys' fees and costs if the net verdict after trial fails to meet the threshold defined in the statute. A plaintiff's PFS is successful (causing the defendant to pay post-offer attorneys' fees and costs) if the net judgment recovered is 125% above the amount of the PFS. On the other hand, a defendant's PFS is successful (causing the plaintiff to pay post-offer attorneys' fees and costs) if the plaintiff fails to obtain a net judgment of at least 75% of the defendant's offer.

Assume the plaintiff filed a lawsuit on January 1, 2010. Defendant filed a PFS to plaintiff for $10,000 on July 1, 2010. There was no response, so the proposal was deemed rejected. The case went to trial on December 1, 2010, where the plaintiff obtained a $15,000 verdict. The judge reduced the jury verdict for collateral source payments of $10,000. The court then considered evidence (by way of attorney affidavit) of the plaintiff's costs during the period January 1, 2010 – July 1, 2010. The costs were $2,000 (filing fees, copies, transcripts, etc.). The net judgment calculation is:

Jury Verdict:	$15,000
Set Offs (Collateral Sources):	-$10,000
Plaintiff's Pre-Offer Costs:	+ $2,000
Net Judgment:	**$7,000**

The net judgment did not exceed the 75% threshold ($7,500), so the plaintiff is liable for the defendant's attorneys' fees and costs from July 1, 2010, through trial. In all likelihood, the defense fees/costs exceed the $7,000 net judgment, so a money judgment is actually entered in favor of the defendant, and the defendant may pursue its fee award from the plaintiff (though most are judgment proof).

Another hypothetical, except here, the plaintiff filed the PFS for $10,000 and obtained a jury verdict for $25,000. The judge reduced the jury verdict for collateral sources, considered evidence of the plaintiff's pre-offer costs, and determined the net judgment as follows:

Jury Verdict:	$25,000
Set Offs (Collateral Sources):	-$10,000
Plaintiff's Pre-Offer Costs:	+ $2,000
Net Judgment:	**$17,000**

The net judgment exceeds 125% ($12,500) of the plaintiff's proposal for settlement, so the defendant is liable for the plaintiff's attorneys' fees and costs from the filing of the PFS through trial.

The plaintiff can serve a proposal on a defendant beginning 90 days after service, and as many times as they like until 45 days before trial. Similarly, a defendant may serve a proposal on a plaintiff beginning 90 days after suit is filed, and as many times as they like until 45 days before trial.

ABUSE BY THE PLAINTIFF'S BAR

The examples above are simple, as they only address situations involving one plaintiff and one defendant. Proposals may also be served in cases where there are multiple defendants. In Florida trucking cases, the most common claims are for the direct or "active" negligence of the truck driver, and vicarious liability (under the *Dangerous Instrumentality Doctrine*, or respondeat superior) against the trucking company. A growing trend among plaintiff lawyers is to serve two proposals simultaneously: one to the company and one to the driver. One (usually the driver's) will be substantially lower than the other. The jury's verdict (in vicarious cases) is not apportioned between the driver and the company, so the "low ball" proposal has a high likelihood to succeed at trial and result in payment of plaintiff's attorneys' fees if the low ball PFS is rejected.

For example, a plaintiff may serve a proposal to the trucking company for $750,000 and a proposal to the driver for $75,000. At trial, the plaintiff in the hypothetical must simply recover a net judgment of $93,750 to be entitled to attorneys' fees. It does not matter that the driver has no money and is covered by the same insurance or self-insured funds as the company defendant. If the low-ball proposal is rejected by the defendant, the plaintiff lawyer (…is thrilled and…) uses the expired proposal to negotiate a much higher settlement because of the anticipated (and ludicrous) attorneys' fee award after trial. Unfortunately, the practice of splitting PFSs between company and driver is well established, and its "legality" (though logically and morally wrong) has been confirmed on numerous occasions.

After a defendant rejects a PFS, a growing trend among plaintiff firms is to have multiple attorneys unnecessarily attending events (depositions, trials, hearings) where they do not participate, and are merely there to drive up fees. Florida trial courts are routinely awarding plaintiff attorneys $500/hour, and in one recent routine small automobile case, the court awarded $1,000 an hour for the senior partner. In that case, the insurer refused to tender its $25,000 limits. The attorney fee award against the insured after trial was nearly $1,000,000.

Unfortunately, the same fee risk does not apply to the plaintiffs under the law, or in practical reality. Defendants are limited to recovery of fees according to their contract rate with their defense lawyers, and let's face it, most plaintiffs are judgment proof, so there are probably no assets to collect an attorney fee judgment from if the defendants prevail at trial.

COMBATING THE PROPOSAL FOR SETTLEMENT

It is possible to use counter-PFSs to combat the plaintiff's PFS and shift the risk back to the plaintiff. Often, the best defense against the proposal is a strong offense. Because the first proposal from the plaintiff may arrive as little as 90 days after service of the lawsuit, aggressive discovery must be undertaken from the outset of the case so there is enough information available to evaluate the case when the Proposal arrives. The plaintiff's deposition should be taken as soon as possible in the first 90 days. There are also insurance products available to both plaintiffs and defendants which can provide up to $250,000 of insurance if a proposal creates liability for the party. However, in our experience, the insurance for most commercial defendants is of dubious value.

Unfortunately, absent legislation, the wild alligator that is Florida's Proposal for Settlement statute is here to stay. If you do business in Florida or have Florida claims, you must be on guard against Florida Man and his Proposals for Settlement.

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AN EMERGING MARKET FOR CANNABIS IN ARGENTINA

Nicolás Jaca-Otaño and **Emelie Hakansson** Barreiro. Oliva. De Luca. Jaca. Nicastro

As international conventions have eased the restrictions related to cannabis, several countries have advanced in their legalization and regulation of its use. In 2017, Argentina introduced a regulatory framework for the medical and scientific investigation of the medicinal, therapeutic, and/or palliative use of cannabis and its derivatives after pressure from many civil society organizations. What followed was an increasing interest among academics, scientists, politicians, investors, and companies, and consequently, the social stigma on cannabis is slowly disappearing.

This has created an emerging market for cannabis in Argentina. This article will first outline the regulatory framework for the medical and scientific investigation of cannabis in Argentina, will then introduce a few current state- and private entrepreneurial initiatives that have emerged and, lastly, will present the market outlook for the industrialization of the medicinal and industrial use of cannabis in Argentina.

ARGENTINA LEGALIZES THE MEDICAL AND SCIENTIFIC INVESTIGATION OF CANNABIS

As mentioned, in March 2017, Argentina approved Law No. 27,350 establishing a regulatory framework for the medical and scientific investigation for the medicinal, therapeutic, and/or palliative use of cannabis and its derivatives. Until then, the cultivation, production, usage, trade, possession, and use of cannabis were prohibited.

Through the regulatory framework, the Argentine National Program for the Study and Research of the Medicinal Use of the Cannabis Plant was created to promote medical and scientific research on cannabis and to guarantee access to cannabis for patients who would require cannabis for medical purposes. The regulatory framework also introduced a National Register, in which any patients suffering from pathologies recognized by the Argentine authorities should be able to enroll and thus be guaranteed free access to cannabis oil treatment.

Despite the creation of the National Program and National Register, access to cannabis for patients has, in practice, still been quite limited as the only pathology recognized by the authorities for cannabis oil treatment was refractory epilepsy. With more pressure from civil society organizations, in November 2020, the authorities also recognized other pathologies for cannabis oil treatment. Simultaneously, the personal- and organizational cultivation of cannabis was legalized under certain conditions: Any patient with a medical prescription and who has signed an informed consent waiver may apply for the approval of personal cultivation. In addition, the complementary regulations recognize the commercialization of cannabis oil through certain authorized pharmacies.

The cultivation, trade, possession, and use of cannabis outside the regulatory framework outlined above remains prohibited (although, the Argentine Supreme Court of Justice has opened up for the personal use of cannabis *"if it does not put any third parties at risk"* through the so-called Arriola Ruling in 2009). Hence, at present date the cultivation and production of cannabis for industrial purposes (hemp) remains prohibited; but, as discussed further down, Argentina has shown significant interest in becoming an actor on the national and international cannabis market.

