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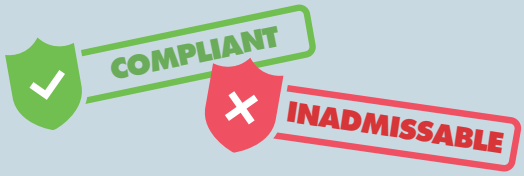

NO STANDARDS: DEFENDING PRODUCT LIABILITY CLAIMS WHEN COMPLIANCE WITH STANDARDS IS INADMISSIBLE

P 12

P 26

THE ROBINS DRY DOCK RULE MAY LEAVE BRIDGE COLLAPSE CLAIMANTS HIGH AND DRY

P 2

PUT DOWN YOUR PHONE AND WATCH THOSE TEXTS: NEW REGULATIONS IMPACTING YOUR OUTREACH TO CUSTOMERS, CLIENTS AND CONTACTS

P 6

FOREIGN DISCOVERY: WHERE TO START?

P 16

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table of CONTENTS

SUMMER 2024

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FEATURES:

THE ROBINS DRY DOCK RULE MAY LEAVE BRIDGE COLLAPSE CLAIMANTS HIGH AND DRY
By Alonzo D. Washington and Adriana C. DiMatteis
Flaherty Sensabaugh Bonasso PLLC ..... page 2

PUT DOWN YOUR PHONE AND WATCH THOSE TEXTS: NEW REGULATIONS IMPACTING YOUR OUTREACH TO CUSTOMERS, CLIENTS AND CONTACTS
By Molly A. Arranz • Amundsen Davis LLC ..... page 6

CHANGES TO FRCP 7.1 AND IMPACTS ON CORPORATE STRUCTURE
By Spencer W. Young • Strong & Hanni ..... page 8

BROWSEWRAP V. CLICKWRAP: HOW ENFORCEABLE ARE YOUR TERMS OF SERVICE?
By Tiffany Fearing • Wicker Smith ..... page 10

NO STANDARDS: DEFENDING PRODUCT LIABILITY CLAIMS WHEN COMPLIANCE WITH STANDARDS IS INADMISSIBLE
By J. Michael Kunsch • Sweeney & Sheehan ..... page 12

THE EVOLVING TEST FOR DELIBERATE INDIFFERENCE IN CORRECTIONAL HEALTHCARE
By Taylor D. Brewer • Moran Reeves Conn ..... page 14

FOREIGN DISCOVERY: WHERE TO START?
By Theodore J. Folkman • Rubin and Rudman ..... page 16

HOW CAN LEGAL DESIGN MAKE PRIVACY POLICIES MORE EFFECTIVE?
By Viktorija Stančikė • WIDEN. ..... page 18

DISNEY'S "STEAMBOAT WILLIE" ENTERS THE PUBLIC DOMAIN, BUT MICKEY MOUSE REMAINS PROTECTED
By Caleb P. Knight and L. Elizabeth King • Flaherty Sensabaugh Bonasso PLLC ..... page 20

BUXOM BARMAID MAKES ANOTHER ROUND, THIS TIME WITH NIL
By Kristina J. Kamler • Baird Holm LLP ..... page 22

VERY SOON, COMPANIES WILL HAVE TO DEFEND THEIR AI'S DECISIONS TOO
By David Metz and Jorge Monroy • IMS Legal Strategies ..... page 24

MASS TOXIC TORTS WATCH LIST (OTHER THAN THE PLAINTIFFS' TV ADS)
By Paul V. Majkowski • Rivkin Radler LLP ..... page 26

ISSUE BIFURCATION: AVOIDING CONFUSION AND IMPROVING OUTCOMES
By Pamela S. Hallford and J. Mark Chappell, Jr. • Carr Allison ..... page 28

CANOPY CONUNDRUMS: ARBORICULTURE & RISK ANALYSIS
By Julian Wadding • S-E-A ..... page 30

A REASONABLE REVOLUTION: A PUSH FOR POLICY REFORM IN THE RETAIL SPACE
By Eddy Silverman • Williams Kastner ..... page 32

DEPARTMENTS:

FROM THE CHAIR ..... page 1
FACES OF USLAW ..... page 34
FIRMS ON THE MOVE ..... page 38
SUCCESSFUL VERDICTS & TRANSACTIONS ..... page 40
DIVERSITY, EQUITY AND INCLUSION ..... page 44
PRO BONO SPOTLIGHT ..... page 46
ABOUT USLAW ..... page 47
USLAW NETWORK SOURCEBOOK ..... page 49
USLAW MEMBER FIRM LISTINGS ..... page 51
TELFA LISTINGS ..... page 61
SPOTLIGHT ON CORPORATE PARTNERS ..... page 64


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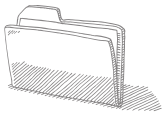

from the CHAIR'S DESK

Welcome to the latest issue of USLAW Magazine, one of the many complimentary resources available from our expansive network of member attorneys from across the U.S., Canada, Latin America, Asia and Europe.

Like the broad range of timely content you'll read in the following pages, our members practice across various practice areas and industries. USLAW has more than 25 active USLAW practice groups and communities, from labor and employment to real estate, transportation, tax law, and everything in between. USLAW is also about connections. Throughout my career, I have prioritized developing relationships with colleagues and the individuals I represent, and this is echoed throughout USLAW. This solid foundation has helped us help our clients wherever their legal matters arise.

Whether you are in the retail space and need a refresher on drafting policy guidelines, want to learn more about the impact of the changes to FRCP 7.1, wonder how the tragic Key Bridge collapse has put the Robins Dry Dock Rule in the spotlight or want to learn how to use artificial intelligence in your trial prep, our authors have insights on these topics and more to share in the pages to follow.

Enjoy this latest issue of USLAW Magazine, connect with us on LinkedIn and visit uslaw.org to learn more about USLAW and how we can help you. Thanks for your continued support of our members and NETWORK.

All the best,

Oscar J. Cabanas
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Publisher **Roger M. Yaffe**
Editor **Connie Wilson**
Art Director **Jeff Freibert** • Compass Creative

Roger M. Yaffe, *Chief Executive Officer*
roger@uslaw.org

Cheryl Hanley, *Practice Group, Special Projects, and Corporate Partner Director*
cherylhanley@uslaw.org

Paige Marotta, *Membership Services Coordinator*
paige@uslaw.org

Jennifer Randall, *Membership Services Manager*
jennifer@uslaw.org

Connie Wilson, *Communications Specialist*
connie@uslaw.org

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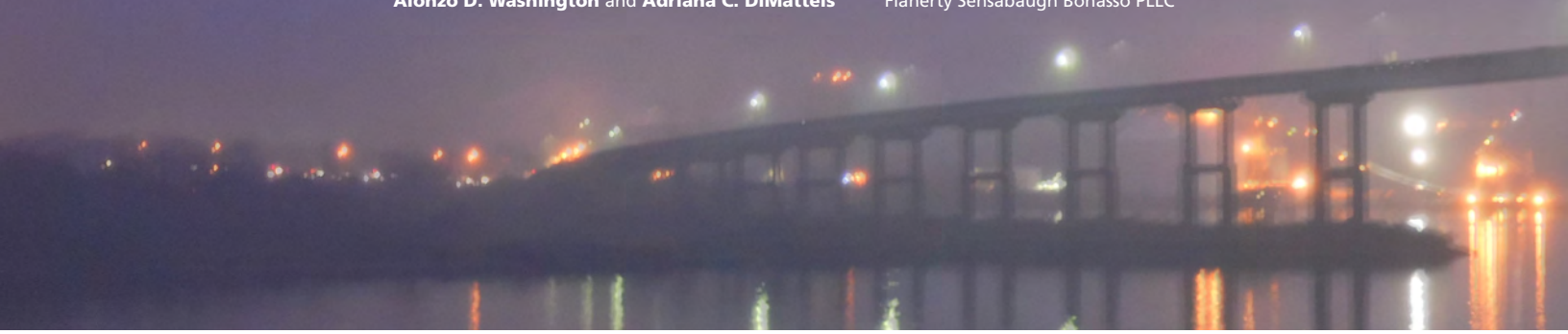
The Robins Dry Dock Rule May Leave Bridge Collapse Claimants High and Dry

Alonzo D. Washington and **Adriana C. DiMatteis** Flaherty Sensabaugh Bonasso PLLC



In the early morning of March 26, 2024, the Dali, a Singaporean-flagged cargo ship, crashed into the Francis Scott Key Bridge, causing the entire bridge to collapse into the Patapsco River. Since 1977, the Francis Scott Key Bridge has connected roadways circling Baltimore Harbor. The Francis Scott Key Bridge carried an estimated 11.5 million vehicles annually. Lawsuits are highly anticipated in the wake of this disaster; however, a 1927 Supreme Court case may prevent claimants from recovery.

Generally, under federal and state law, if a claim is solely for economic loss, without any damage to the claimant's property, then no recovery is possible. The ruling in *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303 (1927) has been adopted by the majority of federal courts, including the Fourth Circuit. In this ruling, the Supreme Court held that "where purely economic losses are concerned – wrongful interference with contractual or business interest – more stringent limitations apply than the concept of foreseeability." *Id.* This is a bright line test that is a broadening of the principle of *Robins Dry Dock & Repair Co. v. Flint*. As a federal common law limit on maritime tort recovery, the rule applies even to damages that pass the foreseeability test. While the rule is not without controversy, it has been applied by most United States circuit courts of appeals to cut off recovery.[1]

Typically, the Economic Loss Rule prevents a party from claiming damages successfully if their damages are purely economic, meaning that there must be some accompanying injury or damage for a party to make their claim. In the instance of the Key Bridge collapse, there is sure to be an influx of claimants who have not suffered personal injury or damage to their property. Companies that utilize the bridge for transportation have undoubtedly had their business ventures interrupted by the collapse. The Francis Scott Key Bridge connected roadways throughout Baltimore Harbor. Without the bridge, businesses and their trucking companies will have to find different means of travel. Some trucks traveling on the Key Bridge transported hazardous materials, such as gasoline and propane, that prohibits those trucks from utilizing tunnels. Furthermore, those using maritime transportation were forced to change their course following the bridge collapse, leading to increases in fueling costs and shipment delays. These vessels were forced to reroute their courses to surrounding New England East Coast ports. Additionally, vessels were stranded in the Port of Baltimore awaiting the reopening of the channel, and businesses inside of the Port relying on shipping traffic came to a complete halt.

The reasoning for the Court's decision in Robins is based on the special need for limitations to recoverable damages in marine casualty cases, which inherently involve nearly limitless potential damages. "A disaster such as an oil spill, the ramming of a bridge, or a collision blocking a channel may have extremely broad economic repercussions, causing delays, inconvenience, and other harm to a wide variety of interests and persons. Reasonable limits on a tortfeasor's responsibility are necessary both to facilitate the judicial administration of compensation for claims and to avoid stretching the third-party system of liability insurance to the breaking point."[2] The *Robins Dry Dock* rule (RDDR) has been upheld time and time again to establish a general rule, which retains its vitality, against recovery of economic loss caused by a maritime tort to the person or property of another. It's been noted that the Robins Dry Dock rule has been so consistently applied in admiralty that it should continue to be applied unless and until altered by Congress or the Supreme Court.

While the RDDR has long been upheld, exceptions to the rule do exist. One example came after the Exxon Valdez oil disaster of 1989, when commercial fishermen and others affected by the oil spill brought economic loss claims. *In re* Exxon Valdez, 229 F. 3d 790, 793 (9th Cir. 2000). While they did not personally suffer property damage, the fishermen were still able to recover $52 million in compensatory damages for their losses. *Id.* This led Congress to enact the Oil Pollution Act of 1990 (OPA). Under the OPA, economic loss recovery for fishermen and other natural resource-dependent professionals is explicitly allowed. Given the statute that

arose out of the Exxon Valdez Litigation, it is possible that maritime law could be altered to allow those affected by the Francis Scott Key Bridge collapse to recover despite the Robins Dry Dock Rule, catalyzing the debate around foreseeability and the economic loss doctrine.

With the influx of claimants expected to flock to the courts following the collapse of the Key Bridge, the courts will have to apply the Limitation of Liability Act. Overcoming the Economic Loss Rule in maritime cases does not give plaintiffs "free reign" when claiming damages. The courts must look to the actual negligence or "conditions of unseaworthiness" that caused the accident. Those who can recover despite the Economic Loss Rule are limited in their damages. Damages under the Act are limited to the amount of value of the claimant's interest. In terms of vessels, damages are typically limited to the value of the vessel itself and any pending freight on board that may have been damaged. Claimants will face the burden of proving negligence. In contrast, the vessels' owners must prove they lacked knowledge of the acts of negligence or the conditions that deemed the vessel's conduct unseaworthy.

On April 22, the mayor and city council of Baltimore filed suit against the owner of the Dali in Maryland federal court, stating that the collapse of the Key Bridge forced Baltimore's "economic engine" to a halt. The City seeks to recover economic damages from the Singaporean manager, the Synergy Marine Group. In the weeks since the collapse, it has been alleged that records from the ship have shown that the vessel was suffering from inconsistent power supply before the ship departed. In their suit, the City claims that ignoring the inconsistencies in the ship's power supply was criminally negligent. Additionally, the Synergy Marine Group has filed a petition in Maryland to limit its liability. If the Maryland court is persuaded in Synergy's direction, recovery from claimants could be limited to $43,671,000, with interest at the rate of 6% per annum, which represents the value of Owner's interest in the Vessel and its pending freight in connection with the voyage. On April 26, a class action led by American Publishing, LLC was filed against Synergy. The class also objects to Synergy's petition for a damage cap, stating that the vessel's conduct was "clearly unseaworthy."

In the month since the Francis Scott Key Bridge collapsed, efforts to clear the debris were ongoing. President Biden announced that the federal government would shoulder the cost of repairs to the Francis Scott Key Bridge. These repairs are estimated to cost more than $400 million and may take up to seven years to complete. The litigation sure to be surrounding the collapse of this Baltimore staple will be on-going for years to come.

Alonzo Washington is a member in Flaherty's Morgantown office. He is a seasoned litigator with valuable experience in product litigation, commercial litigation, medical malpractice defense, construction, surety, maritime/admiralty and other complex litigation matters. Alonzo may be reached at 304.225.3054 or awashington@flahertylegal.com.

Adriana DiMatteis is an associate in Flaherty's Morgantown Office. A member of our commercial litigation group, Adriana credits the West Virginia University College of Law Clinic for learning the importance of listening to the client's story and understanding the best way to advocate for their goals. She may be reached at 304.225.3055 or adimatteis@flahertylegal.com.

[1] § 14:8. Economic losses and remote claims, 2 Admiralty & Mar. Law § 14:8 (6th ed.)
[2] 2 Admiralty & Maritime Law, § 14-7 (5th ed.)

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At the same time, every company knows (or should know) about the importance of getting the right permission or consent before sending those promotions or reminders and before sending a "lead" to a business partner for their outreach or touchpoint. Each should know how to offer consumers an opportunity to be forgotten or to not receive promotions or communications anymore. To date, federal statutes, like the Telephone Consumer Protection Act (TCPA), and regulations put in place by the Federal Communications Commission (FCC), have guided companies in various industries on what level of consent is necessary before sending SMS texts or making phone calls and what's required for giving the recipient an opportunity to revoke consent. The particulars for these marketing or sales activities have been fairly well established.

However, reevaluation of these guardrails should be considered given two recently released Reports and Orders by the FCC. They are set to have a significant impact on what permissions you may need in place before sending SMS texts or making phone calls, what options you need to make available for opting-out of subsequent texting or phone calls—and how you respond to those opt-outs.

ONE-TO-ONE CONSENT FOR LEAD-GENERATED TEXTS

Companies and consumers can both agree that text messaging is invaluable "to stay in touch with friends and family" and "to do business"—that text messaging is "an expected trusted source of communications" and shouldn't be used as an annoyance or scam.