INITIATIVES RELATED TO MEDICAL AND SCIENTIFIC INVESTIGATION OF CANNABIS

Despite the limited applicability of the regulatory framework for the medical and scientific investigation of cannabis introduced in 2017, both public- and private initiatives have emerged in Argentina during the last couple of years. The initiatives in-

clude research related to the cultivation, production, and improvements of crops according to Argentine weather and geography conditions; the production of cannabis oils and the analysis of purity of cannabis oils; the development of new products for medicinal use; and/or the performance of clinical research. The main actors are provincial governments, province-owned companies, science and technology institutions, universities, pharmacies, and civil society organizations.

When it comes to production, the first and still the only (March 2021) company authorized to produce cannabis is the company Cannava, owned by the Province of Jujuy. The company cultivates cannabis and produces products derived from cannabis through its own laboratory, it participates in research projects together with the National Institute of Agricultural Technology ("INTA", according to the Spanish initials), and it works toward the credentialing of health professionals in the medical use of cannabis. As for 2020, the plan was to harvest enough cannabis plant material to obtain 240 liters of cannabis oil while the by-products (stems and leaves) would be transformed into compost since Argentina has not yet legalized the use of cannabis for any other type of industrial product. Cannava is currently working on becoming ISO 9001 compliant, and it plans to complete EU / Global GAP and GMP certifications to facilitate exports.

Further, Cannava has been questioned for its partnership with the company Players Network TV through the brand Green Leaf Farm (which financed 60% of Cannava's installations) as Players Network TV filed for Chapter 11 bankruptcy proceedings in the United States in June 2020.

The state-incentivized project Cannava has served as a pilot for other provinces in Argentina. Companies owned by other provinces have emerged, but none has come as far as Cannava. For example, the governments of San Juan, Mendoza, and Corrientes have signed agreements with the government of Jujuy to advance joint cannabis production and research programs, and in addition, several companies focused on agriculture have formed partnerships with INTA and requested authorization to import genetic material.

The first private initiative related to cannabis is the company Pampa Hemp. Although Pampa Hemp has not yet (March 2021) received all authorizations for its operations, it has already formed the first public-private agreement in Argentina with INTA regarding the research and production of medicinal cannabis in Pergamino, the Province of Buenos Aires. The objectives of the agreement are to promote the Argentine national production of raw material for pharmaceutical use and to develop its own genetics for medicinal purposes and other uses (through the stabilization of local varieties and the creation of a cannabis seed bank with germplasm adapted to the conditions in Argentina). Further, Pampa Hemp also expects to generate exports of local production to the international market.

In conclusion, there are several initiatives in Argentina related to the medical and scientific investigation of cannabis. With Argentina's forthcoming plans to expand the industrialization of the medicinal and industrial use of cannabis, the current initiatives will most likely advance and progress further and there will also be space for new initiatives.

MARKET OUTLOOK FOR THE INDUSTRIALIZATION OF THE MEDICINAL AND INDUSTRIAL USE OF CANNABIS

Early in March this year, when Argentina's President Alberto Fernandez opened Congress, he mentioned six bills that his government would present therein to facilitate "structural change," thus boosting the economy (which had already been hit before the pandemic started, by both inflation and devaluation of the Argentine peso). One of the bills mentioned was a project regarding the industrialization of cannabis for medicinal and industrial use. President Fernandez also declared that cannabis has "very useful properties for medicinal and industrial purposes" and that the "global medical cannabis industry will triple its turnover in the next 5 years."

The bill mentioned is a result of the work produced by the Argentine Ministry of Productive Development, which, in March 2021, released a report regarding the value chain of cannabis. The report presents suggestions for the cannabis politics.

First, for a progressive advancement of the cannabis industry and the industrial use of cannabis, the report suggests that the cultivation, processing, transport, sale, and use of cannabis should be legalized as long as the cannabis varieties produced have a content of tetrahydrocannabinol (THC, i.e., the psychoactive component) below a certain threshold (e.g., such as 0.3% as in the case in the United States). Legislative rhetoric denotes such varieties with a lower THC content as hemp, although the exact definition varies from region to region depending on the jurisdiction. One of the advantages of using cannabis, or hemp, for industrial purposes, is that it is one of the fastest-growing plants and can be used to produce a variety of products, including cosmetics, paper, textiles, biodegradable plastics, and food and beverages.

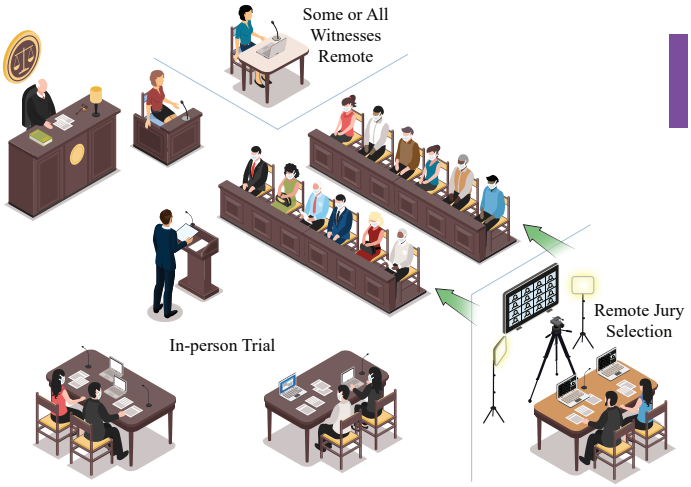
Secondly, to further develop the medical cannabis industry and expand the possibilities for private sector investments, the report suggests that a broader regulatory framework should be created which also would consolidate the latest regulatory advancements. In this sense, it is also suggested that a special authorization scheme for consumer products such as food, dietary supplements, cosmetics, etc., containing cannabidiol (CBD, i.e., the chemical compound derived from the cannabis plant often associated with health benefits) is evaluated along the same lines as that which is being discussed in the United States (and in Europe).

As the report concludes, this would enable both private and public entities to generate innovative developments in genetics, modalities cultivation, processing, products, etc., and thus to take advantage of business opportunities in the cannabis market, both domestically and internationally.

The fact that Argentina already has the advantage of scientific, technological, and productive capacities in key areas (such as genetics and seed production, research and analysis services in biology, and biomedicine), combined with the amplification of the regulatory framework as indicated above, the market outlook for the industrialization of the medicinal and industrial use of cannabis looks promising.

Nicolás Jaca-Otaño is founding partner at the law firm Barreiro. Oliva. De Luca. Jaca. Nicastro where he leads the Corporate & Venture Capital team. Nicolás has more than 20 years of experience representing clients in corporate and M&A projects, finance ventures, as well as in international trade- and commercial operations.

Emelie Hakansson is foreign associate at Barreiro. Oliva. De Luca. Jaca. Nicastro where she leads the firm's Swedish Desk. She is specialized in commercial contracts and dispute resolution. Emelie is also expanding her expertise to business and human rights as she is studying for a master's in international human rights law.



IS THE PANDEMIC COURTROOM HERE TO STAY?

Adapting Advocacy for the Post-Pandemic World

Keith Pounds, Ph.D. and **Katrina Cook, Ph.D.** Litigation Insights

Legal advocacy has changed. The pandemic has seen courts and parties adopting technology to depose witnesses, hold hearings and mediations, and conduct trials in all-virtual or "hybrid" environments (such as jury selection by Zoom and trial in person). As a result, the ways attorneys tell case stories have had to adapt to the unique situational factors of a courtroom that exists entirely online, or one that has been drastically modified to fit social-distancing guidelines.

If you are an attorney on one of the hundreds of cases pending when courts open in your jurisdiction, you may be breathing a sigh of relief. It is tempting to believe that an end to the pandemic will return things back to the way they were in the courtroom.

Don't give in to that temptation quite yet. Some of the technological and physical changes that courts have implemented will live on in many courts, at least for the short term. And just as importantly, courts are not the only thing that has changed during the pandemic; they merely reflect what jurors have experienced in numerous facets of their lives. A savvy attorney needs be aware of how jurors' new experiences and expectations will impact their perceptions of your case in the post-pandemic world.