These values have been reiterated by the FCC in a Second Report and Order released on December 18, 2023. The 72-page Order makes clear that the Commission remains vigilant against a "rise of junk texts" that jeopardize consumer trust. At the same time, in that Order, the FCC proposes closing a "Lead Generator Loophole." This proposed change could dramatically affect companies in many industries that rely upon their business partners to obtain the right permissions or consent to send texts and make calls to customers.

Take, for instance, a company that provides certain products or services, such as loans and related offerings. It may rely upon business partners to find potentially interested customers, to gather their contact information, and then to share this information so the company can reach out to the customer and promote the requested services or products. This sort of "leads-generation" oftentimes plays out with the company's sales team sending multiple text messages or calls to those interested prospects. Before that point, a business partner makes a disclosure and provides an opt-in to calls and texts from "business partners."

In the December 2023 Report and Order, the FCC reiterates that texters and callers must obtain prior express written consent before making the call or sending the text but now, also finds that this consent will only apply to a single seller at a time. The FCC has proposed this revised rule, explaining companies need to comply with a "one-to-one consent" rule. The Rule, not yet in effect, would mean that group consent is insufficient; a consumer, on an individual basis, must convey consent to a company for the calls or text messages about the products or services.

The FCC also adopted two other pro-

tections for the one-to-one consent: that consent only comes after a clear and conspicuous disclosure that the consumer will get those texts and calls; and, if consent is obtained on a comparison shopping website, the texts or calls that follow must be "logically and topically" related to the website offering. Practically speaking, for both of these requirements, compliance may be a challenge. The FCC provides a nebulous standard for "clear and conspicuous"—i.e., what would be apparent to the reasonable consumer—and for companies to determine what is logically and topically related will require them to only send texts or make calls limited to content consumers "would clearly expect."

With this, there appears to be an imminent sunset on entities relying on "bundled consent" for contacting customers and consumers. Though the Order notes the implications of requiring one-to-one consent and has sought comment on ways to "refine our one-to-one consent rule to further mitigate any burdens it may create for businesses," change is coming.

The December 2023 FCC Order notes that amendments may occur and allows businesses a 12-month safe harbor to ensure compliance. The effective date will be announced by subsequent Public Notice.

"EASING" REVOCATION OF THE CONSENT TO BE TEXTED OR CALLED

The FCC kept rolling out additional rules on texting and calling. On February 16, 2024, it released a Report and Order and Further Notice of Proposed Rulemaking meant to address consumers' "right to revoke" consent after deciding they no longer want robocalls or robotexts. The Order was meant to establish new consent protections and to "strengthen consumers' ability to revoke consent so that it is simple and easy."

However, when taking a deeper dive into the particulars, companies, especially those in certain industries, may find more head-scratching than clarity.

Specifically, this Order appears to target texts and calls promoting consumer goods and services and transactional texts those companies may send. The Commission noted that these robocalls and robotexts are restricted by prior express consent. In the February Order, the FCC explained that, going forward, revocation of consent for calls and texts can be made in any reasonable manner. This means that when a consumer replies to a text, for instance, and uses the words "stop," "quit," "end," "revoke," "opt-out," "cancel," or "unsubscribe," this is a per se reasonable means to revoke consent. This is certainly a new rule that all companies need to review.

However, the Order also noted that there are some text messages and phone calls that are exempt from the consent requirement, such as certain health care related or bank fraud communications. And the Order includes proposed rulemaking on revocation that could affect these exempt messages. These types of messages include, for instance, "health care" messages made by a covered entity or business associate, as defined in the HIPAA Privacy Rule, and messages from financial institutions regarding transactions that may involve fraud or identity theft or to notify a consumer about possible breaches of personal security. As long as the company (the health care provider or bank) follows other conditions on the number and frequency of messaging, consent is not required and a request to stop receiving these messages required very specific protocols such as texting "STOP."

The FCC makes clear that the new rule establishes that consumers or recipients can opt-out of or revoke consent for future messages in any reasonable manner and explains this only applies to the calls and texts for which a company had to obtain consent, for instance, marketing and transactional texts and calls. The Order provides that even when that consent has been revoked, the same company can still send exempted messages.

However, the FCC goes on to recognize that consumers may inadvertently opt out of exempted informational calls or messages such as fraud alerts when attempting to stop unwanted telemarketing calls from that same company. The Commission also explained that if a revocation request is made directly in response to an exempted informational call or text, this would mean an opt-out of all further non-emergency calls and texts. No exempt or non-exempt messages, period. The "consumer's intent" is to no longer receive such exempted informational calls from the caller and also "all calls from the caller."

Practically speaking, these proclamations present some challenges. Consider the following. What if a person texts back "STOP" in response to a bank's text message regarding financial safeguards being offered to protect against identity theft? Unless you get better information from the consumer—you can send one clarifying text to see if the recipient wanted to stop receiving all texts—the bank needs to stop sending all non-exempt robocalls and robotexts to that person. This assumes the text does not qualify or could not be construed as an exempt text.

If, however, a person texts back "STOP" to a bank's text message about a potential breach of that person's security, all exempt and non-exempt messages, be it by phone or text, must stop. Again, there is the opportunity to get clarity on the extent of revocation, as well, but stopping all contact can be an administrative challenge, to say the least.

This FCC Order also addresses the timeframe for honoring a do-not call or revocation request and seeks comment on application to wireless providers and the "Wireless Provider Exemption."

These proposed rules remain open to comment; however, certain new requirements on company protocol on "scrubbing" or deleting customer, client or even patient data appears unavoidable.

WHAT THIS MEANS FOR YOUR BUSINESS

There is added pressure on many companies to expand their business and invest in new sales and marketing opportunities. Companies are regularly being presented with improved technologies that allow them to reach customers and clients faster and seamlessly.

Undoubtedly, businesses have in place appropriate practices and protocols to get the right level of permission and to instill the appropriate level of training to not only comply with existing legal restraints but to refrain from sending annoying texts or making bothersome calls.

Now, with these new rules on the horizon, a refresh or revision of these consumer and customer disclosures and a reevaluation of the policies and protocols is critical. Start with a regrouping with your employees that take lead on sales and marketing to ensure you know how and when they communicate with your clients and customers. Evaluate what your business partners are doing on your behalf. With the safe harbor in place for compliance, now is the time to get this in order. The downside to not doing so could be dramatic given the statutory fines baked into the TCPA and related statutes.

Molly Arranz is the chair of Amundsen Davis's Cybersecurity & Data Privacy Service Group. She is a certified privacy professional (CIPP-US) and a recognized Privacy Law Specialist by the American Bar Association. Contact: marranz@amundsendavislaw.com

CHANGES TO FRCP 7.1 AND IMPACTS ON CORPORATE STRUCTURE

Spencer W. Young Strong & Hanni

The limited liability company is the mule of corporate structure—a hybrid between the oldest of corporate forms (the partnership) and the relatively modern innovation of the corporation. And just like a mule inherited certain characteristics, like its shorter mane, from the donkey and other characteristics, like its height, from the horse, so too has the limited liability company inherited certain characteristics, like tax treatment, from the partnership side of the family and certain other characteristics, like limited liability, from the corporation side of the family.

While the genetic mashing that led to the limited liability company has generally made it a favorite among corporate attorneys in a number of contexts like real estate and early-stage start-ups, one unfortunate characteristic the limited liability company inherited from the partnership side of the family is its treatment under Title 28, Section 1332 of the United States Code.

Like the rest of our federal government, federal courts enjoy limited, enumerated powers to hear certain cases listed in Article III, Section 2 of the United States Constitution. This "judicial power," as it's called, extends to "Controversies … between Citizens of different states." This is commonly referred to as "diversity jurisdiction."

Put differently, as long as you don't have citizens from the same state on either side of the "v" and there's at least $75,000 at issue (a statutory requirement Congress added), you can be in federal court regardless of the claims you have. Those claims don't have to be questions of federal law, and your case doesn't have to involve the United States, but you can still be in federal court. The question then becomes how courts determine the citizenship of "persons," like corporations, partnerships, and limited liability companies, that aren't people.

Long before the advent of the limited liability company, federal courts settled this question as to partnerships and corporations. In an 1844 case entitled *The Louisville,*

Cincinnati, and Charleston Railroad Company v. Letson, the Supreme Court gave what would become the rule for determining the citizenship of a corporation—namely, a corporation is a citizen of both the state under the laws of which it was incorporated, *and* the state in which the corporation has its principal place of business.

But, in an 1889 case entitled *Chapman v. Barney*, the Supreme Court declined to extend that rule to partnerships. And thus, a critical distinction between the corporation and the partnership was born—while corporations would be citizens of, at most, two states in the Union for purposes of diversity jurisdiction, partnerships would be citizens of every state in which the individual partners were themselves citizens.

Then came the limited liability company. Born in Wyoming in 1977 at the behest of the Hamilton Brothers Oil Company, which wanted the limited liability protections that a corporation afforded, without the double taxation, the limited liability company lay mostly dormant for over a decade while the uncertainty of its tax treatment lingered. Then, in 1988, the IRS issued Revenue Ruling 88-76, which confirmed that limited liability companies would be taxed as partnerships notwithstanding the express limited liability protections afforded by state statutes (and despite the IRS's earlier efforts to tax them as corporations). Within three years, 18 states had adopted statutes allowing for the creation of limited liability companies, and the LLC craze of the 1990s was born.

Unsurprisingly, cases start popping up in federal trial courts near the end of the millennium raising the question of how the citizenship of limited liability companies would be determined for purposes of diversity jurisdiction. By 2003, in a case from the United States Court of Appeals for the District of Columbia entitled *Johnson-Brown v. 2200 M Street LLC*, the issue was settled—the LLC would get its citizenship test from the partnership side of the family and would be a citizen of every state in which its members are citizens.

Nevertheless, lawyers remained largely ignorant of this rule for many years, treating LLCs like corporations in federal court. But because courts at all levels—trial, appellate, and supreme—have a duty to ensure they have jurisdiction, this ignorance led to draconian and often costly chaos. Indeed, I remember a federal appellate judge expressing disappointment several years ago that one of the cases before her court would likely have to be dismissed for lack of jurisdiction because it appeared that members of the LLC on one side of the "v" were citizens of the same state as parties on the other side. Particularly disappointing to this jurist was the fact that the parties had likely spent upwards of a million dollars *each* on attorney fees, but the dismissal for lack of jurisdiction would force them to start their litigation all over, putting them back at square one.

In August of 2019, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed an amendment to the disclosure requirements found in Rule 7.1 of the Federal Rules of Civil Procedure. The proposed amendment added a requirement that every litigant must, as soon as they appear in federal court, file a disclosure statement advising the court of its citizenship for purposes of diversity jurisdiction. The comments from the committee made clear that this amendment was in direct response to lawyers' oversight regarding the citizenship of limited liability companies in federal court, and the fallout it created for litigants. After the required hearings on the amendment, it went into effect on December 1, 2022.

I first learned of the amendment last summer. Although we filed our case before the Rule 7.1 amendment went into effect, the federal court in my home state of Utah ordered my client and the other litigants in our case—all of which were LLCs—to make the required disclosures, and to make sure we did them properly, the court ordered us to disclose their *entire* ownership structure until we got to a corporation or an individual, at which point we had to disclose their citizenship.

As you might expect, the process of properly doing these disclosures was quite cumbersome. My client had a series of LLCs stacked on top of each other within its corporate structure, and one of those LLCs had given a small amount of equity to a dozen or so former employees as part of their compensation. It did not matter that those employees were three or four LLCs removed from my client; we had to reach out to every one of those former employees to ask about where they resided on the date we filed our lawsuit. That question understandably triggered a litany of questions from the former employees about the lawsuit, with many of them worried they were somehow implicated.

Ultimately, we got the information and made the disclosure, but I realized in the wake of that experience that every LLC-client wanting to file suit in federal court would have to undertake the same burden of ignoring every LLC up the chain of its corporate structure and figuring out the citizenship of every single individual or corporation that had any ownership, large or small—even those former employees who had no ongoing involvement with the company.

Since then, I have started advising clients to consider inserting a corporation where it makes sense within their corporate structure. While inserting a corporation does expose clients to the risk of double taxation that LLCs did away with, clients may still have the option to choose pass-through tax treatment under subchapter S of the Internal Revenue Code (such corporations being colloquially known as "S corporations"). Although an election under subchapter S comes with certain limitations, the most significant of which being that shareholders of an S corporation cannot be corporations, partnerships, or limited liability companies, these drawbacks must be weighed against the burden of reaching out to every individual anywhere in the ownership chain of an LLC to determine where they live, *every* time the company gets sued or is filing suit in federal court on the basis of diversity jurisdiction.

If a subchapter S election is still not workable for the client, I advise that the client consider inserting into its operating agreement (and the operating agreements of every other LLC up the chain of ownership) a requirement that the members advise the company of their citizenship for the purpose of diversity jurisdiction and require that members update this information as soon as it changes. Pragmatically, this comes with certain drawbacks since most members will not have this requirement in mind on an ongoing basis, but these drawbacks can be at least somewhat eliminated with regular reminders of the requirement, perhaps every year with delivery of their Schedules K-1.

While LLCs are still an advantageous corporate vehicle in a number of contexts, like all choices in life, they come with pros and cons. Although there's no "magic pill" to rid a client of all the cons, good lawyers will do well to make sure their clients are always thinking through their corporate structure with eyes wide open.

Spencer W. Young is a business attorney with Strong & Hanni. His practice includes both litigation—with a focus on complex commercial, real estate, and intellectual property disputes, as well as white collar criminal defense—and transactional work, with a focus on mergers and acquisitions, real estate, and data privacy. He is also a proud member of the Federalist Society and the National Society of the Sons of the American Revolution.

BROWSEWRAP V. CLICKWRAP

HOW ENFORCEABLE ARE YOUR TERMS OF SERVICE?

Tiffany Fearing Wicker Smith

Nothing beats that feeling of victory even when it is a mobile game like Candy Crush. But not much thought is given to the terms of use to which players must agree to play. On April 18, 2024, a federal court found that participants in the "Candy Crush All Stars 2023 Tournament," which allowed Candy Crush players to compete for $250,000 in prizes and a trip to London, agreed to King.com Limited's (the makers of Candy Crush) terms of use. To play Candy Crush, players affirmatively demonstrated their acceptance of the terms by clicking an "accept" button in a popup dialog box on their app. In this class action suit, *Sorina Montoya v. King.com Limited*, the court found that King.com Limited's terms of use presented via clickwrap effectively bound players to its terms of use.

Whether playing in an online tournament, booking a hotel stay, reserving time to play golf, or renting a boat for an afternoon, people are going online or using a mobile application for virtually every transaction. And the businesses offering these products or services are frequently turning to terms of service agreements and other electronic contracts within their platforms to bind these users to their terms.

But as technology advances, so should everyone's understanding of these electronic contracts. Because even the most well-crafted, protective electronic contract will have little value, if any, if it is not enforceable. Therefore, it is crucial for lawyers to understand and advise their clients as to the best ways to ensure these electronic contracts are enforceable if challenged.

This article will introduce the two most common methods for presenting Terms of Service and other electronic contracts: ***browsewrap*** and ***clickwrap***. Next, it will discuss potential issues with their enforceability. Finally, this article will "wrap" things up with recommendations for the most effective ways to bind users to a business's terms.

WHAT IS A BROWSEWRAP AGREEMENT?

A browsewrap agreement implies the user's consent to the website's terms of service. By a user's continuous use of the website, it is assumed that the user agrees to the terms of service. In browsewrap agreements, the terms of service are often found in the footer of a website via a hyperlink. For example, a user would scroll to the bottom of a website, find the words "Terms of Service," and click on the hyperlink to find the terms.

WHAT IS A CLICKWRAP AGREEMENT?