PERSUASION IS AN EVOLVING ART

To make a message persuasive, it must be relevant and timely. Ancient rhetoricians referred to the concept as kairos, the importance of time and setting when making arguments – in other words, the *situational* factors that impact an attempt to persuade. Fast forward to our current pandemic: As you go forth to argue your case's merits, it is rare to encounter a time so likely to have impacted the way juries view your case and how they make decisions.

To study these changes, we surveyed over 200 prospective jurors to learn more about their expectations and preferences. Not surprisingly, 80% indicated that they are at least somewhat comfortable using online video-conference tools such as Zoom. We also asked if it would be more difficult to pay attention to a trial that took place entirely online; 60% said it would be at least as easy to pay attention as it would be in person. One very interesting finding is that, when presented with a choice to report for jury duty in person or via Zoom, more than half would choose jury duty online. While there are any number of different practices courts are implementing to accommodate civil trials this year, it is clear that jurors have higher expectations that technology be used to make the experience better for them. In the post-pandemic courtroom, counsel should consider demonstrating a proficiency with these potential accommodations, from remote technology to the use of masks.

ACCOMMODATIONS HAVE CREATED NEW DIFFICULTIES

Of course, these accommodations are a double-edged sword. Indeed, from a juror's perspective, one of the biggest challenges sitting through an online or partially online civil trial has been tuning out all of the new distractions. For remote jurors, these include the challenges of being at home, or in an office, and being required to focus for long stretches of time on a Zoom screen. For example, 67% of those we surveyed said it is harder to judge other people's body language in a video meeting than an in-person meeting. And jurors don't fare much better in the hybrid trial, where the modified courtrooms place parties at safe distances, often with jurors farther away from witnesses and counsel. Add in the now-ubiquitous plexiglass dividers and the fact that everyone is wearing masks, and it is easy to see how these changes add up to a challenging and uncomfortable experience for our jurors.

It is up to trial counsel to help a jury overcome some of these challenges, and it starts with trial preparation. From the beginning, counsel should emphasize the integration of themes and demonstratives that help keep the jury engaged in this distraction-prone courtroom environment.

KEY THEMES ARE MORE IMPORTANT THAN EVER

We have long advocated using key themes for trial advocacy, and they are more important than ever in a courtroom filled with potential distractions. Themes are more than just pithy statements – they should reflect a key message or idea about your case that your juror supporters can easily remember and use to argue for your case in deliberation. Your themes should tie to evidence in your case and should be repeatable by witnesses in their testimony. Jurors will better assimilate your case messages through themes that are identifiable and repeated often.

For instance, in a recent wrongful death case involving a snowplow, the driver and expert established the concept that "You Cannot Avoid What You Cannot See." This theme helped persuade jurors that despite the best practices of the driver, a pedestrian who was not exercising necessary care can be struck and killed by walking in the plow's blind spot. Memorable themes tailored to your case, such as "Safe When Used Safely" or "Dose Makes the Difference" or "A Time-Tested Product," will help juries go to bat for you in deliberations, especially when they are repeated often enough that jurors can recall them easily.

WITNESSES WILL REQUIRE SPECIAL PREPARATION

Your next significant consideration should be working with witnesses to incorporate those themes and to present as credibly as possible, whether via Zoom or in a modified courtroom. And while 66% of our respondents said they would find a witness who testified via video just as credible as one who testified in person, an online witness still poses a challenge to trial practice. For instance, in the pre-pandemic courtroom, witnesses were handed documents and exhibits, sometimes for the very first time, on the stand. These exhibits had the capacity to surprise and confound a witness, a potentially significant sign to a jury that the witness is not credible. On Zoom, it is more difficult for an attorney to "surprise" a witness; at the same time, however, any facial reaction a witness has will be magnified for the jury.

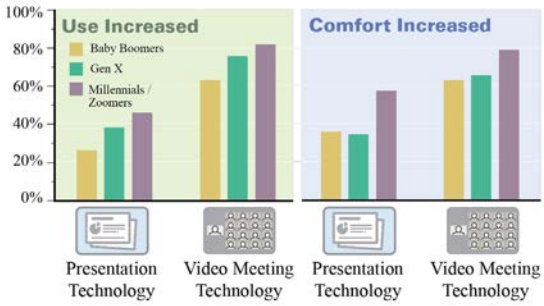
Consider a recent example of a witness testifying via Zoom, who was projected live into the courtroom on a screen large enough to be seen across the conference center. When opposing counsel asked a question, the expert rolled her eyes. What would have been a subtle expression under normal circumstances was caught easily by every member of the jury.

In short, there are trade-offs to consider when preparing witnesses. Preparation should not only incorporate relevant themes, but also nonverbal communication tips and technology training so the witness is comfortable with the format they will rely on to testify.

CREATIVE DEMONSTRATIVES REINFORCE YOUR THEMES & KEEP JURORS ENGAGED

Finally, you can reinforce your themes through the use of creative and engaging visual aids that work in every setting, including Zoom trials. In our recent survey, participants reported increased use of video-conference platforms and other types of presentation technology since the start of COVID-19 (51% of potential jurors said their use of presentation technologies, such as PowerPoint, had increased since the start of COVID-19; 75% of potential jurors indicated their use of video-meeting technology, such as Zoom, had increased.). And not only have jurors indicated a general comfort with video-conference tools (as previously noted), but they also reported specifically that their comfort with such technologies has increased during the pandemic (55% of potential jurors stated their comfort with presentation technologies, such as PowerPoint, had increased; 72% said their comfort with video-meeting technology, such as Zoom, had increased). ***Even more interesting, this change was consistent across age groups as you can see in the following chart.***

INCREASE IN USE/COMFORT BY PERCENTAGE



So, while the common stereotype that Millennials, along with the newest generation reaching juror eligibility, Zoomers, "need" visuals may hold true, older jurors such as Baby Boomers are not far behind. With a more technology-savvy population comes higher expectations for media presentations in the post-pandemic courtroom. This shift is further reinforced by our survey, where jurors indicated they expected attorneys to use some sort of visual aid when presenting their case (56% of potential jurors expected an attorney to use PowerPoint in presenting their case; 64% said they would expect attorneys to use creative graphics and videos to illustrate their case). Jurors in our mock trial exercises echo this sentiment, frequently expressing that they wish they could "see" what the attorneys were talking about or mentioning they had trouble visualizing exactly what the scene of an accident looks like.

Even beyond jurors' expectations, demonstratives are helpful in opening and closing to bolster the themes introduced during witness testimony and oral arguments. The added repetition aids jurors' recollection, and the visual format provides an effective medium for those with a more visual learning style.

From our experiences in both Zoom trials and hybrid trials, there are several important considerations when incorporating demonstratives into a presentation:

- First, consider how the demonstratives will be shown to jurors. Will jurors view them online via their computer screens? Will they be projected onto a screen in the courtroom? If the demonstrative is presented online, remember that jurors will have a much closer view of the information than they would if it were projected in a physical courtroom. For example, pulling a designation from an email and projecting it on a courtroom screen makes it difficult for jurors to read the parts of the email that are not being magnified. That same designation presented online is much closer to the juror, so additional information is likely to be noticed. As such, it is important to think about what exactly you want jurors to focus (or not focus) on.
- Second, when demonstratives are pulled up on Zoom, the image frequently obscures the presenting attorney. Therefore, be especially selective in the number of demonstratives used in opening and closing, focusing on quality over quantity. The attorney will get more screen time as they make their arguments, and jurors will have a curated set of the most crucial themes and evidence to remember.

CONCLUSION

Although many courts have reopened, and there are plans for more openings in the fall, the ripples of the pandemic lockdown are likely to resonate for some time. With the rise in technology comfort and the strong potential for distractions among remote jurors, certain preparations are more important than ever. Develop clear themes to convey your case, incorporate those themes into witness testimony, and use demonstratives strategically to emphasize your case message. Counsel will find an advantage in embracing the enduring technological changes and juror expectations of the post-pandemic world.

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

Keith Pounds is a senior consultant at Litigation Insights with 17 years of litigation consulting experience. He has worked on numerous complex, high-exposure cases, including antitrust, patent, trade secret, contract, whistleblower, employment, professional malpractice, product liability, and securities litigation. An expert in the fields of communication and storytelling, his practice area covers a variety of industries in venues across the country.

KEY POINTS OF THE NEW PAYROLL TAX CREDIT AVAILABLE IN 2021 FOR PUBLIC COLLEGES, UNIVERSITIES AND GOVERNMENTAL HEALTHCARE ENTITIES

Judith W. Boyette and **Nancy Hilu** Hanson Bridgett LLP

Effective January 1, 2021, certain governmental organizations are eligible for the employee retention and rehiring payroll tax credit originally established under Section 2301 of the CARES Act, which was previously only available to private-sector employers. The credit is available as an offset to payroll taxes based on eligible wages paid from January 1, 2021, through June 30, 2021.

Q: WHICH GOVERNMENTAL EMPLOYERS ARE ELIGIBLE FOR THE NEW EXTENDED AND ENHANCED EMPLOYEE RETENTION PAYROLL TAX CREDITS?

Public colleges, public universities, and governmental entities whose principal purpose is providing medical or hospital care are eligible. These governmental employers also must have either: (1) had operations fully or partially suspended during 2021 due to an order from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or (2) had a more than a 20 percent decline in gross receipts in any calendar quarter in 2021 compared to the same quarter in 2019.

Q: HOW IS THE EMPLOYEE RETENTION PAYROLL TAX CREDIT CALCULATED?

For employers that averaged 500 or fewer full-time employees during 2019, qualified wages are those paid to any employee during any period in the calendar quarter in which the business operations are fully or partially suspended due to a governmental order or any calendar quarter the business is experiencing a significant decline in gross receipts (more than 20 percent).

For employers that averaged more than 500 full-time employees during 2019, qualified wages are those paid to employees for time that the employee is not providing services due to either (1) a full or partial suspension of the employer's business operations by a governmental order, or (2) the business experiencing a significant decline in gross receipts (more than 20 percent).

In both instances, certain amounts paid by an employer to provide or maintain a group health plan can be included in eligible wages, even if no other wages are paid to the employee.

Q: HOW CAN ELIGIBLE GOVERNMENTAL EMPLOYERS RECEIVE THE EMPLOYEE RETENTION PAYROLL TAX CREDIT?

Presumably, the eligible governmental employer will use the same process the IRS has used for private-sector employers claiming this tax credit during 2020. The IRS issued Information Release 2020-62 early in 2020, indicating that employers could be immediately reimbursed for the credit by reducing their required deposits of payroll taxes. During 2020, employers claiming these types of payroll tax credits have been able to request an advance payment of the employee retention payroll tax credits. After reducing employment tax deposits to account for the credits, eligible employers could request the amount of the credit that exceeded the reduced deposits either by filing Form 7200 or waiting for a refund when claiming credits on their quarterly employment tax return.

Under the year-end tax legislation, the IRS is directed to provide guidance on how employers whose number of average full-time employees in 2019 was not greater than 500 may receive advance payment of the employee retention payroll tax credit

based on using 70 percent of the average quarterly payroll for the same quarter in 2019. If the amount of the actual payroll credit determined at the end of the quarter in 2021 is less than the amount of the advanced payment, the employer will have to repay the excess to the IRS. We expect the IRS to clarify whether this advance payment process would be available to eligible governmental employers with 500 or fewer employees. We also expect the IRS to issue guidance in the near future on whether governmental employers newly eligible for this payroll tax credit will be able to use a revised Form 7200 or will need to use a newly-issued different Form. We will update our guidance as the IRS issues further instructions.

Q: IF AN EMPLOYER OFFSETS THE TAX CREDIT FROM THE EMPLOYER FICA TAX AND DOES NOT MAKE THE DEPOSIT OF THESE EMPLOYMENT TAXES ON THE DEPOSIT DUE DATE, WILL THE EMPLOYER INCUR A PENALTY FOR FAILING TO TIMELY DEPOSIT EMPLOYMENT TAXES?

No, this should not be the case. The CARES Act specifically directs the IRS to waive the failure to deposit penalty that would otherwise apply with respect to the employee retention payroll tax credit amounts. The IRS issued Notice 2020-22 that waived these penalties with respect to wages affected during 2020. Technically, the IRS will need to extend the penalty relief provided under Notice 2020-22 for employers who fail to deposit such taxes with respect to wages paid in 2021.

For further information on the employee retention payroll tax credits available to governmental employers under the COVID-19 relief provisions of the year-end 2020 appropriations legislation, please contact a member of the Hanson Bridgett Employee Benefits team.

Judith W. Boyette has advised employers and employee benefit plans on all aspects of compensation and benefits including tax, regulatory, fiduciary responsibility, financing, and organizational integrity issues for more than 25 years. Judy has unique experience as both a lawyer and an administrator with hands-on experience running large, complex employee benefit programs.

Nancy Hilu counsels governmental entities, tax-exempt organizations, as well as private and public companies on all aspects of employee benefits. Nancy advises clients on the design, implementation, and continued legal and regulatory compliance of their retirement plans, including defined benefit, 401(k), 457(b), and 403(b) plans.

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Victoria M. Almeida, senior counsel at Adler Pollock & Sheehan P.C. in Rhode Island, received the Hall of Fame Award from Rhode Island Lawyers Weekly. The award is a special lifetime achievement award for the senior leaders of the profession. Honorees must have practiced law for at least 35 years. Almeida was admitted to the Bar in 1976. She has been practicing law for 45 years and has been with AP&S for 35 of those 45 years. Along with co-chairing the firm's Government Relations Practice Group, she currently serves as chair of the Board of Directors of Rhode Island Legal Services (RILS). She is past president of the RI Bar Association, is vice president of the RI Bar Foundation, chair of the RI Health Services Council, and vice chair of the RI Parole Board.

Barclay Damon LLP has launched its first podcast series, Barclay Damon Live: The Cannabis Counselor, With Aleece Burgio. Burgio, the firm's Cannabis Team leader, hosts the podcast, which has weekly episodes ranging from 10 to 20 minutes and covers topics relating to federal and state cannabis legislation and the cannabis industry generally. The Cannabis Counselor is intended for people looking to enter the cannabis industry, existing multistate operators, and anybody looking to become more knowledgeable on topics surrounding the legal cannabis industry. The Cannabis Counselor podcast is available on the firm's website, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Play.

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

USLAW's Kansas/Western Missouri member firm unveiled a new name partner, new firm name, and new firm logo. Lee B. Brumitt was elected a name partner by the firm's board, the firm unveiled its new name – Dysart Taylor Cotter McMonigle & Brumitt, P.C. – with Brumitt's addition, and updated the logo as well. For more information, visit dysarttaylor.com.

Dysart Taylor in Kansas City, Missouri, supports the annual Trolley Run, an annual fundraiser for the Children's Center for the Visually Impaired (CCVI), as a sponsor of the event. Managing Director Amanda Pennington Ketchum, along with several firm friends and family members, participated in the run as part of the Dysart Taylor corporate team. The CCVI Trolley Run is one of Kansas City's oldest and largest road races. This year, the 33rd annual race offered both in-person and virtual participation options, including a USATF certified four-mile race. (Pictured: several members of Team Dysart Taylor, including Rocky the Husky).