A clickwrap agreement obtains the user's explicit consent to a website's terms of service. By requiring users to make an affirmative action, the user demonstrates awareness and acceptance of the terms of service. In clickwrap agreements, the user must make an active choice such as clicking a box that states, "I agree." For example, Candy Crush presented players with an in-app dialog box informing players that they must confirm that they agree to Candy Crush's terms of use by clicking a green "accept" button to continue playing.

KEY SIMILARITIES AND DIFFERENCES

Both the browsewrap and clickwrap methods are frequently employed to obtain consent to an electronic contract and terms of service. Their key differences stem from how they are presented to the user, how consent is acquired, and how the data is recorded. These differences are critical, as they affect the enforceability of electronic contracts.

Presentation. Browsewrap agreements have their terms and conditions hyperlinked at the footer or sidebar of a website. To access the terms of service, the user must locate the hyperlink. Clickwrap agreements, however, serve as a gateway that a user must pass by affirmatively making an action indicating their acceptance. Unlike browsewrap agreements, users do not have to find the terms of service, as they are prominently placed in front of the user.

Consent. In browsewrap agreements, users' consent is implied by their continued use of the website without any explicit acceptance of the terms and conditions. On the other hand, clickwrap agreements require users to make an affirmative choice and actively acknowledge their consent to the terms and conditions by a specific action like clicking a box. The browsewrap method of consent is passive, while the clickwrap method is active.

Records. Since the browsewrap method of consent does not require an explicit action, keeping a record of user consent is more challenging. At best, businesses can use website analytics or behavioral data to demonstrate consent. The clickwrap method, however, allows businesses to record user consent through timestamps and unique identifiers to show a user's acceptance of the terms and conditions.

ARE BROWSEWRAP OR CLICKWRAP AGREEMENTS ENFORCEABLE?

The *Electronic Signatures in Global and National Commerce Act* (ESIGN) and the *Uniform Electronic Transactions Act* (UETA) have made electronic contracts and digital signatures legally valid. Despite ESIGN's and UETA's regulations, the traditional contract principles of offer, acceptance, awareness, and consideration still apply to both browsewrap and clickwrap agreements.

Among the basic contract principles, acceptance of an electronic contract remains the most vulnerable to legal challenge. Whether an electronic contract will be enforced is largely dependent on how the terms are presented and what action a user is required to perform to show assent.

Since the browsewrap method does not require users to read the terms and conditions or take any action indicating their agreement, browsewrap agreements are more challenging to enforce. For example, in *Vitacost.com, Inc. v. James McCants*, a Florida court found a browsewrap agreement unenforceable since the terms and conditions were at the bottom of the page where users would not see it without scrolling all the way down. And in *Brett Long v. Provide Commerce, Inc.*, a California court declined to enforce a browsewrap terms of use agreement that appeared in the checkout because it was not conspicuous enough as its text color blended too much with the background. As these cases demonstrate, it is difficult to prove awareness of a browsewrap agreement when users are not clearly presented with the website's terms and conditions.

On the other hand, the clickwrap method forces users to take a specific action such as clicking a checkbox. With an emphasis on users' clear awareness in clickwrap agreements, there is more evidence of users' acceptance and awareness. For example, in *Caspi v. Microsoft LLC*, a New Jersey court ruled in favor of the enforceability of Microsoft's clickwrap agreement where users had to navigate through each page of Microsoft's agreement and click "I agree" before proceeding to each page. Similarly, in *Davis v. HSBC Bank Nevada, NA*, a federal court ruled that a credit card applicant could have read that there was an annual fee had the applicant read the terms and conditions in the scrolling box menu before clicking "I agree." Accordingly, to determine a browsewrap agreement's enforceability, courts may scrutinize its placement, visibility, and compliance with regulations. In sum, a clickwrap agreement is more likely to be enforced compared to a browsewrap agreement.

WHAT IS THE BEST OPTION?

Although browsewrap agreements have questionable enforceability, the browsewrap method remains relevant under certain circumstances. For example, browsewrap agreements can be an option for strictly informational websites where users are simply reading or watching content. Also, non-transactional websites without account creation or payments are lower risk and could arguably benefit from the browsewrap method. Browsewrap agreements offer a less disruptive and more convenient user experience, but risk not being enforceable.

Despite browsewrap's more favorable user experience, more businesses are converting to clickwrap agreements. As discussed supra, clickwrap agreements are the most reliable method that can protect a business's interests in a legal proceeding. With the clickwrap method, defense attorneys can provide clearer evidence that the user read and actively chose to agree to the terms and conditions.

It should be noted that whether an entity uses a clickwrap over a browsewrap agreement may depend on various industry-specific, consumer-protection, or data privacy laws, such as:

Health Insurance Portability and Accountability Act – HIPAA is a federal law that establishes national standards to protect patients' health information. Given the sensitive data protected by HIPAA, patients must give explicit consent. Thus, clickwrap consent is required.

General Data Protection Regulation – The European Union's GDPR is the most stringent privacy and security law in the world. Since the GDPR mandates explicit opt-in consent, only the clickwrap agreement method is possible.

Children's Online Privacy Protection Act – COPPA requires parents or legal guardians to give verifiable consent. Therefore, clickwrap agreements are the best option.

California Consumer Privacy Act – The CCPA is a privacy law that applies to most businesses that process personal data from California residents. A clickwrap agreement is the optimal method.

Given the nature of these laws, it is a better practice for entities subject to them to employ clickwrap agreements. Nonetheless, clickwrap agreements provide the best overall option for most entities given their better enforceability, clear consent, and legal compliance.

IT'S A WRAP!

As electronic contracts become increasingly ubiquitous, lawyers must understand this evolving digital landscape to ensure that their client's terms are enforceable. As seen with the browsewrap and clickwrap method, ***how*** an electronic contract is presented is just as important as ***what*** is presented. Since browsewrap agreements rely on implied consent, while clickwrap agreements involve explicit consent, clickwrap agreements have proven more enforceable. Therefore, in most scenarios, clickwrap agreements are the better option.

Tiffany Gatesh Fearing is an associate in the Tampa office of Wicker Smith, where she focuses her practice on appellate, commercial litigation, construction, products liability, and transportation matters. She is a graduate of Washington University in St. Louis, and St. Louis University School of Law.

NO STANDARDS:

Defending Product Liability Claims When Compliance with Standards is Inadmissible

J. Michael Kunsch Sweeney & Sheehan

Most products are designed to meet or exceed industry consensus and/or mandatory government standards. While frequently characterized derisively by plaintiff's counsel as "minimum," these standards represent the balance between safety risks and benefits of using the product, show the state of the art, and may reflect the technological feasibility of alternate designs. Accordingly, when defending product liability claims, manufacturers seek to admit evidence of the standards and compliance with them as proof that a product is not defective. And plaintiffs are universally permitted to offer evidence that a product does not comply with standards as evidence of defect.

The overwhelming majority of jurisdictions in the United States deem evidence of compliance with voluntary industry and/or mandatory standards to be relevant and admissible in product liability cases, even if such compliance is not conclusive on the issue of defectiveness. But what happens when a Court decides that compliance with standards is irrelevant and inadmissible in a strict liability risk-utility claim, as the Pennsylvania Supreme Court recently did in *Sullivan v. Werner Co.*, 306 A.3d 846 (Pa. 2023)? This article analyzes *Sullivan*, explores evidentiary issues that are likely to arise from the decision, and offers practice tips for defending design defect cases when compliance with standards is inadmissible.

PENNSYLVANIA PRODUCT LIABILITY LAW

In 1966, the Restatement (Second) of Torts §402A was adopted by the Pennsylvania Supreme Court as the law of strict product liability in *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Accordingly, the focus in a §402A case is on the product and not the manufacturer's conduct. Based on that premise, the Pennsylvania Supreme Court held in 1987 that evidence of compliance with industry standards is inadmissible because that evidence goes to the reasonableness of a manufacturer's design choice, and improperly injects negligence principles into strict liability. *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 528 A.2d 590 (Pa. 1987).

In 2014, the Pennsylvania Supreme Court reaffirmed that Pennsylvania follows §402A in design defect cases. In so doing, however, the Court overruled longstanding precedent that purported to eliminate "negligence" concepts and reinforced that a plaintiff must prove that a product is in a "defective condition" that is "unreasonably dangerous." *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). Going forward from *Tincher*, a plaintiff must establish the defective condition under one of two tests – consumer expectation and risk-utility. Under the consumer expectations test, "the product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer." *Id.* at 387. Under the risk-utility test, "a product is in a defective condition if a 'reasonable person' would conclude that the probability and seriousness of harm caused by the product

outweigh the burden or costs of taking precautions." *Id.* at 389. A plaintiff is permitted to pursue either or both theories.

Tincher offered manufacturers hope that *Lewis*, and its prohibition of evidence of compliance with standards in strict liability cases, would be reexamined, specifically stating that this seismic shift in Pennsylvania product liability law would necessarily require review of prior decisions regarding foundational issues such as proof of claims and defenses. However, the *Tincher* Court left those issues undecided. In the nine years following *Tincher*, considerable time and expense was spent litigating the admissibility of this evidence, with courts reaching different results. *See, e.g., Lehmann v. Louisville Ladder Inc.,* 610 F.Supp.3d 667 (E.D. Pa. 2022) (predicting the Pennsylvania Supreme Court would lift its categorical exclusion of industry standards evidence in strict liability actions); *Mercurio v. Louisville Ladder Inc.,* 2019 U.S.Dist.LEXIS 65560 (M.D. Pa. April 17, 2019) (precluding evidence of compliance with government/industry standards to show proof of non-defectiveness).

THE SULLIVAN COURT REAFFIRMS EXCLUSION OF COMPLIANCE WITH STANDARDS

The *Tincher* Court explained that under the consumer expectations test, a "product is not defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk of injury of which the plaintiff complains (e.g., a knife). The nature of the product, the identity of the user, the product's intended use and intended user, and any express or implied representations by a manufacturer or other seller are among considerations relevant to assessing the reasonable consumer's expectations." *Tincher*, 104 A.3d at 387.

Regarding the "risk-utility" standard, the *Tincher* Court cited the following factors articulated by Dean Wade that are relevant to the manufacturer's risk-utility calculus: "(1) the usefulness and desirability of the product - its utility to the user and to the public as a whole; (2) the safety aspects of the product - the likelihood that it will cause injury, and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and not be as unsafe; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance." *Id.* at 389-90 (citations omitted).

Evidence of compliance with standards appears directly relevant to the risk-utility test. Since *Tincher* explained that the risk-utility test offers courts an opportunity to analyze post hoc whether a manufacturer's conduct in manufacturing or designing a product was reasonable, manufacturers argued that while evidence of industry standards is not controlling as to the existence of a defect in the product, it is certainly evidence of reasonableness of the design, the risks and utility of the product, and the other Wade factors.

The hope of *Tincher* came to a crashing halt in *Sullivan*, beset by time and changes in the composition of the Court. The plaintiff in *Sullivan* was injured when he fell off a rolling mobile scaffold. He contended that the deck pins which secured the scaffold platform to the frame were defective because they could be inadvertently rotated off the platform during use, allowing the platform to fall through the frame. The expert retained by the manufacturer and retailer opined that the scaffold met ANSI and OSHA requirements and that most manufacturers used the same type of deck pins. The Court of Common Pleas of Philadelphia County precluded the compliance evidence. After a jury found the scaffold defective and the Court entered judgment in favor of the plaintiff, the Superior Court affirmed the trial Court's preclusion order.

Reaffirming *Lewis*, a three-justice plurality of the Supreme Court affirmed, holding that compliance evidence went to the conduct of the manufacturer in complying with the standard, and not the characteristics or attributes of the product which may render it defective. The Court also noted that the Restatement (Third) of Torts, Products Liability §4, which allows evidence of compliance, was rejected by the *Tincher* Court. The Court was not swayed by being an outlier on this issue, well out of the mainstream of thought that evidence of compliance is relevant and admissible even if not conclusive.

LOOKING BACK TOWARD THE FUTURE

Manufacturers defending strict liability risk utility claims in Pennsylvania must now look back to how they defended cases prior to *Tincher* to determine a path forward. One of the most absurd evidentiary contortions under *Lewis* occurred when presenting the product to a Jury. While the case law said that the focus of the case was on the "whole" product, manufacturers were required to cover up labels on the product certifying compliance with industry standards, often ANSI standards, or mandatory governmental standards such as OSHA.

Also, while evidence of compliance with standards will not be admissible, it may still be possible to offer evidence of the goals of the standard that pertain to the characteristics of the product and its non-defectiveness. For example, fiberglass stepladders are designed to comply with ANSI A14.5, which sets forth both design specifications and performance testing criteria for evaluating the design. One or more of the 15 design verification tests specified in ANSI A14.5 may be relevant to rebut the failure mechanism and causation scenario posited by a plaintiff's expert. During the defense presentation, the defense witness and/or expert may be permitted to describe the test and its purpose in the context of the ladder design to show the characteristics and performance of the ladder under loading conditions. Similar testimony may be permitted on other products. Making the consensus standard your design standard may offer a path to admissibility under the right circumstances.

Further, evidence of industry and government standards remains admissible when a plaintiff pursues a negligence theory and/or if the plaintiff "opens the door" by offering that evidence in their case.

Finally, remember that a plaintiff will be able to offer evidence of non-compliance during their case to establish defectiveness (and, potentially, punitive damages), so even if you can't get evidence of compliance before the jury, complying with the requirements does eliminate that claim from their arsenal. You may need to be more creative about establishing the beneficial aspects of your product's design, which can be even more persuasive to a jury than simply telling them that some third-party not in Court endorsed your design.

J. Michael Kunsch, a shareholder in the Philadelphia office of Sweeney & Sheehan, is an AV Preeminent-rated attorney with a primary focus in the defense of complex litigation involving product liability, retail and hospitality, transportation, and commercial disputes. He is a graduate of the University of Arizona and the Villanova University School of Law and has been recognized from 2011-2024 as a Pennsylvania Super Lawyer®.

THE EVOLVING TEST FOR DELIBERATE INDIFFERENCE IN CORRECTIONAL HEALTHCARE

Taylor D. Brewer Moran Reeves Conn

In 1976, the United States Supreme Court established in the landmark case of *Estelle v. Gamble* the right to adequate health care for all incarcerated people. In creating this uniquely American right, the Court observed, "It is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself." For nearly 50 years, correctional health care providers have worked to comply with this law, often stretching the limits of human and financial resources as legislation shifts and public health initiatives emerge and fade.

Providing medical care consistent with the standard of care in the free world, to patient populations that do not mirror the free world, is challenging on the best day. The incidence of substance abuse disorder, for example, is approximately 12 times higher in the incarcerated population, and the incidence of Hepatitis C is about 10 times higher. Often, the newly incarcerated patient has not had access to routine preventive care for chronic conditions, thereby increasing the prevalence of issues like diabetes and hypertension in the correctional setting. Jail and prison administrators must keep apprised of advances in law and medicine applicable to their inmate patients, whose health concerns can vary widely by state, region, and geographic area.

Unsurprisingly, the definition of constitutionally adequate correctional health care also varies by jurisdiction, shaped by judges and juries who render verdicts according to the law, as well as personal experiences, beliefs, and feelings. Often the rulings and verdicts come from cases involving claims of deliberate indifference pursuant to 42 U.S.C. § 1983, such that case law becomes the guidepost for what, exactly, constitutes deliberate indifference.

By way of a small sample of recent deliberate indifference cases, in 2021, a Florida jury awarded $450,000 after finding jail providers delayed the inmate plaintiff's colostomy reversal and hernia repair sur-

geries by 11 months. *See Christmas v. Corizon, et al.* (M.D. Fla., April 22, 2021). In another deliberate indifference case a year later, a Michigan jury awarded $6.4 million to the estate of an inmate patient who died from complications of alcohol withdrawal. *See Jones v. County of Kent, et al.* (W.D. Mich., Dec. 2, 2022). Conversely, a Virginia jury found no deliberate indifference for a jail physician's allegedly improper interpretation of an EKG but awarded $4 million for negligence. *See Boley v. Armor, et al.* (E.D. Va., Dec. 9, 2022).