FACES of USLAW

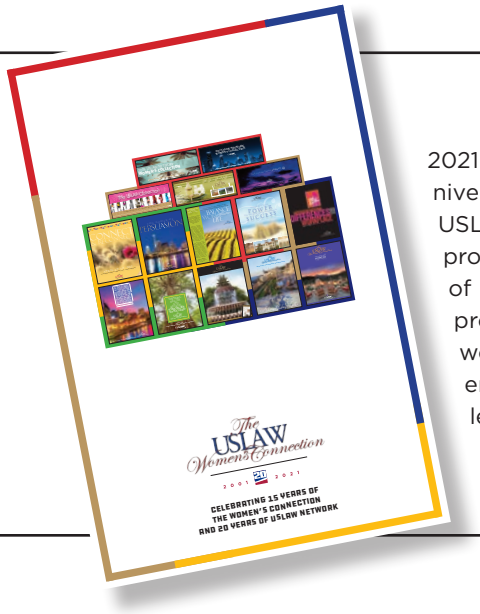
Christopher R. Hedican of Baird Holm LLP in Nebraska has been named the firm's new managing partner. He replaces Richard E. Putnam, who served in this role for the past 12 years and will be returning to the full-time practice of law at the firm. Hedican has been an attorney for 31 years, and at Baird Holm for 24 years. His practice has been focused on employment litigation, prosecuting noncompetes, trade secret and fiduciary breach claims, and defending all types of employment claims, including discrimination, wrongful termination, retaliation, employment torts, and public policy claims. For the past five years, Hedican has also served as a member of the Firm's Executive Committee.

LEWIS ROCA

USLAW's Colorado member firm Lewis Roca Rothgerber Christie LLP has launched a complete rebrand that includes a new visual identity, website, and shortened brand name, Lewis Roca. The rebrand reflects the firm's client experience focus that is the foundation of its culture and approach to service delivery. To learn more about the firm, please visit www.lewisroca.com.

BARCLAY DAMON LLP

Barclay Damon LLP is a new member of the Law Firm Antiracism Alliance (LFAA), which facilitates the pro bono work of more than 290 alliance firms. Member firms include those from every state and many foreign countries. The LFAA was formed in 2020, "to identify and dismantle structural and systemic racism—particularly anti-Black racism—in the law."



2021 is a big celebratory year for USLAW. Not only are we marking the 20th anniversary of USLAW NETWORK, but this year also marks the 15th hosting of the USLAW Women's Connection event. The USLAW NETWORK Women's Connection provides a forum for women lawyers to collaborate, develop and advance the status of women involved in the legal arena through the strengthening of personal and professional relationships. This group creates a business development and networking environment that includes leading attorneys, businesswomen, and leaders from a cross-section of industries and jurisdictions across the NETWORK. To learn more about the USLAW Women's Connection, click here.

Baird Holm LLP partner Lindsay K. Lundholm has been appointed to the American Arbitration Association (AAA) Roster of Arbitrators. Lundholm's selection by the AAA to serve as an arbitrator on its roster comes after her work as an advocate litigating a wide variety of disputes in AAA arbitration and FINRA arbitration for almost two decades. The AAA is a not-for-profit organization that aims to move complex cases through arbitration fairly and cost effectively, with the goal of getting parties back to business as soon as possible.

Baird Holm LLP attorney John R. Holdenried has been selected as a Fellow of the American Health Law Association (AHLA). Fellows are recognized for their career-long achievements, contributions, and tenure with AHLA, and their continuing service and leadership in the legal profession. AHLA Fellows are ambassadors for the Association and serve as role models and mentors to current AHLA members.

R.J. (Randy) Stevenson of Baird Holm LLP in Nebraska received the University of Nebraska at Omaha's College of Public Affairs and Community Service (CPACS) Alumni Award for excellence in public service.

Kadeem Wolliaston of Barclay Damon LLP has been named to the 2021 National Black Lawyers "Top 40 Under 40" ranking. This is an honor given to a select group of attorneys for their superior skills and qualifications in the field. It is by invitation only and is limited to 40 attorneys per state.

In a story titled "The 2021 Above & Beyond: Forty Women Working Toward a Fairer Future," CityandStateNY.com details the recipients of its annual Above & Beyond Awards. Connie Cahill of Barclay Damon LLP is profiled along with other impressive honorees.

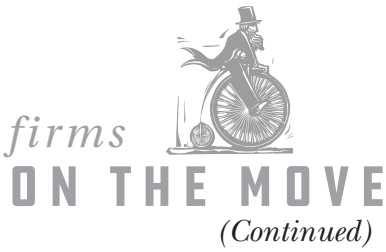
Sheila Gaddis of Barclay Damon LLP has been appointed as co-chair of the New York State Permanent Commission on Access to Justice's newly formed Racial & Gender Equity Working Group. This is evidence of her personal commitment and her strong work as part of Barclay Damon's ongoing dedication to advancing a workplace and a world where all people can thrive personally and professionally.

Yvonne Hennessey of Barclay Damon LLP has been appointed to the Institute for Energy Law advisory board and has been named editor for the institute's Oil & Gas E-Report.

Jack Quinn of Barclay Damon LLP has been elected to the Michael J. Fox Foundation for Parkinson's Research Board of Directors.

Carr Allison Shareholders Brett Ross and Bill Graham have both been named to 2021-22 committees for the Wholesale & Specialty Insurance Association (WSIA). Ross has been named to the Emerging Issues and Innovation Committee and Graham to the Legislative Committee. WSIA is a member service organization representing the entirety of the wholesale, specialty, and surplus lines industry.

Connell Foley LLP will receive the "Affiliate Member of the Year Award" from the American Council of Engineering Companies of New Jersey (ACECNJ) at the ACECNJ 50th Anniversary Engineering Excellence Awards Banquet in July. Held annually, the awards program recognizes the top accomplishments and contributions of New Jersey's engineering profession to the state and the nation. At the 50th anniversary event, ACECNJ will honor those who provide invaluable service to New Jersey's engineering community. Connell Foley has been actively involved with the ACECNJ, in particular through its "Emerging Leaders" program, at which Connell Foley attorneys present on "Professional Malpractice and Risk Management for Engineers."



Three Connell Foley LLP partners were named by NJBIZ as "Leaders in Law." Corporate and Business Law Group chair (and past chair of the USLAW Board of Directors) John D. Cromie, Managing Partner Philip F. McGovern Jr., and Cybersecurity, Data Privacy and Incident Response Group chair Karen Painter Randall are among the honorees selected by NJBIZ for their "outstanding" dedication to their occupation and their communities.

Keely Duke of Duke Evett PLLC has accepted an invitation to become a Fellow of the American Bar Foundation.

Ralph L. Arnsdorf, Franklin & Prokopik, P.C. principal, has been selected as a Fellow in the Construction Lawyers Society of America. He is one of 1,200 attorneys, throughout the United States and internationally, to be given this honor. The Fellowship is an invite-only, society of construction attorneys, and lawyers are selected based on accomplishments in any of the disciplines within construction law as well as possessing a superior ethical reputation.

Chelsey Golightly of Jones, Skelton & Hochuli, PLC (JSH) has been elected to serve on the Executive Council of the Association of Defense Trial Attorneys (ADTA). She will serve a three-year term. Golightly previously served as chair of ADTA's Committee on Diversity and Inclusion. Her colleague and JSH partner Donald Myles has been a member of ADTA since 2013.

Ben Ochoa and Angela Vichick of Lewis Roca in Colorado have been appointed to the Board of Directors of the Colorado Hispanic Bar Association Foundation. Ochoa and Vichick will serve three-year terms as board members and will provide guidance on and support for the 501(c)(3) nonprofit corporation's service mission—funding scholarships for law students attending the University of Colorado Law School or the University of Denver Sturm College of Law. Before being appointed to the Foundation, Ochoa served as a member of the Board of Directors and was chair of the association's nominations and endorsements committee.

Quattlebaum, Grooms & Tull PLLC Managing Member Joseph R. Falasco has been elected a Fellow of the American Bar Foundation (ABF). The American Bar Foundation is among the world's leading research institutes for the empirical and interdisciplinary study of law.

Joseph W. Price II of Quattlebaum, Grooms & Tull PLLC was selected for inclusion in the 2021 "40 Under 40" class by Arkansas Business. Nominated by readers and chosen by the editors of Arkansas Business, the honorees were selected from hundreds of nominations and are recognized for making a significant impact on their companies, organizations, and communities.

Mghnon Martin, an associate in SmithAmundsen's Commercial Litigation group, was selected by the National Black Lawyers as a "Top 40 Under 40" member in Illinois. Membership in this exclusive organization is limited to the top 40 attorneys under the age of 40 in each state, who have exemplified exceptional results in their careers.