Courts mold the definition of deliberate indifference as well, most notably through the grant and denial of motions for summary judgment. For example, a court in Nebraska granted summary judgment in favor of four correctional officers by finding no evidence of objectively serious injuries, and no evidence the officers observed any injuries. *See Yanga v. Eastman, et al.* (D. Neb., Nov. 2, 2022). However, a court in Illinois denied summary judgment in a deliberate indifference case in which prison staff allegedly failed to safeguard an inmate even after the inmate handed staff a suicide note and threatened suicide. *See Lisle v. Welborn*, 933 F.3d 705 (2019).

In other words, that which a California jury deems to be deliberate indifference may not be that which a Florida judge deems to be deliberate indifference, and vice versa. Nevertheless, traditionally, a claim for relief under § 1983 requires proving:

> (1) The defendant had subjective awareness of the plaintiff's objectively serious medical need;
> (2) The defendant was aware there was a substantial risk of harm if that need was not addressed; and
> (3) Notwithstanding awareness, the defendant acted (or failed to act) anyway.

Of the approximately 2 million people incarcerated in the United States, over 450,000 are pre-trial detainees, entitled to the presumption of innocence until proven guilty. If the treatment at issue was provided to a convicted inmate, the 8th Amendment's prohibition of cruel and unusual punishment supplies the right. If the treatment at issue was provided to a pre-trial detainee, the 14th Amendment's due process clause supplies the right. The United States Supreme Court initially detailed this distinction in 2015. *See Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

In deliberate indifference cases, courts of appeal are split on whether the standard for proving a violation of the 8th Amendment differs from the standard for proving a violation of the 14th Amendment. While more Circuits continue to apply the traditional/subjective test than the objective test, the divide is becoming more equal, and in December 2023, the Fourth Circuit became the fifth of the 12 Circuits to adopt the purely objective test. The other Circuits that recognize the objective test are the Second, Sixth, Seventh, and Ninth.

Under the objective test, the pretrial detainee plaintiff suing under the 14th Amendment need not show that the defendant actually knew of and ignored a serious need – just that the defendant should have known of the need, and that the action was objectively unreasonable. Notably, for convicted prisoner plaintiffs suing under the 8th Amendment, the traditional test still applies.

Through its precedent-setting decision in *Short v. Hartman* 87 F.4th 593 (4th Cir. 2023), the Fourth Circuit clarified that a showing that the defendant knew of and disregarded a substantial risk to the inmate's health and safety is sufficient, but unnecessary, to satisfy the test for deliberate indifference. In *Short*, the Court found the defendant prison officials had actual knowledge of the patient's suicide risk, but that all the plaintiff needed to show was that the officials should have known of the patient's suicide risk. There, the decedent attempted suicide while incarcerated and died from her injuries two weeks later. The decedent's husband filed suit against the Sheriff's Office and several individual employees, alleging deliberate indifference towards his wife's risk of suicide.

Applying the elements of the purely objective rubric, the Fourth Circuit in *Short* held, as many courts have, that a substantial risk of suicide constitutes a serious medical need. As reported on the intake forms, Ms. Short had recently attempted suicide and was experiencing withdrawal and feelings of uselessness. As for the second and third elements of the test, the court found the defendants had actual knowledge because they processed the decedent's intake forms, and knew the excessive risk posed by inaction because prison policy clearly included prior suicide attempts and alcohol withdrawal as suicide risk behaviors. The court found the defendants took no steps to mitigate the risk, such as removing the bed sheets from the cell or re-locating the inmate from isolation to a populated cell.

Since *Short*, a handful of published opinions in the Fourth Circuit have applied the "new" objective test. Five days after publication of the *Short* opinion, in another deliberate indifference case involving inmate suicide, the Eastern District of Virginia applied the purely objective test and denied a defendant psychiatrist's motion for summary judgment. In *Lapp v. United States, et al.* (E.D. Va. Dec. 13, 2023), the prison psychiatrist discontinued antipsychotic medications when the patient returned from the mental health hospital. The psychiatrist testified in his deposition that he did so because the patient stated he no longer wanted to take the medications, but the psychiatrist documented he discontinued the medication "due to lack of current, clinical indication." One month after discontinuation, the patient committed suicide. The Court, applying the objective test, found an issue of fact as to whether the psychiatrist knowingly or *recklessly* disregarded the need for psychiatric medication. Following denial of summary judgment, the psychiatrist settled the case for $1.75 million.

To mitigate against the more plaintiff-friendly objective test, defendants in the Fourth Circuit are asserting and pursuing the defense of qualified immunity. For example, in a case involving opioid withdrawal, the Eastern District of North Carolina recently granted a motion for summary judgment in favor of several correctional defendants. *See Wright v. Granville County*, the Court (E.D.N.C. Mar. 29, 2024). The Court there found qualified immunity shielded the defendants from liability because at the time of the events, deliberate indifference required a subjective showing – that the defendants actually knew of and disregarded the risk – as opposed to the objective test requiring only that they should have known of the risk.

Other circuits may soon join the five that currently apply a purely objective test for deliberate indifference. Now more than ever, correctional staff must remain knowledgeable about identifying and treating the serious medical needs faced by incarcerated patients. Any correctional health care professional knows that for their patients, care inside the facility often far exceeds the care those patients receive outside the facility. Still, correctional health care must meet certain standards. After all, it is a constitutional right.

Taylor Brewer is a partner at Moran Reeves Conn in Richmond, Virginia, where she concentrates her practice on defending health care providers in medical malpractice and regulatory matters, and advising health care professionals of all kinds on risk management issues.

FOREIGN DISCOVERY: WHERE TO START?

Theodore J. Folkman Rubin and Rudman

"I need to subpoena a witness in London for a deposition." "I need to get documents from a company in Munich." Litigators face such situations more and more often, but often, they don't know where to start. The law of international judicial assistance is rich and complex, but there are a few points every in-house lawyer who hires litigators should know.

1. AMERICAN COURTS GENERALLY CANNOT COMPEL THIRD PARTIES ABROAD TO TESTIFY OR TO PRODUCE DOCUMENTS.

We're familiar with this rule in state court litigation, where lawyers understand the need to obtain a subpoena in the state where the witness lives. Prior to the 2013 amendments to the Federal Rules of Civil Procedure, federal court litigators knew that federal subpoenas for witnesses in another district should be issued in the name of the court where the witness was located. The same principle that applies in interstate cases applies in international cases. A U.S. subpoena generally can be served only within the United States. So, obtaining evidence abroad only rarely means serving a U.S. subpoena on a witness abroad.

2. FOREIGN COURTS CAN COMPEL THIRD PARTIES WITHIN THEIR JURISDICTION TO PROVIDE EVIDENCE.

Thus, often the right thing to do is to ask the foreign court for assistance, or more precisely, ask the American court to ask the foreign court. While the U.S. is liberal about such things and allows foreign litigants to ask U.S. courts for help directly, most foreign courts are not so liberal and will only respond to requests from the U.S. court itself. Many countries, including the United States, are parties to the Hague Evidence Convention, a treaty that provides a simplified means for making such requests. The basic procedure is to draft the letter of request, make a motion in the U.S. court to issue the letter of request, and then transmit it to the central authority that the foreign state has designated to receive the request. The authority then—assuming the letter of request passes muster under the Convention—will pass the request on to the appropriate court, which will take the evidence and return it to the U.S. In non- Convention countries, the procedure is similar, but the U.S. court issues letters rogatory instead, and there is no central authority designated to receive them. In some cases (notably Canada), the U.S. lawyer, working with a foreign lawyer, can approach a court directly for assistance. In other instances, the letters rogatory must be transmitted through the diplomatic channel—a costly and time-consuming process that should be a last resort.

3. YOU MAY NEED PERMISSION, EVEN WHEN THE WITNESS IS WILLING.

Why go through all this trouble if the witness is willing to testify? Why not just hire a stenographer and take the deposition in a law office abroad, or even take it by video? Some countries, such as the United States, have no objection to foreign lawyers taking evidence in their territory without permission. But in many countries, particularly civil law countries, taking evidence without permission is forbidden or even criminal, even when the witness is willing. In Evidence Convention countries, the Convention provides that a commissioner can take evidence from a willing witness, provided he has the foreign state's permission (unless the foreign state has declared that no prior permission is required). Procedures for requesting that permission vary, but in a typical case, a U.S. court will issue a commission to take the evidence, and then the commissioner or counsel representing one or both of the parties, with help from counsel in the foreign state, will request permission from the appropriate court or ministry.

4. YOU CAN'T ALWAYS GET WHAT YOU WANT.

Although the introduction of the idea of proportionality into U.S. discovery practice has, at least in theory, reined in the scope of American domestic discovery practice, the scope of our discovery practice is unheard of abroad, even in other common-law countries. Many Evidence Convention countries have declared, as the Convention allows them to do, that they will not execute requests for the pretrial discovery of documents at all or that they will only execute requests that seek documents identified with sufficient particularity. Letters of request must be drafted with these limitations in mind, and counsel have to make peace with the reality that they may not get the breadth of documentary evidence they are used to getting in domestic cases. Lawyers have to temper their expectations about testimony, too. The default in many countries is that the judge questions the witnesses or at least leads the questioning. Many countries do not routinely administer oaths or transcribe testimony verbatim. The Convention allows U.S. courts to request that the foreign court adopt special procedures for taking testimony, and thus a letter of request can ask for the use of procedures more familiar to U.S. lawyers. But the Convention does not require foreign courts to agree to the special measures requested if they are incompatible with the foreign law or if they are impractical for the foreign court to use. In practice in many countries, the foreign judge will ask the questions and counsel—either the U.S. lawyers or foreign lawyers working with them—may be able to ask other questions or to follow up. Fortunately, U.S. courts will make allowances when considering whether evidence taken abroad under foreign rules is admissible. But that flexibility is not limitless. Part of the practice of international judicial assistance is appreciating the inherent limitations you face, which vary from country to country, and thinking hard about the balance between what you want, what you need, and what you can get.

5. START EARLY.

In many Convention countries and some non-Convention countries, it's reasonable to expect a three-to-six-month timeframe to obtain evidence. In some countries, particularly non- Convention countries where a traditional letter rogatory is necessary, the process can take more than a year. The problem of time is made worse by the need, in some cases, to sequence discovery—for instance, to need some discovery domestically in order to be able to make the document requests in your letter of request specific enough to meet the foreign court's standards. So, litigators should not delay thinking about discovery abroad.

6. WORK WITH FOREIGN COUNSEL.

It is always a good idea to retain lawyers in the foreign jurisdiction. In many cases, once you have the letter of request or the letters rogatory, it is possible to approach the foreign court directly rather than transmitting the request through governmental or diplomatic channels. But in such cases, you will likely need a foreign lawyer to prepare the application and appear at any necessary hearings. If the discovery is opposed by the foreign witness, then you will have to have counsel to argue the issue. And sometimes, the foreign lawyers, not U.S. counsel, may have to take the lead in questioning the witnesses.

7. WORK WITH KNOWLEDGEABLE U.S. COUNSEL.

Ideally, the lawyer you hire to handle a case will be knowledgeable about taking foreign discovery. But if he or she is not, a cost/benefit analysis will show that often it makes sense to outsource some of the work of obtaining evidence abroad to U.S. lawyers with experience in the area. For lawyers unfamiliar with the process, the cost in time and money of figuring out what to do and how to do it can make obtaining the evidence uneconomical in the context of the lawsuit. Consider suggesting that litigation counsel outsource the drafting of the letter of request and coordination with the foreign lawyer to a lawyer who does not need to learn the field from scratch and who can do the work much more efficiently than you could. Of course, even if you bring on a lawyer to consult, litigation counsel, and ideally the foreign lawyer, will need to be involved in drafting the letter of request since you know your case and what you need and since the foreign lawyer knows what the foreign courts will and will not do.

International judicial assistance is more important today than ever before. Knowing the basics can help you make decisions that will help your team get evidence it couldn't get in any other way.

Ted Folkman is a partner at Rubin and Rudman in Boston. He is the author of International Judicial Assistance (2d ed. 2016) and of the Letters Blogatory blog. He is a past co-chair of the International Law Section of the Boston Bar Association and a member of the American Law Institute.

HOW CAN LEGAL DESIGN MAKE PRIVACY POLICIES MORE EFFECTIVE?

Viktorija Stančikė WIDEN

THE PROBLEM WITH PRIVACY POLICIES

Articles 13 and 14, along with other provisions of the EU General Data Protection Regulation (the GDPR), require businesses to provide individuals with comprehensive information about the processing of their personal data. One of the most important instruments for informing individuals about the handling of their personal data is privacy notices, often referred to as privacy policies. Since the GDPR came into effect six years ago, privacy policies have become a standard feature on nearly every website. Initially, compliance with transparency requirements was poor because many privacy policies used vague language. For instance, they described data processing purposes merely as "internal administration" or "business purposes" and stated that data would be stored "no longer than is necessary to achieve the specified purposes," without clear definitions.

Although such issues still occur, they are now much less prevalent. There is a clear trend towards crafting privacy policies that are more detailed and precise. However, it would be too early to assert that individuals are properly informed about the processing of their data. Only a small fraction of website visitors actually read these privacy notices, let alone understand them. The privacy notice link is clicked by a small percentage of visitors, and those who do visit the page spend so little time there that it is challenging to claim genuine access to and understanding of the information provided.

The reason behind this may be that, in practice, the focus is more on achieving formal compliance rather than genuinely informing individuals. It appears that privacy policies are crafted more to satisfy the requirements of supervisory authorities rather than to inform individuals whose personal

data is being processed. Organizations are creating long, precise, and detailed privacy policies but pay less attention to how such a large amount of information is presented to individuals and whether they are capable of understanding it.

Such practices are hardly compatible with the GDPR's concept of transparency, which the European Data Protection Board emphasizes as "user-centric rather than legalistic" in its guidelines on transparency. Therefore, when deciding between absolute legal accuracy and completeness of information versus enhanced readability with minor compromises in precision, the latter is advisable. The main purpose of privacy notices is to help individuals understand how their personal data is processed rather than just to avoid fines from supervisory authorities. Moreover, penalties can be imposed not only for missing some kind of information in the privacy policy but also for presenting information in a way that is too complex and fails to consider the understanding capabilities of the intended audience.

Balancing the comprehensiveness of information with its understandability may not be an easy task. However, there are effective methods to make privacy notices more "human" while ensuring they meet the requirements of the GDPR. This balance can be achieved through the application of legal design principles in the creation of privacy notices.

WHAT IS LEGAL DESIGN?

Legal design is an approach that applies design thinking principles to the field of law, placing the user at the center of the process. The main goal of legal design is to make the law more understandable and engaging to everyone, not just legal professionals. Legal design goes far beyond document or information design. It is also used to enhance the effectiveness of legal systems, processes, or services.

Legal design emphasizes the necessity to:

- Understand the characteristics and needs of the recipients of the legal information (to empathize with the users of the legal system).
- Prepare tailored information that meets these needs using clear, simple language, structured formats, and visual elements beyond mere text.
- Engage in continuous iteration by testing and refining the effectiveness of documents or solutions based on feedback.

HOW CAN LEGAL DESIGN MAKE PRIVACY NOTICES MORE EFFECTIVE?

Legal design principles can be effectively applied to privacy policies using the following strategies:

AUDIENCE ANALYSIS. To ensure that a privacy notice is comprehensible, it is essential to understand the target audience and who will be reading the document. While there are instances where the notice might target professionals with specialized knowledge, these cases are relatively uncommon. Typically, the language should be clear and straightforward, accessible to individuals with a basic education. For more vulnerable groups, such as children, the language should be further simplified and can include visual elements or even comics to aid understanding and make privacy notices more fun. Of course, this should be done carefully without distorting the meaning of the message.

FOCUS ON STRUCTURE. A lengthy, 20-page PDF document that even lacks keyword searchability is likely to be read only by supervisory authorities, competitors, and curious lawyers. The information architecture must be more user-friendly to ensure the privacy notice effectively reaches and engages its intended audience. Right from the outset, it should be immediately apparent where specific information can be found. For larger documents, it's beneficial to break down the content into separate sections that address distinct issues, incorporate techniques like jump links to facilitate navigation, and present information in clearly defined layers. Utilizing tools to identify the information most commonly sought by readers and prominently displaying this information at the beginning of the policy can be highly effective. Additionally, creating a Frequently Asked Questions (FAQ) section that addresses these common queries can further enhance the policy. On the other hand, it is crucial to maintain a balanced structure to ensure that important information is not obscured. For instance, it is advisable to avoid configurations where only positive details are highlighted in the initial layers while critical information about risks, data transfers to third countries, etc., is relegated to subsequent layers. Such practices can mislead the reader and diminish the transparency of the policy.

TEXT ISN'T THE ONLY COMMUNICATION METHOD. It's important to remember that information can be presented in a variety of ways, including illustrations, icons, videos, and even interactive game elements. While these visual and interactive formats cannot completely replace written text, they serve as excellent complements, significantly enhancing the understandability of information.

"TESTING" PRIVACY POLICIES. To make privacy policies more effective, it's beneficial to "test" them before they go live. This doesn't necessarily require extensive user research. A simpler approach involves colleagues who are less familiar with data protection laws reviewing the draft policy. They can provide feedback on its clarity and suggest enhancements to make it more user-friendly or engaging. AI tools can also provide valuable insights and enhance the privacy policy. After publication, it is beneficial to regularly review the metrics such as how often the policy is read, the time spent on it, which sections are most engaging and so on. This data can then be used to further improve the privacy notice.

EFFECTIVE MANAGEMENT OF CHANGES. Privacy policies usually contain a fictitious provision that the controller can change the privacy policy at any time, so the visitor should re-read it from time to time. Given that only a small proportion of visitors to a website even turn to the privacy policy page, the chances that they will go to see if and what has changed are close to zero. To help data subjects navigate through the changes, changes to the privacy policy could be accompanied by a notice in the website's news section that summarizes the changes, or by other measures to draw the attention of data subjects to the substantive changes.

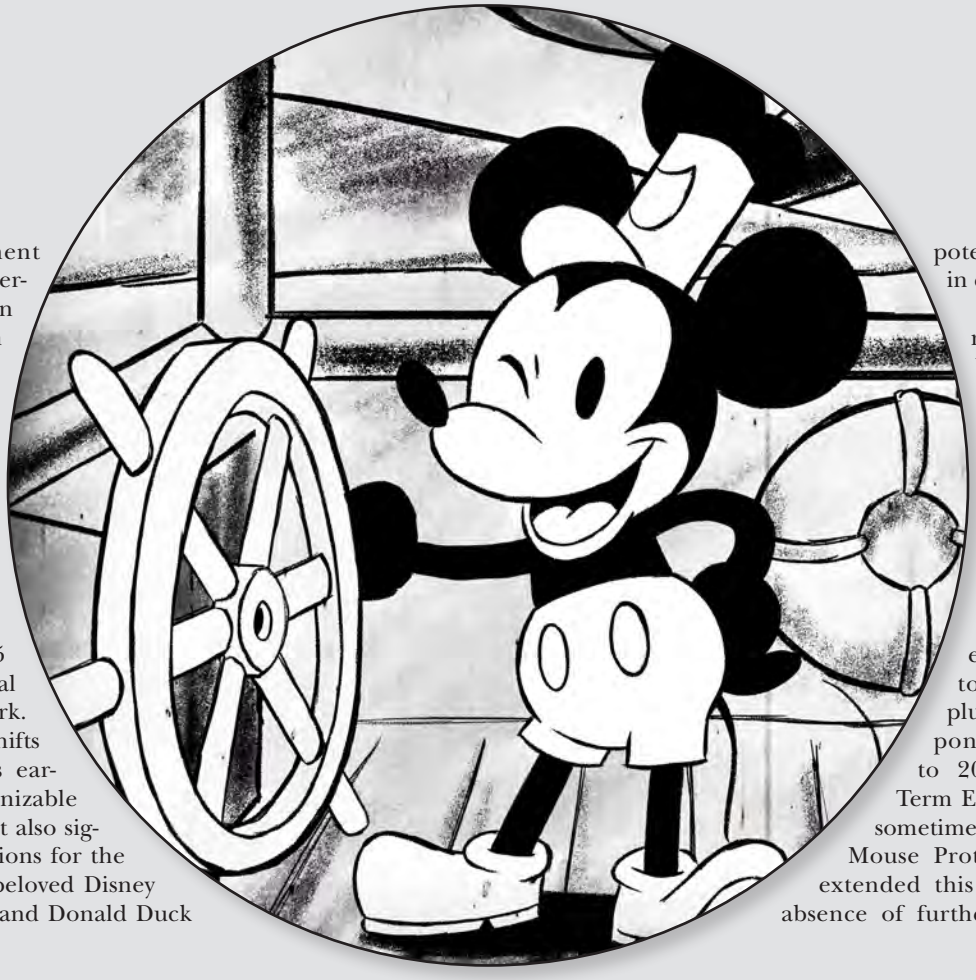
CONCLUSION

These strategies are just examples of how legal design can make privacy notices more reader-friendly. However, there is no universal or one-size-fits-all practice for what a good privacy notice should look like, and it probably cannot be. The choice of specific measures to make privacy notices more effective will depend on the nature of the data subjects (the audience), the scope of the privacy notice (how many issues the notice is intended to cover), the culture of the organization and nature of its activities, the functionality of the website, and other relevant factors.

Viktorija Stančikė is a senior associate at WIDEN in Lithuania. She has over a decade of professional experience and specializes in data protection, intellectual property, and technology law. Viktorija is also a keen enthusiast of the legal design movement.

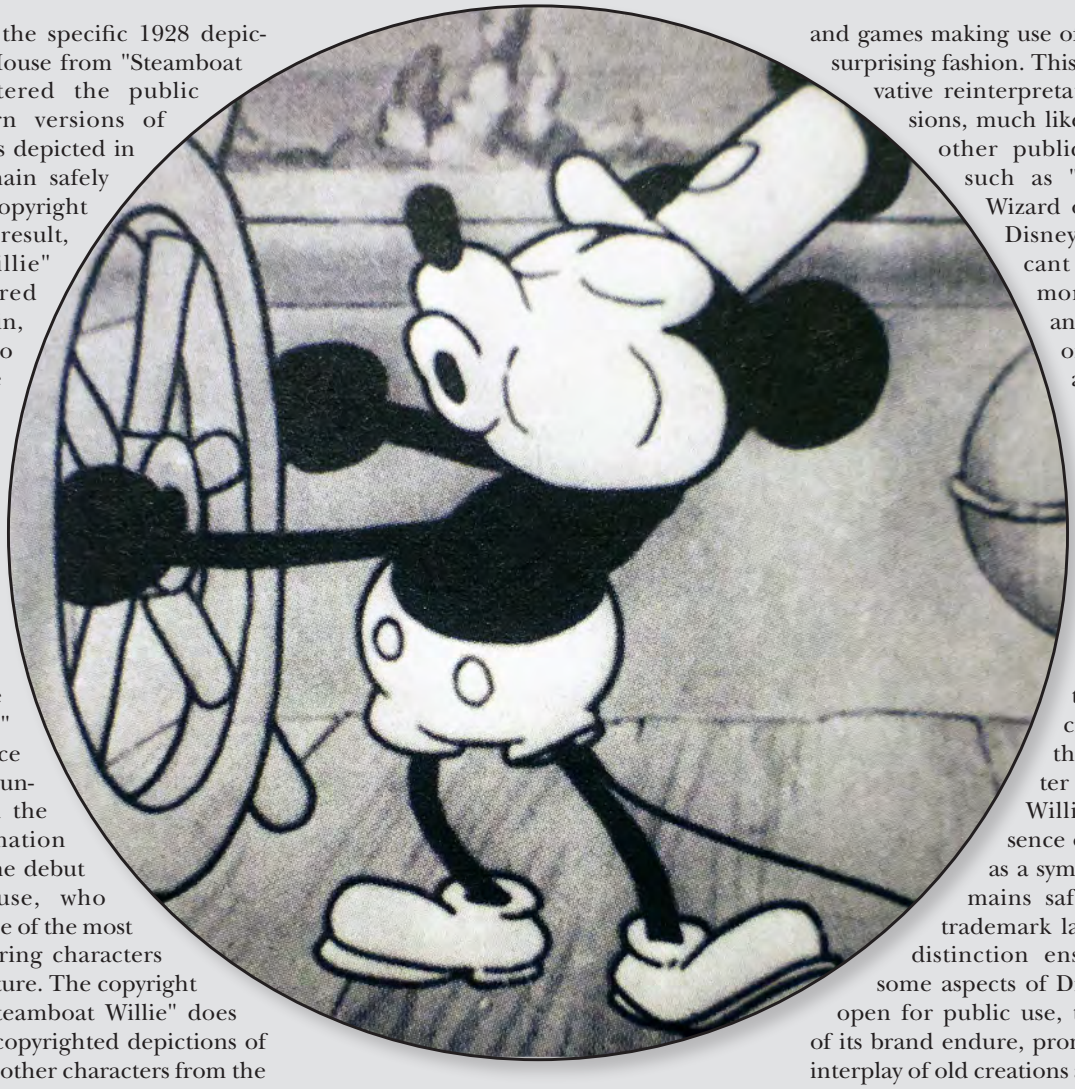
DISNEY'S "STEAMBOAT WILLIE" ENTERS THE PUBLIC DOMAIN, BUT MICKEY MOUSE REMAINS PROTECTED

Caleb P. Knight and **L. Elizabeth King** Flaherty Sensabaugh Bonasso PLLC



A pivotal moment occurred in the entertainment industry on January 1, 2024, when Disney's "Steamboat Willie," the animation that first introduced the world to Mickey Mouse, entered the public domain. This transition is due to U.S. copyright laws stipulating that the rights to a character expire 95 years after the original publication of the work. This event not only shifts how one of Disney's earliest and most recognizable works can be used but also signals broader implications for the industry, with other beloved Disney characters like Pluto and Donald Duck potentially following suit in coming years.

Initially, the copyright for "Steamboat Willie" was set to expire in 1983, reflecting the existing copyright laws at the time, which offered protection for 56 years. However, the Copyright Act of 1976 significantly altered these terms, extending protection to the author's life plus 50 years, thus postponing the expiration to 2003. The Copyright Term Extension Act of 1998, sometimes dubbed the "Mickey Mouse Protection Act," further extended this term. However, the absence of further extensions means



that, as of now, the specific 1928 depiction of Mickey Mouse from "Steamboat Willie" has entered the public domain. Modern versions of Mickey Mouse, as depicted in later works, remain safely under Disney's copyright umbrella. As a result, "Steamboat Willie" has now entered the public domain, meaning it is no longer under the exclusive control of Disney and can be freely used by anyone without requiring permission from the copyright holders.

This milestone is significant because "Steamboat Willie" is not just any piece of media; it's a foundational work in the history of animation and represents the debut of Mickey Mouse, who would become one of the most iconic and enduring characters in global pop culture. The copyright expiration of "Steamboat Willie" does not affect other copyrighted depictions of Mickey Mouse or other characters from the film, which remain protected under more recent copyright filings.

UNDERSTANDING COPYRIGHTS AND TRADEMARKS

Understanding the nuances of intellectual property laws is crucial. While Disney has lost its copyright for "Steamboat Willie," this is separate from a trademark. Disney also has a registered trademark for Mickey Mouse. Copyrights, which cover original works of authorship, like movies and books, are time-limited. Currently, any work published before 1929 is public domain as of January 1, 2024. Works published between 1929 and 1977 enjoy 95 years of protection, and those published post-1978 are protected for 70 years following the author's death.

Trademarks, however, protect words, symbols, and designs that identify a brand's goods and can remain in force indefinitely, provided they continue to be used in commerce. Beyond being a character in films, Disney's Mickey Mouse is a trademarked symbol of the company. While copyrights expire, trademarks do not, offering a different layer of ongoing protection.

One character, such as Mickey Mouse, might receive copyright and trademark protection. Mickey Mouse has been featured in movies and other works but is also a well-known symbol of Disney. The copyright and trademark each provide separate types of protection simultaneously, so long as both are in effect at the same time. Once a copyright expires, the trademark can continue. Because Disney has a registered trademark for multiple images of Mickey Mouse, it will still receive protection for these trademarks under trademark law.

THE IMPLICATIONS OF "STEAMBOAT WILLIE'S" PUBLIC DOMAIN STATUS

The entry of "Steamboat Willie" into the public domain is not just a historical footnote; it opens opportunities for creative use of this version of Mickey Mouse without Disney's permission. In fact, news of the copyright expiration was met with several announcements of upcoming movies and games making use of the character in surprising fashion. This can lead to innovative reinterpretations and expansions, much like those seen with other public domain works such as "The Wonderful Wizard of Oz." However, Disney retains significant protections for more recent works and the broader use of Mickey Mouse as a trademarked brand icon.

Despite the loss of copyright for "Steamboat Willie," Disney continues to hold a robust portfolio of protected works and symbols. The future may see new creations involving the iconic character from "Steamboat Willie," but the essence of Mickey Mouse, as a symbol of Disney, remains safeguarded under trademark law. This nuanced distinction ensures that while some aspects of Disney's legacy are open for public use, the core symbols of its brand endure, promising a complex interplay of old creations and new interpretations in the years to come.

Caleb Knight is a member in Flaherty's Charleston office. He handles a broad array of corporate and health law topics, including mergers and acquisitions, governance, employment law, restaurant/brewery and retail issues, and healthcare regulatory compliance. Caleb may be reached at 304.347.4242 or cknight@flahertylegal.com.

Elizabeth King is an associate in Flaherty's Charleston office. She focuses her practice on business and corporate matters, commercial litigation, and bankruptcy/creditors' rights. She also provides legal counsel to various healthcare clients. She may be reached at 304.347.4207 or eking@flahertylegal.com.

BUXOM BARMAID MAKES ANOTHER ROUND, THIS TIME WITH NIL

Kristina J. Kamler Baird Holm LLP

Name, image, and likeness ("NIL") rights have been gaining attention since the U.S. Supreme Court confirmed certain NCAA student-athlete compensation rules violate the Sherman Act in 2020.[1] This has prompted an uptick in the proposal and adoption of right of publicity laws, the legal backbone of NIL rights.[2] Federal and/or state court decisions involving NIL in the past four years have also doubled those reported from 2015 to 2020.[3] Despite this increased attention, 15 states still have no statutory scheme governing rights of publicity and there is no federal legislation directly on point.[4] Few cases demonstrate the market uncertainty this creates and burden it places on courts better than the case of Iowa's Buxom Barmaid.

Long before Caitlin Clark's outstanding athletic performances and record-breaking endorsement deals, Ruth Bisignano ("Bisignano") drew crowds to Des Moines, Iowa with a unique performance of her own. Balancing two-pint glasses of beer on her bosom and delivering them to customers, crowds flocked to see Bisignano do her shimmy in the early 1950s. Korean war veterans diverted their planes to Des Moines to grab a beer off Bisignano's bosom. Famous Hollywood director, Cecil DeMille (who watched the show twice), encouraged Bisignano to charge more for her services. Authorities were not as thrilled about the spectacle. Local police arrested her for indecency and the IRS charged her a burlesque tax. Unphased, Bisignano charged three times the normal price for a glass of beer. And so, Bisignano was able to own a bar in the 1950s when it was unusual for a woman to work outside the home, let alone make a career out of risqué behavior. Married 16 times to nine different men, Bisignano's marriages and divorces were also highly publicized.