Mike McGrory, a partner and co-chair in SmithAmundsen's Cannabis group and member of the Aerospace group, was admitted as a member of the Federation of Defense & Corporate Counsel, a professional trade association of vetted and premier defense and corporate counsel and industry executives. Membership is limited, selective, and by nomination only.

E. Holland "Holly" Howanitz, a partner at Wicker Smith O'Hara McCoy & Ford, P.A. in Jacksonville, Florida, was invited to join the executive committee for the Jacksonville chapter of ABOTA as membership chair. ABOTA is a national association of experienced trial lawyers and judges and its members are dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution.

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

VERDICTS

Carr Allison (Birmingham, AL)

Carr Allison Shareholders Charlie Ireland and Ginny Gambacurta in Birmingham, Alabama, have secured a defense verdict in a premise liability claim in Federal Court after a four-day trial with seven figures in claimed damages for AMC Theaters.

Carr Allison (Birmingham, AL)

Elizabeth "Betsy" Burgess and Kayla Scarpone of Carr Allison's Tallahassee office prevailed on a dispositive motion resulting in the prompt dismissal of a high-exposure premises case.

Duke Evett PLLC (Boise, ID

Josh Evett of Duke Evett PLLC successfully defended a medical device manufacturer before the Idaho Supreme Court on appeal. This result ends the lawsuit successfully in favor of Duke Evett's client. The case involved allegedly defective electrical stimulation pads that burned the plaintiff during physical therapy. Because the plaintiff could not exclude reasonable secondary causes of the plaintiff's burn, she could not establish a claim.

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

Franklin & Prokopik, P.C. in Maryland secures complete reversal of $400,000 jury verdict in a premises liability case, On February 25, 2021, the Maryland Court of Special Appeals reversed a $400,000 jury verdict entered against one of Franklin & Prokopik's retail clients in 2019. The case involved a customer who sued a grocery store alleging that she was struck while shopping by a stocking cart being pushed by a vendor who was at the store stocking its merchandise. Plaintiff claimed that the vendor should be treated as the grocery store's employee. Plaintiff's counsel, who deployed the "Reptile Theory" in opening and closing arguments, also argued that because the business had no security footage of the incident, the business must have spoliated/destroyed evidence. There was no evidence offered of the destruction of video at trial. Instead, the store owner testified that the store's surveillance system did not capture the incident at issue.

Over challenges raised by the store, the trial court allowed the jury to decide whether the vendor was an employee of the store and provided jury instruction related to spoliation of evidence. The jury found in favor of Plaintiff at trial. On appeal, the Maryland Court of Special Appeals reversed the jury's verdict and ordered that a defense judgment be entered in favor of the store. Firm Principal Steve Marshall tried the jury trial and briefed and argued the successful appeal. For additional details, click here.

Murchison & Cumming LLP (Los Angeles, CA)

Much to Lisa Angelo's surprise, upon the reopening of the courts during COVID-19, the parties in her case were ordered to appear for trial and jury selection. In this real estate fraud case, the plaintiff sued her former best friend of 34 years, for intentional misrepresentation, negligent misrepresentation, constructive fraud, and breach of fiduciary duty. The defendant vehemently denied each and every allegation set forth by the plaintiff.

Due to "social distancing," they could only voir dire 18 jurors at a time. The court's clerk placed red tape on every fifth seat in the jury box and throughout the gallery so jurors would know where to sit and would remain at least six feet apart from each other at all times. More shocking, neither the plaintiff nor the defendant could sit in the courtroom and observe jury selection and voir dire because only a certain number of people could be together in the courtroom at all times. In other words, the seats that clients would have normally occupied instead had to go to a prospective juror during voir dire to accommodate 18 jurors in the room along with counsel, the judge, and courtroom staff. In order to make the courtroom "open to the public," which it most certainly was not, the daily court sessions were "live streamed" on the court's website for free.

The only jurors who consistently got to see the front-side of the trial attorneys were the three jurors who were lucky enough to get a seat inside the jury box. Instead of focusing on whether a juror's smile meant something, whether good or bad, all Lisa could focus on was the evidence that she planned to get admitted each day, the testimony she planned to elicit, and how she could get her message across without knowing whether people liked it or not.

A fully masked Orange County jury returned a defense verdict in favor of Murchison & Cumming Partner Lisa D. Angelo's client.

Rivkin Radler LLP (Uniondale, NY)

Michael Troisi, Brian Bank, Michael Welch, Laura Mulholland, and Michelle Vizzi secured dismissal of a COVID-19 business interruption putative class action on behalf of Badger Mutual Insurance Company. Three insured restaurants sued Badger in federal court on behalf of themselves and a putative class of other policyholders seeking coverage for over $5 million in economic losses incurred from the government-mandated closures of their restaurants during the COVID-19 pandemic.

Badger moved to dismiss the complaint, arguing that the restaurants had not alleged direct physical loss of or damage to their properties, and that the policies' virus exclusion barred coverage for their claims. Plaintiffs countered that the policy provisions were vague, their loss of use of the restaurants satisfied the "loss of or damage to" requirement under the policies, and that their losses were proximately caused by the government closure orders and not the virus itself.

United States District Judge Jennifer Dorsey adopted our arguments and granted Badger's motion to dismiss the complaint in its entirety, with prejudice. The Court found that the restaurants had failed to plausibly allege direct physical loss of or damage to their properties, and that even if they had, the policies' virus exclusions unambiguously applied. The Court also found unpersuasive Plaintiffs' argument that the virus was not the efficient proximate cause of their injuries, explaining that but for COVID-19, the government closure orders would not exist and the restaurants would not have lost business.

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

(Continued)

TRAUB LIEBERMAN WICKER SMITH HINCKLEY ALLEN RIVKIN RADLER

Traub Lieberman (Hawthorne, NY)

Traub Lieberman Partner Lisa M. Rolle obtained summary judgment in favor of defendant SRI Fire Sprinkler, LLC, a family-owned and operated fire sprinkler company. The judgment was determined pursuant to CPLR 3211(a)(5) on the grounds that Philadelphia Indemnity Insurance Company's (Plaintiff) negligent construction claim accrued on the date when work was completed at the premises, not on the date of the incident as alleged in the Plaintiff's complaint. In the underlying subrogation action, the Plaintiff commenced the action in subrogation of its insured, Bet Am Shalom Synagogue (Bet Am), to recover damages in excess of $173,390.86 which it allegedly paid to Bet Am for water damage cleanup and remodeling after certain sprinkler pipes froze and burst in the recently constructed wing of the Westchester synagogue on January 1, 2019, and January 7, 2019. The Plaintiff alleged that its subrogor, Bet Am, sustained interior water damage on the first floor and basement levels of the premises.

The Plaintiff contended that its subrogation action accrued when the property damage was sustained in January 2019. Traub Lieberman moved to dismiss the Plaintiff's complaint entirely, as New York courts have long held that a cause of action based on an alleged defective construction or design accrues on the date of completion of construction and not on the date of the alleged injury or date of payment. Therefore, a subrogee may have its claim dismissed based upon the action or inaction of its subrogor[1]. The Court agreed and dismissed the Plaintiff's complaint in its entirety.

[1] Allstate Insurance Co, 1 N.Y.3d 416 at 423 (2004); Winkelmann v. Excelsior Insurance Co., 85 N.Y.2d 577, 650 N.E.2d 841, 626 N.Y.S.2d 994 (1995); Krause v. American Guaranty & Liability Insurance Co., 22 N.Y.2d 147, 239 N.E.2d 175, 292 N.Y.S.2d 67 (1968); Exchange Mutual Indemnity Insurance

Traub Lieberman (Hawthorne, NY)

Traub Lieberman Partner Colleen Hastie defeated a dispositive motion to dismiss in favor of third-party Skilled Nursing Facility ("SNF"). Plaintiff commenced action against SNF sounding in medical malpractice, negligence, and violations of Public Health Law §2801-d, alleging SNF failed to properly care for, diagnose, and treat the plaintiff's decedent during his residence at SNF. SNF commenced third-party action alleging contribution and common law and contractual indemnification against SNF's contract physician ("physician") who treated decedent during decedent's admission at SNF, alleging physician committed medical malpractice.