The sensational headlines Bisignano generated were nothing short of eye opening:

"POLICE NAB RUTHIE FOR 'SHAKING THE SHIMMY' IN TAVERN"[5]

"HER BEER-BOSOM ACT GETS AHEAD"[6]

"BALANCING BEER MAID LOSES HUBBY AND BAR"[7]

As all good things must come to an end, so did the frenzy surrounding Bisignano. By 1970, Bisignano closed her bar. Thereafter, she lived a quiet life with her last husband, Frank Bisignano ("Frank"), until her death in 1993. Frank passed away three years later. They both died without children and without wills.

From 1997 to 2012, only one publication mentioned Bisignano; a 2006 book: "The Life and Times of the Thunderbolt Kid," a memoir by Bill Bronson, which discussed Bisignano in just three paragraphs. Recognizing Bisignano's story had transformed from that of a public nuisance to that of a trailblazer who could inspire other women to break barriers, Exile Brewing

Company ("Exile") sought to honor her. After searching for someone claiming to own Bisignano's NIL and not locating anyone, Exile named a beer "RUTHIE" as a tribute to Bisignano in 2012. Thereafter, some relatives of Bisignano came forward, assuring Exile that Bisignano would have loved the tribute. In 2019, the beer earned the title "Official Craft Beer of the Iowa State Fair." In November 2019, Exile filed an application to register the name "RUTHIE" with the U.S. PTO; the mark was registered to Exile on March 16, 2021.

In 2020, one of Frank's nephews, Fred Huntsman ("Fred"), reopened both of the Bisignanos' estates (the "Estates"), claiming he inherited Bisignano's NIL through intestate succession. Suit for misappropriation of Bisignano's NIL was filed against Exile on June 1, 2020. Because there was no statutory or common law governing rights of publicity in Iowa, the Estates' litigation against Exile ran the gamut of Iowa's Probate Court, State District Court, Iowa Supreme Court, Federal Court, and U.S. PTO.

First, the reopening of Bisignano's Estate was litigated in the Probate Court. Exile argued the Estates could not be reopened due to jurisdictional limitations in Iowa's Probate Code. The Probate Court held Exile was an interloper and declined to close the Estates due to a jurisdictional exception for the discovery of "new property." Although the Iowa Supreme Court affirmed the decision on appeal, it also held that reopening the Estates did not, in and of itself, equate to a finding that Bisignano's NIL existed, the NIL passed to Fred under Iowa's intestate succession laws, or the NIL is an "inheritable" right under Iowa law.[8]

Parallel to the probate proceedings, the case moved forward in the District Court for Polk County, Iowa on a common law right of publicity and trademark causes of action. On cross motions for summary judgment, the District Court adopted a common law right of publicity but held whether the Estates abandoned or consented to Exile's use of Bisignano's NIL was a jury question. This was, in part, because Fred moved to Washington in 1983, did not attend the Bisignanos' funerals, and posted Exile's "RUTHIE" beer marketing materials on his own social media. Said Court also held there was no applicable First Amendment privilege due to the commercial nature of Exile's speech and despite the clear intent to spark discussions about women's rights.

Following the District Court's ruling, the Estates filed an amended complaint, removing their trademark infringement claim, conceding the Estates could not own a trademark because they were not in the business of selling any goods or services. The trademark claim was replaced with a false endorsement and sponsorship claim under the Lanham Act. Exile promptly removed the case to the U.S. District Court for the Southern District of Iowa based upon federal question jurisdiction.

Around the same time, the Estates filed a Petition to cancel Exile's trademark registration, claiming the mark could not be registered under the Lanham Act because it is in reference to a deceased person. Said proceedings were stayed, pending the resolution of the District Court case.

After another 18 months of litigation and on cross motions for summary judgment, the U.S. District Court for the Southern District of Iowa issued a lengthy ruling:[9]

> 1. Holding Copyright Act and Lanham Act preemption defenses must be specifically pled, when other jurisdictions deciding more recent cases hold the defense can be raised via a Rule 12(c) motion for failure to state a claim.
>
> 2. Acknowledging a jurisdictional split but holding the Estates have standing to bring a false endorsement claim under the Lanham Act when engaged in no commercial activity.
>
> 3. Dismissing the Estates' Lanham Act false endorsement/sponsorship claim because said Act expressly provides that a mark is abandoned through discontinued use and no intent to resume use (three consecutive years of non-use gives rise to a presumption of abandonment).
>
> 4. Holding the Iowa Supreme Court would adopt a common law right of publicity, that said right descends through intestate succession, and the Estates have standing to bring Bisignano's right of publicity claims under Iowa's common law.
>
> 5. Refusing to apply the laches doctrine to the Estates' common law claims on the basis that there is an applicable five-year statute of limitations and barring the Estates from recovering damages accruing prior to June 1, 2015.
>
> 6. Holding the issue of whether the Estates abandoned or waived their claims, as well as acquiesced in Exile's use, was a question for the jury.

Ultimately, the parties reached a settlement before the case proceeded to trial on the abandonment, waiver, and acquiescence issues.[10]

But the dispute demonstrates the need for statutory laws governing NIL rights. In addition to involving two issues for which there are federal court jurisdictional splits, the case involved the ever-evolving area of First Amendment rights to free speech. In fact, the U.S. Supreme Court is now set to decide a case outlining the boundaries of free speech in the context of commercial and political speech. In re Elster, 26 F.4th 1328, 1333 (Fed. Cir. Feb. 24, 2022) (cert. granted June 6, 2023) (evaluating whether an individual has a first amendment right to trademark the slogan "TRUMP TOO SMALL" for use on t-shirts and apparel). So, when the Supreme Court issues its Elster opinion, consider whether Exile had a first amendment right to use its beer bottles, cans, and packaging to discuss the deceased buxom barmaid's impact on the bar industry. Or, if Exile should be required to pay a fee to spark discussions about women's rights that are based upon a deceased historical figure. Finally, consider whether legislation is better suited to resolve such disputes and call on your legislatures for a solution.

Kristina J. Kamler of Baird Holm LLP in Nebraska has been a litigator for more than a decade, defending a broad range of disputes from rapid response and pre-litigation phases through trial and appeals. Her practice has broadly ranged from basic premises liability and auto accident claims to complex gas explosion, toxic tort, sexual assault, intellectual property, construction defect, professional negligence, commercial contract, and third-party insurance claims.

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3 Westlaw search for the term "name, image, and likeness" in all state and federal databases, search completed March 10, 2024. Results available at: https://1.next.westlaw.com/Search/Results.html?query=Name%2C%20image%2C%20and%20likeness&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad6ad3e0000018e293f57da92a38e8b&searchId=i0ad6ad3e0000018e293f0ca78ce3d2d8&transitionType=ListViewType&contextData=(sc.Search)
4 Right of Publicity, available at https://rightofpublicity.com/statutes (last accessed March 10, 2024).
5 Sioux City Journal, Sioux City, IA, May 5, 1953.
6 Daily News, New York, NY, June 4, 1953.
7 Daily News, New York, NY, Jan. 6, 1954.
8 *Matter of Estate of Bisignano*, 991 N.W.2d 135 (Iowa May 26, 2023).
9 *Estate of Bisignano v. Exile Brewing Co.*, 2023 WL 7167889 (S.D. Iowa Sept. 26, 2023).
10 *Id.*

VERY SOON, COMPANIES WILL HAVE TO DEFEND THEIR AI'S DECISIONS TOO

David Metz and **Jorge Monroy** IMS Legal Strategies

In the last 30 years, artificial intelligence (AI) has transformed from software that could almost beat a chess world champion to today's systems that can recognize language and images at a human level, draft entire articles in seconds (not this one!), generate images and videos nearly indistinguishable from real ones, and convincingly voice a fake Oasis reunion album.

AI's emergence as a capable tool for business and personal use has spawned particular media attention. In turn, critiques and thought pieces have focused on exploring its use, preventing its misuse, and conceptualizing how different sectors can and should adapt to its inevitability. This is certainly the case in the legal field, as local, state, national, and international law organizations continue to showcase the possibilities of AI and how it will affect litigants and decision-makers. Key to any industry discourse is answering the question: "What does AI mean for us?"

We have heard much discussion in the legal field regarding the admissibility of AI-generated evidence, jurors' trust in said evidence, and its current and future uses in attorney preparations and courtroom proceedings. However, less focus has been placed on what AI used in business settings will do to the fact patterns of corporate litigation. Soon enough, lawsuits concerning product liability, employment, antitrust, intellectual property, and more will begin to implicate businesses' use of AI — an immensely powerful but largely obscure technology — in their fateful actions.

WHEN COULD AI'S USE IN BUSINESS LEAD TO LITIGATION?

Authors are already up in arms about the dubious way AI systems have been "trained"—the process of feeding vast amounts of data to the algorithm, analyzing the results, and iterating accordingly[1] — on mountains of their copyrighted work.[2] And although it is difficult to predict exactly what forms AI will take as it further integrates with businesses, be it expanded or limited for specific needs, one can easily imagine a slew of plaintiff claims waiting to hit the pipeline:

- AI tasked with fielding job candidates did so in a discriminatory fashion.
- AI logistics software calculated an unsafe route, schedule, or load size, resulting in a tragic trucking accident.
- AI diagnostics software failed to recommend a test that would have caught a patient's fatal condition.
- AI set anti-competitive pricing, manufactured a design defect, infringed a patent, or violated consumers' data privacy.[3]

As we track trends in juror attitudes and overall decision-making, we have a keen interest in determining how AI's inclusion in these classic litigation genres will interact with jurors' views, biases, and, ultimately, verdicts. The first step to answering this question will be to carefully analyze the attitudes and experiences they develop concerning AI. In the coming years, we will see fewer jurors who have never used it and more whose lives have been changed or utterly transformed by it—for better or for worse.

HOW DOES THE CURRENT JURY POOL FEEL ABOUT AI?

Public views about AI and its implications have garnered much inquiry in recent years, with the Pew Research Center diligently tracking relevant attitudes since 2021.[4] To get a pulse on where jurors stand now, arguably at the dawn of the AI revolution, IMS Legal Strategies also surveyed a national sample of 210 jury-eligible citizens from late 2023 to early 2024 to gauge their experiences and attitudes toward artificial intelligence.

Echoing the findings of Pew's 2023 poll, our sample of jury-eligible individuals exhibited a solid baseline of familiarity with AI. Pew reported that 90% of its respondents have heard of AI; our own re-

search indicated that 74% of jury-eligible respondents are somewhat (56%) or very (28%) familiar with AI and its applications. The introduction of chatbot services such as ChatGPT has undoubtedly driven much of that familiarity. Although both surveys revealed that most people have heard of ChatGPT (58% of the Pew sample and 68% of our sample), our research found that a considerably smaller percentage of people (38%) have actually used it or similar chatbot services. Granted, these numbers will likely rise, and associated attitudes will evolve, as media attention and industry adoption continue to increase awareness and accessibility.

At the same time, apprehension about the increasing use of artificial intelligence in our daily lives has seen a surge. In Pew's 2023 poll, 52% of respondents expressed being "more concerned than excited" about AI, compared to 37% in 2021 and 38% in 2022. Our own poll landed at 41% on that measure—though, perhaps most notably, both of these most recent polls found that a mere 10% of respondents were "more excited than concerned" (the remainder reported both emotions in equal parts).

Where is this unease coming from? A portion surely stems from various reports highlighting AI's current shortcomings (e.g., its willingness to present falsities as fact [generously dubbed "hallucinations"] or its potential for discrimination[5]), further compounded by anxiety about how it might kill jobs or otherwise encroach on employees in the workplace. Indeed, Pew found that individuals already have strong opposition to AI being involved in hiring practices, such as reviewing job applications (41% oppose, 28% favor, 30% unsure), and an even larger proportion of individuals oppose AI making final hiring decisions (71% oppose, 7% favor, 22% unsure). Though there were some areas where opposition to AI was less pronounced—including monitoring workers' driving behavior, analyzing how retail workers interact with customers, or evaluating how well people are doing in their jobs—a negative sentiment prevails, particularly when it comes to employers' ability to surveil employees. How corporations elect to use AI moving forward will greatly impact this outlook by shaping employees' individual experiences and resulting attitudes.

WHAT DOES AI MEAN FOR DEFENDANT CORPORATIONS?

Unknowns abound as businesses consider incorporating these new technologies into their day-to-day practices. Given we are still in the nascent stages of AI's rollout, a daunting variety of questions awaits companies that face litigation in the future. For example:

- What role will experts play in educating the jury on the inner workings of artificial intelligence? In arguing the reasonableness of AI's decision-making and its role in causation or a defendant's negligence? How much credence will jurors lend to these types of experts? Whether in-house or external, such experts may be viewed as akin to Human Resources directors in employment litigation or Persons Most Knowledgeable (PMKs) in product liability matters. Their ability to simplify the processes and capabilities of artificial intelligence to the layperson juror may prove paramount to the defense's position. Of course, if AI developers themselves cannot fully account for how the systems work,[6] how can experts?
- If a human has been removed from the equation, who will jurors believe is most responsible when an AI "fails?" Will every AI-led decision, no matter how small, require a human to sign off and shoulder responsibility for it? Who will jurors perceive as the "decision-maker" as far as liability is concerned? The company as a whole? The executive who instated the technology? The tech who oversees it (if any)? Jury psychology suggests that blaming an AI alone would not be a cognitively satisfying outcome—AI cannot be punished or face justice. Yet, what if the AI itself eventually becomes the most conversant party about key case issues and decisions?
- Might the original developer of the AI system in question, or at least the party who "trained" it, serve as a convincing "empty chair" to help mitigate a defendant's perceived fault? What contracts will we see formed between the AI developer and business customer to address potential liability?
- Will the prevalence of powerful AI tools exacerbate juror hindsight bias issues regarding what companies could or should have done or known? To what extent will attorneys and experts, more than ever, need to help jurors keep track of what features were and were not available at the time?
- And, of course, how will juror risk profiles change for purposes of jury selection?

IN CONCLUSION

The fact that the questions above may only be the tip of the iceberg reflects the magnitude of the changes at our doorstep. At this point, we cannot even know all the questions worth asking about our shared future with AI, let alone have all the answers. Barring any widespread regulation regarding its use or its role in litigation, however, it is safe to say that jurors' evolving views will set the tone as we approach a novel generation of lawsuits. As the profuse considerations about its effect on corporate litigation come into focus, we plan to conduct periodic follow-up studies for a deeper dive into how jurors might evaluate these hazy new issues of AI-related liability.

David Metz brings a marketing and storytelling perspective to his role as an associate jury consultant at IMS, helping lawyers understand the juror audience and the messaging required to reach them. Clients benefit from his ability to develop themes and strategic recommendations based on rigorous jury research analysis.

IMS jury consultant Jorge Monroy specializes in advanced quantitative statistical methods, leveraging data from jury research exercises and community attitude surveys to inform and enhance counsel's trial strategies. He particularly enjoys developing juror profiles for voir dire and crafting supplemental juror questionnaires.

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MASS TOXIC TORTS WATCH LIST

(other than plaintiffs' TV ads)

Paul V. Majkowski Rivkin Radler LLP

We are all familiar with the TV ads run by members of the plaintiffs' bar seeking plaintiffs for mass toxic tort litigation, those asking whether you or someone you know has been "exposed" to a particular substance and now suffers from one or more particular diseases. In an article earlier this year, the *Wall Street Journal* cited research showing that in 2023, almost 800,000 ads were broadcast at a cost of more than $160 million, targeting matters such as the Roundup herbicide, talcum powder allegedly contaminated with asbestos, water contamination at Camp Lejeune, and drugs like Ozempic now being used to treat obesity.

Albeit not likely to appear in a comparable TV ad, there are many issues and developments that bear watching from the perspective of product manufacturers and their counsel on the defense side of these matters.