Physician moved for dismissal of the third-party complaint on grounds that they cannot be liable on theories of contribution of indemnification, because the statute of limitations on medical malpractice had lapsed prior to plaintiff's commencement of the action against SNF, and physician cannot be held liable under theories of negligence or violation of Public Health Law §2801-d. Prior to the opposition of the motion, the plaintiff stipulated to discontinue claims of negligence and Medical Malpractice against SNF.

Traub Lieberman opposed the motion to dismiss on grounds that claims for contribution and indemnification may be based on any theory of liability that the plaintiff could have asserted but failed to interpose. It is not necessary that the physician be liable for the decedent's injury under the same theories or violation of duties alleged by the plaintiff against SNF. Traub Lieberman argued this right to contribution and indemnification from a third party extends to third-parties that the plaintiff had no right of recovery due to a failure to join the third party as a defendant or other special defense baring recovery, including expiration of the statute of limitations.

The court, denying the physician's motion to dismiss, adopted SNFs argument, finding that though the physician may not be liable under the Public Health Law, and may not be sued by the plaintiff for medical malpractice, it does not preclude SNF's claims against the physician.

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

E. Holland "Holly" Howanitz and Catherine Crawley received a complete defense verdict on a premises liability case in Alachua County in May 2021. The Plaintiff had a life care plan of $1.6 million and claimed permanent injuries from neck and shoulder surgery. She also claimed permanent disability and lost wages of over $350,000.

TRANSACTIONS

Hinckley Allen (Hartford, CT)

Hinckley Allen represented its long-time client, Brinker Capital, a registered investment adviser, and its affiliated broker-dealer, in their sale to a new investment partnership controlled by funds affiliated with Genstar Capital Partners, a California-based private equity firm, and TA Associates Management, a Boston-based firm. The sale was consummated contemporaneously with the investment partnership's acquisition of another financial services company, Orion Advisor Solutions, and its affiliates.

The merger represents a significant moment for the financial services industry, unifying one of the foremost technology providers for fiduciary advisors with the largest privately held turnkey asset management platform. The union of Orion and Brinker Capital will expand the combined firm's capabilities, providing more than 10,000 active investment advisor representatives with access to investment strategies from the firm's seasoned portfolio managers and third party strategist partners. Chuck Widger, executive chairman and founder of Brinker Capital, will remain an investor and strategic advisor for the combined business.

Throughout the acquisition, Hinckley Allen assisted in navigating complicated tax issues and obtaining required client consents and regulatory approvals, including HSR and FINRA Rule 1017 filings and mutual fund shareholder votes.

Rivkin Radler LLP (Uniondale, NY)

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

pro bono SPOTLIGHT

HansonBridgett

BARCLAY DAMON LLP

Barclay Damon LLP

Through Barclay Damon's multi-award-winning pro bono program, the firm annually dedicates thousands of hours to pro bono services to those seeking access to justice. The firm's full-time attorneys provide free legal assistance to low-income individuals and organizations that assist them, helping to navigate issues related to immigration, housing, women's rights, prisoners' rights, community building, and economic development, among others. Barclay Damon continues to meet the moment in support of helping others.

Pro Bono Aid for Victims of Tomaszewski Embezzlement and Bankruptcy: Michael S. Tomaszewski chapter 11 bankruptcy case and, thereafter, when the case was converted to chapter 7 bankruptcy. Tomaszewski owned and operated the Michael S. Tomaszewski Funeral and Cremation Chapel, LLC, located in Batavia, New York. As the chapel's funeral director, Tomaszewski accepted deposits from customers to pay for future funeral, burial, or cremation needs ("pre-need payments"). Under Section 453 of the NYS General Business Law, a funeral home accepting a pre-need deposit is required to place the deposit in a segregated interest-bearing account in the name of the client. In violation of that statute and the criminal laws of the state, Tomaszewski is alleged to have embezzled the entire deposit of each victim, amounting to over 100 victims and almost $600,000.

Tomaszewski pled guilty to certain of the criminal charges and is awaiting sentencing. The team of Barclay Damon lawyers negotiated a stipulation with the debtor whereby he agreed that the firm's clients' claims were nondischargeable. All other victims with counsel followed suit. The victims are hopeful that, between restitution in the criminal matter, the efforts of the chapter 7 trustee and aid organizations, and with the recent involuntary bankruptcy filed against the chapel, they will realize cash or in-kind recoveries on their converted pre-need deposit claims.

To the New York Supreme Court, Schenectady County in support of pro bono matter: In the summer of 2018, Joseph Cooper had complained to his landlord about certain repairs that were required in his rental unit. When the repairs were not completed, Mr. Cooper withheld $320 from his rent to make the repairs. Mr. Cooper visited family out of town in late September of that year, and when he got back, he discovered his apartment had been re-rented and his belongings were gone. Mr. Cooper, a father to two toddlers, was rendered homeless for a period of time thereafter with only his few remaining personal effects.

After receiving a referral from the Legal Aid Society of Northeastern New York, in November 2018, Barclay Damon took his case pro bono and commenced an action in the Supreme Court, Schenectady County, against Mr. Cooper's landlord.

The firm engaged in motion practice led by Steven Mach that subsequently established the defendant's liability in the matter. Mach, Allen Light, and Amanda Miller then all collaboratively worked in handling a damages hearing before the court, which consisted of valuation, witness preparation, and testimony at a hearing before the judge. Through this collaborative effort, the court has awarded Mr. Cooper a judgment totaling nearly $3,500 in damages against the landlord.

Hanson Bridgett LLP

Hanson Bridgett is driven by a commitment to diversity, equity, and inclusion; charitable giving; pro bono legal work; and hands-on service.

This past April, Hanson Bridgett's Management Committee members, along with several other attorneys, participated in a pro bono training workshop and clinic. The clinic was in partnership with Centro Legal de la Raza, a nonprofit legal services organization based in Oakland, and assisted asylees with completing forms and documentation for permanent residence status.

For the past year, several firm attorneys, including Partners Kathryn Doi and Samir Abdelnour, have represented parents and children who were separated at the border under the Trump Administration. Hanson Bridgett attorneys assisted these individuals with filing claims under the Federal Tort Claims Act, a prerequisite to filing a federal action for damages, in partnership with the Lawyers Committee for Civil Rights. These efforts are part of a nationwide effort by legal advocates to help families impacted by the previous Administration's family separation policy to seek compensation for the trauma and other harms they experienced when they were unlawfully, intentionally, and forcibly separated at the border.

Additionally, Doi and Abdelnour have taken part in ongoing working group calls with attorneys at non-profits and other firms engaged in this effort to develop and discuss strategies for litigating and/or resolving the claims on behalf of the children and families affected. On May 10, 2021, Hanson Bridgett joined with members of this working group, as well as several other law firms, nonprofits, and law school clinics in signing a letter to the Biden Administration encouraging the establishment of a settlement liaison to negotiate monetary reparations and relief from deportation.

about USLAW NETWORK

2001. The Start of Something Better.

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

Fast forward to today.

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

Home Field Advantage.

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

A Legal Network for Purchasers of Legal Services.

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

USLAW IN EUROPE.

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

How USLAW NETWORK Membership is Determined.

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

USLAW in Review.

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

The USLAW Success Story.