First, the ads themselves highlight one of the primary issues in any toxic tort claim – was there sufficient exposure to cause harm? If not, it cannot be said that the substance caused the harm. As the adage goes, "The dose makes the poison" (a phrase derived from the basic principle of toxicology expressed by Paracelsus: "All things are poison and nothing is without poison; only the dose makes a thing not a poison.)" Indeed, even pure water can be toxic if you drink too much in a short period of time as your kidneys cannot process the excess water, potentially leading to a life-threatening dilution of the sodium content of your blood.

Exposure is a critical but difficult factual issue in many toxic tort contexts because it calls for reconstructing how the plaintiff has allegedly interacted with a substance perhaps over the course of decades. While exposure and its counterpart dose (whether and to what degree the substance was ingested, inhaled or absorbed into the body) are really matters of amount, there is typically little or no data or measurement to support such

an analysis, just anecdotal recollections of using a product, such as accounts of taking 3-5 minutes to apply talcum powder after a shower amid clouds of dust.

In a litigation, at this stage, an expert will be presented to provide an opinion regarding exposure, but is it sufficient for the expert to opine merely that exposure was sufficient to be harmful or must the expert quantify the exposure (which, again, typically involves extrapolation from some limited evidence)? And how will the quantification be assessed?

There have been some court decisions calling for quantification evidence and requiring it to conform to accepted methodologies. For example, a New Jersey appellate court recently found the lower court had failed to properly consider the methodology behind a plaintiff's expert evidence in a talcum powder case offered to extrapolate lifetime exposure from the number of containers of defendants' products that each plaintiff claimed to have used in their lifetime. (*Barden v. Brenntag North Am., Inc.*) One of the problems in trying to reconstruct exposure is that the analysis will rely on a number of presumptions rather than data for its calculations, e.g., the number of times the product was used and the length of time it was encountered, how often the plaintiff bought and replenished the product, and incomplete data measuring the concentration of the suspect contaminant in the product.

Not long ago, the New York Court of Appeals reiterated the need to quantify exposure and dose, i.e., "[t]he requirement that plaintiff establish, using expert testimony based on generally accepted methodologies, sufficient exposure to a toxin to cause the claimed illness," while rejecting plaintiff's simulation of asbestos exposure due to "flaws" in the test. (*Nemeth v. Brenntag North Am., Inc.*) Another New York court later focused on the element of "dose," as opposed to exposure, noting that "exposure simulation studies must account for the amount of respirable asbestos fibers released from the toxic product . . . Simply quantifying the magnitude of asbestos fibers released into the environment is insufficient." (*Dyer v. Amchem Prods. Inc.*) That is, as alluded above, how many asbestos fibers would enter the body via inhalation and thus potentially cause harm.

These sorts of rulings emphasize the role of the courts as "gatekeepers" of reliable scientific evidence. The gatekeeping role is reemphasized under the 2023 amendments of Federal Rule of Evidence 702, which clarify that a court must review expert testimony as a preliminary question, finding whether its proponent has established the testimony's admissibility by a preponderance of the evidence and the expert's "opinion reflects a reliable application of the principles and methods to the facts of the case." (Fed. R. Evid. 702) While the gatekeeping concept to preclude unreliable expert testimony, including so-called "junk science," from being presented at trial is not new, many courts had foregone their gatekeeping role, increasingly deferring the consideration of expert evidence to the jury as a matter of its strength or weight. The amendments clarify that the burden is on the courts to determine reliability as a question of admissibility.

We will watch to see if the federal courts' gatekeeping role is reinvigorated. In the mass toxic tort area, there have been notable pretrial exclusions of experts in cases involving the pesticide paraquat and an alleged link between acetaminophen and autism.

The battle over science in the courtroom is being waged on another front as well, as some plaintiff-side science is coming under scrutiny, a counterpunch to usual attacks on "industry-sponsored" science.

For example, in a case involving a claim for mesothelioma allegedly arising from exposure to a cosmetic talc product, for proof of causation, plaintiff relied on a published study, "Malignant mesothelioma following repeated exposures to cosmetic talc: A case series of 75 patients." (*Peninsula Pathology Assocs. v. American Int'l Indus.*) The paper was not derived from some epidemiological study, however; it consisted of cases "selected from [a] medical-legal consultation practice," and the authors identified exposures based on deposition testimony and interrogatory answers. Defendants argued that the publication would merely be a vehicle to put 75 other plaintiffs in other cases before the jury under the guise of a scientific study and sought discovery regarding the basis for the study on which they might base a Rule 702 challenge. The district court denied the discovery, which ruling is on appeal to the Fourth Circuit.

In an amicus brief to the Fourth Circuit, the American Tort Reform Association explains that "[t]he ability to test scientific claims is particularly critical when made-for-litigation science is at issue," and parties must be able "through discovery, to probe the basis of a proposed expert's testimony and present significant flaws or misrepresentations" on a Rule 702 motion, if the courts are "to diligently exercise their gatekeeping responsibility."

We can expect wrangling to continue from both sides, accusing the other of either made-for-litigation/junk science or industry-sponsored science.

As a final topic for our discussion of mass toxic tort developments to watch, corollary to traditional toxic tort cases discussed above are claims attacking a product's alleged toxic hazards under various consumer protection statutes and causes of action. These sorts of claims can typically be pled as class actions and the science component is not as rigorous as having to prove actual exposure and causation. The gravamen of these cases is that the consumer has been misled because some undisclosed, potentially hazardous substance is in the product.

For instance, as a corollary to the cases alleging cancer from using the Roundup herbicide, consumer class actions were brought based on the purported presence of glyphosate in breakfast cereal (used on the wheat crops), which would be allegedly misleading insofar as the product is advertised as "natural."

Similarly, while PFAS (per- /polyfluoroalkyl substances) have been the subject of many claims for direct exposure (these are the firefighting foam commercials) as well as groundwater contamination, the substances are also found in various consumer products, prompting consumer lawsuits. For example, suits have been filed against cosmetics manufacturers based on the presence of PFAS in their products. (PFAS would be used in cosmetics to enhance the product's durability, spreadability, etc., given the substances' water-resistant properties and film-forming capabilities.) PFAS are man-made and known as "forever chemicals." Thus, cosmetics suits have alleged, for example, that a cosmetic maker's claims of "open, inclusive and sustainable beauty" is contradicted and misleading if the product contains forever chemicals.

So, as discussed above, there is plenty to watch for in mass toxic tort area – what will be the next alleged toxin highlighted on TV; greater judicial focus on quantifying exposure; increased gatekeeping of expert testimony; battles over whose science is legitimate; and which products on our shelves also present toxic concerns. Make sure to tune in.

Paul V. Majkowski is a partner with Rivkin Radler LLP in Uniondale, NY, and focuses on the defense of complex mass toxic tort and class action litigation in both domestic and foreign forums, in matters involving herbicides, pesticides and other chemicals. He can be reached at paul.majkowski@rivkin.com.

ISSUE BIFURCATION: AVOIDING CONFUSION AND IMPROVING OUTCOMES

Pam Hallford and
Mark Chappell
Carr Allison

1938 is often wrongfully overlooked as a year of technological progress. With World War II looming on the horizon, history quickly forgets that some of the most earth-shattering discoveries of the modern age were unveiled in 1938: the first freely programmable computer was developed by Konrad Zuse, nuclear fission was discovered by Otto Hahn and Fritz Strassman, the first Superman comic made its debut from writer Jerry Siegal and artist Joe Shuster, and, only marginally less important, Rule 42(b) of the Federal Rules of Civil Procedure was first adopted into practice.

Since its adoption, federal judges have been authorized under Rule 42(b) to try issues separately through a procedure known as bifurcation. Rule 42(b) allows "for convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues,

claims, crossclaims, or third-party claims..."

One of the most useful applications of this rule, and the topic that is the primary focus of this article, is for the courts to allow for the issues of liability and damages to be tried separately in personal injury cases. In theory and when allowed to operate as intended, Rule 42(b) allows for the issue of liability to be tried first and without the complex, lengthy evidence of damages to be presented to the jury. Only if liability is found to exist against a defendant, would evidence of damages be presented. If a defense verdict is rendered by the jury on liability, then the court, jury, and all participants would avoid the unnecessary, needless presentation of evidence on damages, substantially reducing the ever-increasing litigation costs for clients.

Similarly, if a defendant's request for bifurcation is granted, defense counsel is permitted two separate opportunities to fend against a plaintiff's claim, eliminating the possibility of evidence from the injuries and damages portion of a case to improperly influence the jury and cause a finding for the plaintiff on liability because of sympathy.

The benefits of bifurcation are well-known among judges across the country, too, even though they are reluctant to grant such a request. One study of federal and state judges found that out of 94 percent of federal judges who have granted bifurcation in their career, 84 percent felt it improved the trial process. Still, the acceptance of bifurcation has been limited because the practice has been undeservingly labeled as pro-defendant.

The pro-defendant reputation initially arose out of a study conducted in 1966, where researchers claimed to have determined that plaintiffs prevailed in 66 percent of non-bifurcated trials and only 44 percent in bifurcated trials. This study and subsequent similar studies had questionable selection criteria but nevertheless managed to cement the reputation of issue bifurcation as being pro-defendant. Plaintiff lawyers now often object to bifurcation proposals, citing outdated studies from decades prior and complicating efforts to streamline civil jury trials, resulting in the underuse of Rule 42(b).

Despite having a pro-defendant reputation, case law from states around the country has varied stances on the issue. For example, New York, a left-leaning state, mandates bifurcation in most personal injury cases. In contrast, Texas, a right-leaning state, does not allow for the bifurcation of liability and damages in personal injury cases under any circumstances. These unconventional positions illustrate that the matter of issue bifurcation is not as straightforward as often believed.

Judges in the federal courts have generally been found to be in favor of bifurcating personal injury matters. However, successfully implementing such a strategy in federal court is difficult due to the near constant objections of plaintiff lawyers, who believe that having the jury hear evidence of a plaintiff's injuries and damages will generate sympathy and cause the jury to be more inclined to rule in their favor on liability. This claim itself should be an argument in favor of bifurcated trials since plaintiff lawyers are essentially advocating for the improper use of evidence, but rather than admitting to such tactics, the sterile-trial theory was brought into existence.

The sterile-trial theory is broader than admitting to reliance on sympathy to improperly influence the opinions of jurors. The theory asserts that bifurcation actually causes prejudice by creating a sterile trial environment that obscures the gravity of the underlying facts and events, stripping the trial of its human element. This argument essentially claims that to decide on liability, a jury must also have knowledge of the claimed damages and vice versa. Instead of arguing each element of the case on its merits, plaintiff lawyers often prefer to muddy the waters by relying on the jury's emotions to sway them into ruling in the plaintiff's favor.

Plaintiff lawyers seem to have overlooked that they, too, may benefit from bifurcation when the issue of liability is uncertain. If a plaintiff can bifurcate a trial and succeed in the liability phase, the defendant is at risk of paying a substantially larger damages award. This is because the information in the liability portion of a case helps to humanize a defendant by demonstrating to the jury that they took actions to prevent or minimize the plaintiff's injuries and damages. Because of this, defendants should not move to bifurcate every trial uniformly but should analyze each individual fact pattern and determine if the benefits of bifurcation outweigh the risk of an increased verdict.

To both maximize outcomes and minimize expenses, defense counsel should ask themselves the following questions before moving for bifurcation:

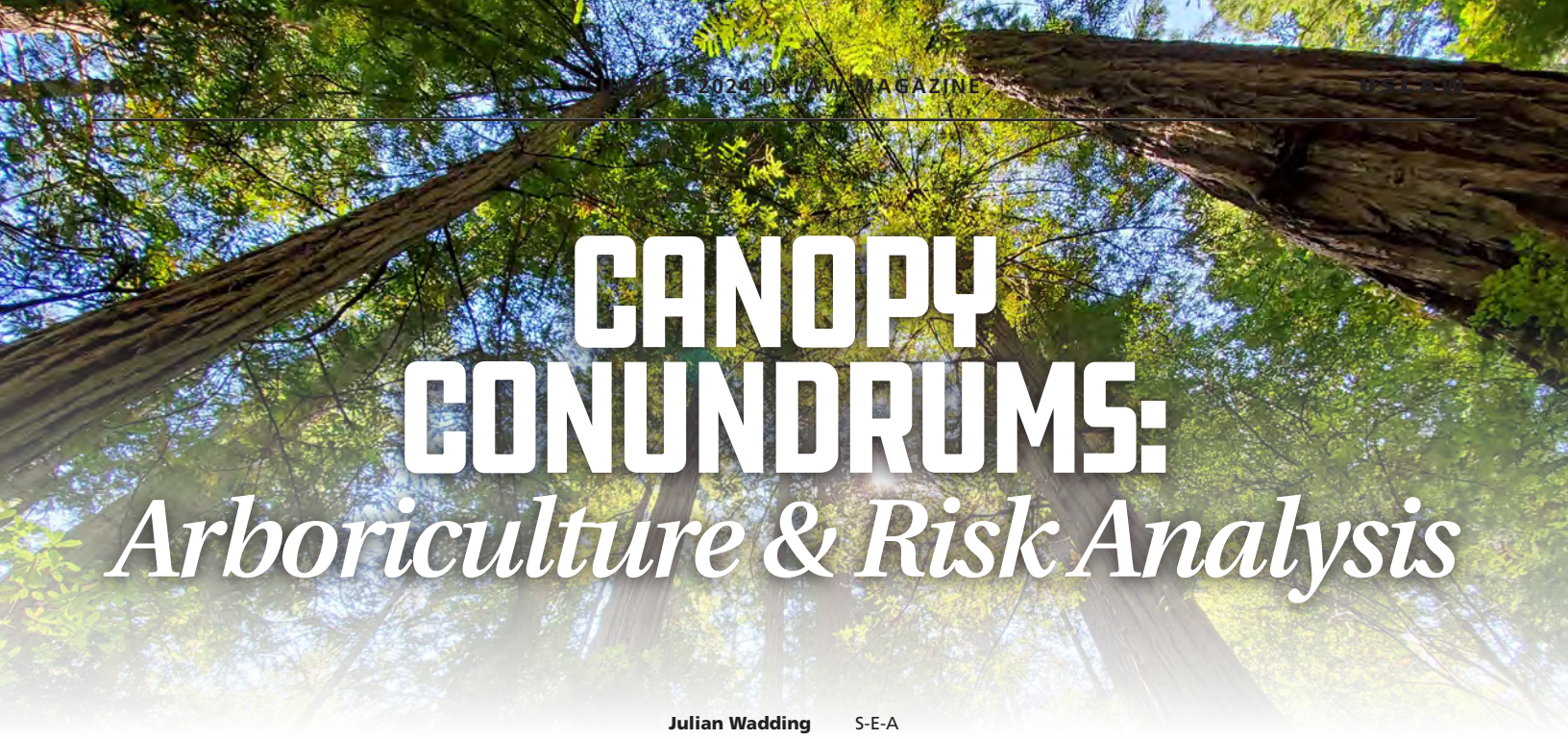
1. Will contesting liability be the strongest defense for the defendant during the trial?
2. Is there pro-defendant evidence in the liability phase that would cause a jury to reduce their assessment of damages?
3. Is the evidence and counterevidence of the plaintiff's claimed injuries and damages complex and lengthy enough to warrant separate trial settings to improve judicial economy?
4. Will many of the same witnesses from the liability phase also be required to testify in the injury and damages phase of the trial?

Whether or not a defendant should move for bifurcation ought to come after careful consideration of these factors. The ideal conditions for bifurcation include cases where (1) liability is the strongest defense, (2) there is little evidence in the liability phase that would lessen a verdict if a defendant were to lose the liability argument, (3) the plaintiff's claimed injuries and damages would require lengthy presentation of evidence and counterevidence, and (4) there are few witnesses that will be required to testify in both the liability and damages phases.