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

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

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

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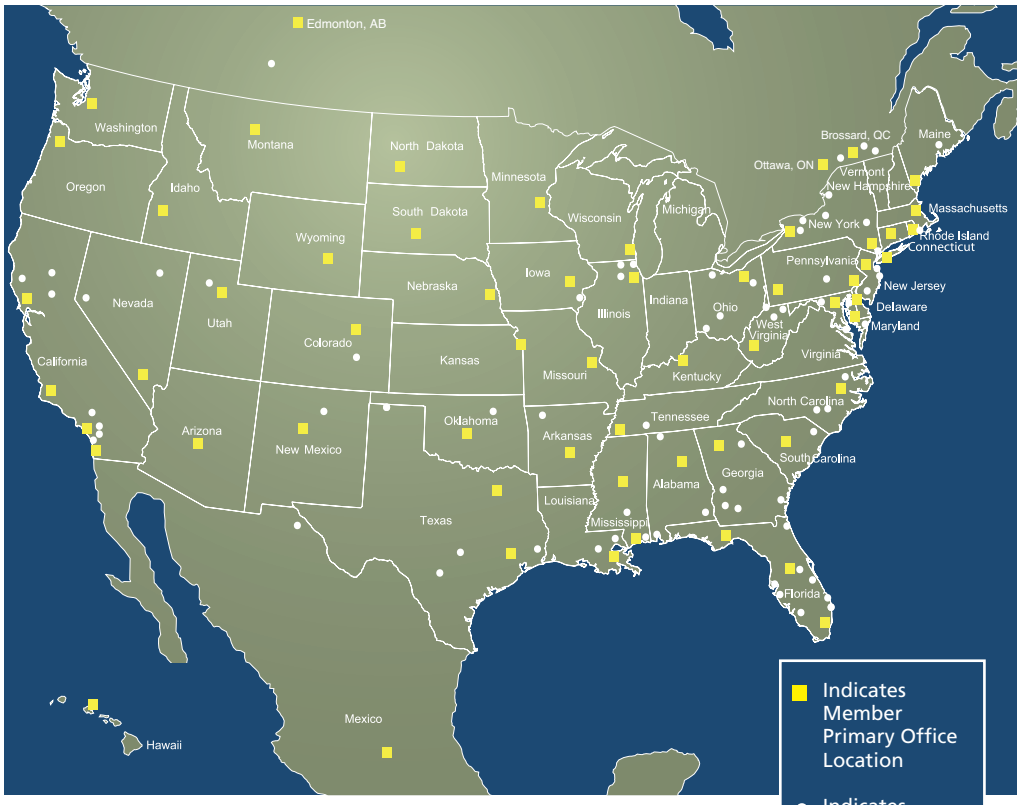

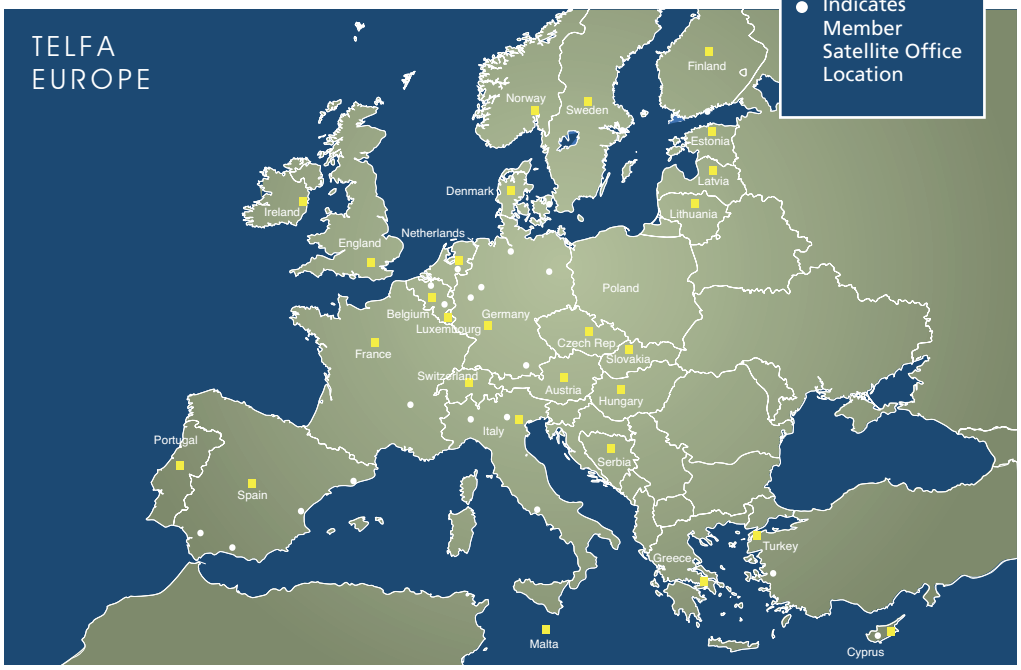

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the complete USLAW SOURCEBOOK

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

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

VIRTUAL OFFERINGS

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

EDUCATION

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

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

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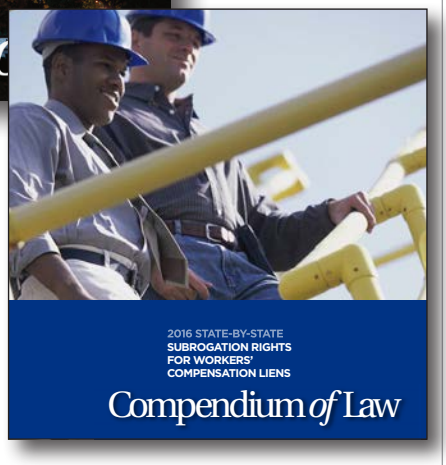
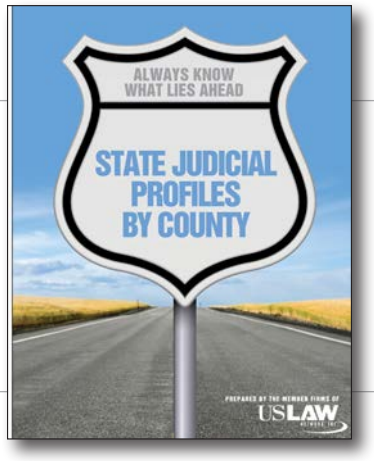


COMPENDIA OF LAW

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.

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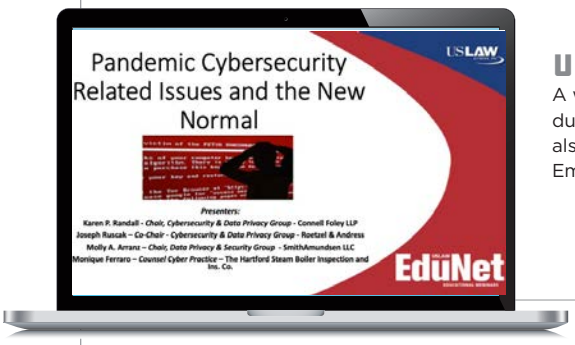
In today's digital world there are many ways to connect, share, communicate, engage, interact and collaborate. Through any one of our various communication channels, sign on, ask a question, offer insight, share comments, and collaborate with others connected to USLAW. Please check out USLAW on Twitter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



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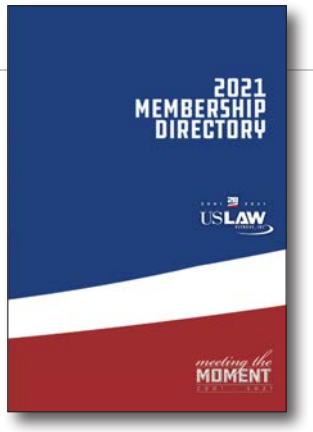
A wealth of knowledge offered on demand, USLAW offers a regular series of interactive webinars produced by USLAW practice groups. The one-hour programs are available live on your desktop and are also archived at USLAW.org for viewing at a later date. Topics range from Cybersecurity to Medicare to Employment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

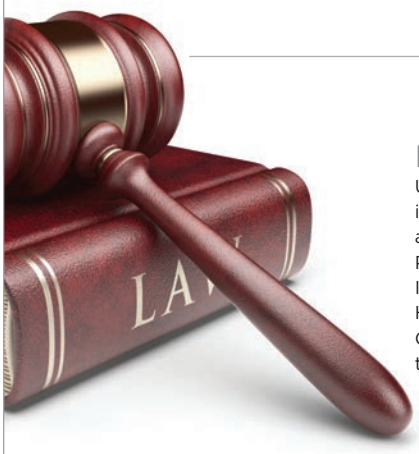


USLAW MEMBERSHIP DIRECTORY

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

CLIENT LEADERSHIP COUNCIL AND PRACTICE GROUP CLIENT ADVISORS

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



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

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