Issue bifurcation is an underused tool in jurisdictions around the country, including in the federal courts. Under the right circumstances, nearly all jurisdictions, aside from Illinois and Texas, at least claim to be open to the practice, and when a case arises with the right circumstances to benefit a defendant by bifurcating the liability and damages phases of a trial, defense counsel should do so but only after careful consideration of its risks. Over time, along with computers and Superman comics (I'm not so sure about nuclear fission), issue bifurcation will hopefully become more commonplace and accepted by both lawyers and judges around the country.

Pam Halford is a shareholder at Carr Allison in the Dothan (AL) office. Pam's practice focuses on the commercial transportation industry, specifically the defense of commercial motor carriers involved in catastrophic accidents. Pam also offers assistance to a diverse group of clients on an array of topics from dram shop to premises liability.

Mark Chappell is an associate at Carr Allison in the Dothan (AL) office. His practice focuses on transportation, personal injury, premises liability and general tort litigation. In addition, Mark is experienced in managing all stages of litigation in federal and state courts.



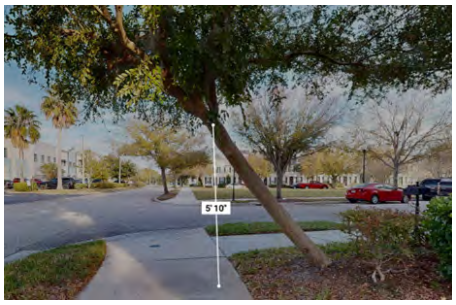
CANOPY CONUNDRUMS: *Arboriculture & Risk Analysis*

Julian Wadding S-E-A

When most think of an arborist, they think of someone who trims trees for aesthetic reasons. While arborists do engage in this activity, they also specialize in other areas of arboriculture relating to both urban landscapes and utility infrastructure. For Certified Arborists (Arborists), the industry of arboriculture has many different specializations. Arborists may be responsible for following best management practices involving the care of trees in an urban environment or could work alongside engineers and city planners to improve the beauty, drainage, and air quality in urban environments. These same Arborists can be responsible for the health of the trees, how they interact with the public, and ensuring the trees do not interact with critical infrastructure such as power lines.

Certified Arborists are credentialed by the International Society of Arboriculture (ISA) and are recognized nationally throughout the United States without any need for state-specific licensure. With 36,000+ Certified Arborists, only a small percentage of them are certified in sub-specialties such as a Utility Specialist, Municipal Specialist, or Master Arborist.

Regardless, all Certified Arborists are to perform their duties within an established best practice to ensure a level of public safety. Central to this effort, when a tree has a heavy concentration of public exposure underneath it, the Arborist should monitor the tree for compliance with local and municipal codes or standards. These codes and standards define distances or heights from the ground to the first lateral branching to establish a distance that is appropriate. This confirms that pedestrians or vehicles may be able to pass without contacting any of the subject trees. As with many codes and standards established at the local municipal level, requirements may vary throughout the nation. Accordingly, when injuries or property damage arise from contact with trees along trafficked pathways, a Certified Arborist will need to evaluate their compliance with the governing municipal codes and standards. Additionally, they must ensure that the health and condition of these trees are acceptable and pose no risk to the public.



Evaluate tree/limb clearance for compliance with municipal codes and standards.

A lesser-known industry is vegetation maintenance. All utilities are required to ensure they provide safe and reliable power to their customers. While an ISA Certified Utility Specialist may not be required to oversee this vegetation management, they are uniquely positioned to evaluate the best management practices applied throughout the various utility infrastructures and easements.

When a power plant utilizes a transmission system to deliver power to substations, the infrastructure often consists of massive structures that transmit this power over large distances, high above the ground. The importance of vegetation management in the utility industry cannot be underestimated in this regard. Vegetation is a biological entity that is innately dynamic. Ensuring that vegetation does not interfere with overhead electrical transmission requires due diligence, appropriate planning, and purposeful execution.

An important distinction when understanding the interaction of vegetation and electric utilities is the difference between distribution and transmission systems. Transmission systems, with respect to vegetation management, are their own entity and have their own management practices. The large structures often seen in rural areas are subject to the Electrical Reliability standard FAC 003-4, regulated by the North American Electric Reliability Corporation (NERC). This requires a minimum clearance between vegetation and transmission lines. However, it does not establish a maximum clearance or a particular management program for vegetation. That is typically accomplished by the utility via a holistic approach based on flora and fauna endemic to the respective area. Mismanagement can not only affect the reliability of power transmission, but may increase the likelihood of forest fires, via contact with trees or tree failure into the lines.

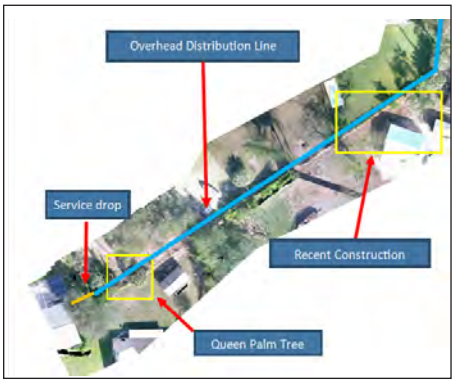
Distribution systems, however, are the utility infrastructure that delivers power to the customer. This system typically consists of structured poles that carry the overhead electrical transmission via conductors directly to the consumer. Understanding the difference between these two systems is key as both take a very different approach to vegetation management.

The vegetation clearance distances for distribution systems are often decided by the utility and its contractors, or by the state or local municipalities. Therefore, one size does not fit all, and the best practices take a holistic approach to achieve the most appropriate vegetation management schedule. Considering that vegetation is a

biological variable that can change based on weather patterns such as precipitation and sunlight as well as growth rate, the extent to which the vegetation can interfere with overhead distribution systems can vary. Accordingly, it not only matters how the trees are maintained, but how they are trimmed. Utilities use methodologies consistent with the ANSI A300 Pruning Standards and directional pruning methods to discourage growth into the overhead electrical facilities.

Directional pruning in proximity to a circuit body.

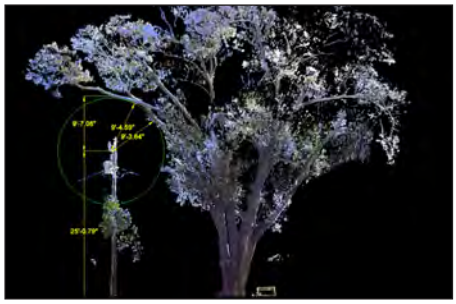
Directional pruning combined with a strategic IVM Plan (Integrated Vegetation Management Plan) is a strong way to mitigate contact with overhead electrical facilities, thus reducing the possibility of public interaction, such as contact with vegetation, that can lead to fires at/around residential structures. If such an event occurs, a thorough evaluation of all the conditions may be needed to understand how and why a loss occurred.



Evaluate vegetation interference along a circuit body for fire origin and cause.

Direct contact with live transmission and distribution lines is not always required for electrocutions to occur. Downed powerlines and flashover can result in electrocutions. According to the specialty insurance provider NIP Group, electrocution is the second-most common cause of death among tree service workers. A set of distance metrics known as the Minimum Approach Distances (MAD) defined within OSHA 1910.269, sets the standard distances for activities based on the voltage of the overhead electrified line. OSHA 1910.269 also provides different tables for use by qualified line professionals and unqualified line professionals, respectively.

While the distinction between qualified and unqualified line professionals is defined by ANSI Z133, the employing institution defines the level of proficiency needed in the work practices involved to become a qualified line professional. Line clearance professionals should be aware of these approach distances. Loading, weather, temperature, and their respective effects on overhead lines become critical to the safe approach of these lines. Evaluation of these effects, along with the evaluation of the approach distances employed, are considerations when evaluating the factors leading up to an electric shock event.



Evaluating the distance for distribution infrastructure after electric shock and contact events.

When evaluating a tree for vitality, it may exhibit several clues that can indicate ailments. These clues can be physical manifestations like defoliation or chlorosis (yellowing leaves). Other visual cues can manifest in forms of fungal conks or insect damage to indicate a possible systemic health issue. If these issues are not addressed in time, they can increase the likelihood of failure in a tree. These failures can take the form of decayed branches breaking off from wind loading, or a bark inclusion that could split a tree in two. These failures can also be at the center of disenchantment by HOAs, property owners, and planned communities when expectations of tree caliper after a period of years is not met.

The initial design choices, construction practices, adjacent structures, and historical maintenance can all affect the growth of trees and plants. Combinations of these factors can lead to a mismatch of actual growth with respect to an expected growth projection over a period of years. Accordingly, claims are made against a variety of businesses where the demands are for full replacement with mature trees throughout a community. These claims can be made against the original designers, original contractors, and/or maintenance companies that were charged with meeting certain contractual obligations.

Appropriate construction practices are also something to consider. For example, if a tree by a home is subject to nearby construction activities, this could cause shearing of roots or suffocation from mechanical compaction, which can invite pests and diseases. Design practices should consider the expected use function and proximity of trees in relation to critical infrastructure such as roadway curbs, sidewalks, and driveways in addition to the effects of drainage profiles for stormwater runoff. In turn, maintenance practices should consider the effects of certain machinery and the interactions they will have with root systems, branch growth, and resilience against windstorms. While these practices may have immediate deleterious effects on vegetation, some of these symptoms may manifest themselves a great deal of time later and be misconstrued with respect to the proximate cause.

Evaluate damage to trees in urban settings relating to design, construction, and maintenance deficiencies.

Recognizing the importance of trees and vegetation, their relationship with urban environments, and their interaction with the public is key to understanding the associated risk. As trees are a vital component to any ecosystem, the importance of appropriate management methodologies cannot be understated. Recognizing all of this will help mitigate risk and assist in determining the cause surrounding events such as fires, line contacts, tree failures, and bodily injuries. A Certified Arborist can help navigate the multitude of considerations that these evaluations require.

Julian Wadding is a civil consultant, EIT and ISA-Certified Arborist in S-E-A's Tampa Office and a member of the Utility Arborist Association. He holds a Bachelor of Science in civil engineering. Prior to S-E-A, he worked as a design arborist, where he worked for a utility in assisting with vegetation maintenance of distribution infrastructure.

A REASONABLE REVOLUTION: A PUSH FOR POLICY REFORM IN RETAIL SPACE

Eddy Silverman Williams Kastner

The year was 2024. It was April, and I was in the midst of facilitating a captivating discussion regarding the "damned if you do/damned if you don't" nature of the retail litigation sphere—a presentation aptly titled "Damned If You Do/Damned If You Don't."

The focus of the discussion in the moment was on theft deterrence, and the insidious tendency of increasingly common deterrent measures to *increase* claims, like the utilization of armed third-party security contractors for instance.

There was a momentary respite, enough time for me to ask a question that seemed innocent enough: "Are any clients making changes to *their policies* to allow *employees* to do more to deter theft?"

There was an immediate-collective groan from the room—a proverbial clutching of pearls. How dare I propose such a thing! Change polices to allow employees to *do more*…? "Why, I never!"

And this was when I asked a follow-up question: "Who in the room has heard of The Shopkeeper's Privilege?"

1-to-2 hands, maybe.

"Get them up, folks, hands higher," I urged. Surely, there must be more….

"*Everyone* hasn't heard of this privilege?" I asked with genuine surprise.

"Folks, under The Shopkeeper's Privilege, *you can do some things*," I explained, "to protect your chattels."

No, this was not all empty old timey speech for humorous affect, about "shopkeepers" and "chattels." *I meant it.* You can, indeed, *do some things,* under The Shopkeeper's Privilege, and under other related or similar privileges. You can do *reasonable* things to protect your chattels, your stuff—your merchandise—like, I don't know, *touching* the person walking out of your store with a cartful of goods…or, get those pearls ready, you could maybe even grab that person, or hold that person.

"But counsel, why would you ever suggest such a thing? We could get sued!"

I got news for you: you're getting sued anyway. You're getting sued even in the instances where you're doing everything right, and you're going to keep getting sued, and in the meantime, there is an ill-intentioned person walking out of your store with globs of your stuff, *knowing*

"You can't touch me." One might even say you are "damned if you do, damned if you don't." So, what then do you do?

"REASONABLE."

That's the word.

And while I'm collecting groans, perhaps this word will prompt one from the attorney readers (wait until I start talking about how "it depends").

Companies and their employees can—and indeed I believe *they should*—employ *reasonable* means to protect merchandise, themselves, and their customers.

What is reasonable, you ask?

"It depends."

DEPENDS ON WHAT?

How much is the person taking? How is he or she acting? What are the physical characteristics of the bad actors and the employee?

"But who makes the call?" "*Who says* what's reasonable, ultimately?"

It depends.

At the furthest extent of a dispute arising out of the sort of scenario we are discussing though—a physical or otherwise forceful or assertive engagement (shouting, etc.)—a jury, or maybe a judge, is going to be the one that makes the decision: was the defendant-store's conduct reasonable under the totality of the circumstances?

Our clients act reasonably, or try to at least, *and in either case*, we the lawyers defend them. We make the argument. The trier of fact makes the call. And this brings us full circle.

If the goal is to act *reasonably*, and if ultimately that is the measure by which the trier of fact will determine liability, why are we setting higher standards for ourselves in the form of policies that demand more than reasonable conduct? And then – double whammy – why are we allowing opposing counsel to conflate those policies with law, to color them indistinguishable from the legal standards by which we are judged, such that we are allowing violations of our own policies to, well, *damn* us?

Why not write the policy *to the law*: allow "reasonable" conduct? Wouldn't *that* be reasonable?

I GET IT…

Lesser of two evils and all that; we cannot have employees going "hands on" at will or escalating every situation into a physical altercation.

I work in this space.

I see injuries to innocent customers from shoplifter pursuits; I see fights; I see shootings, and worse. I. Get. It.

But does this all mean that we blanketly prohibit employees from touching customers in any scenario, under any circumstances—and that we make this our official policy?

Does this mean that we prohibit "pursuit" *under any circumstances*?

Does it mean that we do not ask for a receipt from anyone, or not approach persons of color even where all of the criteria for an approach are met?

Can we not just be reasonable?

Or can we not at least just write that one simple word into our policies—just that word, "reasonable"—because that is the law.

THE "PRIVILEGE" YOU DON'T EVEN NEED (THE RIGHT TO ACT REASONABLY)

In my jurisdiction, Washington State, "The Shopkeeper's Privilege" is codified in RCW 4.24.220 ("Action for being detained on mercantile establishment premises for investigation— **"Reasonable grounds as defense."**). Shoot, my state's privilege-statute has "reasonable" right in the title, and then in the body the statute expressly allows for "detaining"—which Webster's Dictionary defines as "to hold or keep in or as if in custody"—"in a **reasonable** manner and for not more than a **reasonable** time," where the store "had **reasonable** grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting…." Wait, we are allowed to "detain" and hold, and it doesn't say anything about not touching? How could it be that the law allows for conduct here that would be a violation of just about every retailer policy of which I know? Why are these so starkly different?

It is your privilege as a shopkeeper—as a retailer—to act reasonably. But know that one does not even need a privilege to act reasonably. Why? Well, because negligence, that ever-present claim that forms the basis of almost every lawsuit that arises in the retail space, is itself built on a foundation of reasonableness. Don't believe me? Ask Google (you don't even need a Westlaw subscription). *Google* can tell you that negligence is the "failure to use **reasonable** care, resulting in damage or injury to another."

So, I ask again then, why are we exchanging this familiar and intuitive ideal of reasonableness for inflexible policies—the veritable legal standard for liability—for "should-not-dos" and "do-not-touches" that form the noose by which we hang ourselves? What possible global benefit could this have for retailers, because this practice certainly does not seem to be limiting claims or improving the retail experience for the customer.

YOU'RE GETTING SUED ANYWAY.

Can I tell you what's reasonable? No. But like the great Justice Potter Stewart, I'll sure know it when I see it. And I'll know unreasonable when I see it too. And in either case, I will advocate for you, referring to your defense attorney in the abstract, and will work to achieve the best result, because that's my job—that's our job. That's the service for which you pay us.

You're getting sued anyway, so why not fight? And why not take the weights off our ankles if we're going to run the race? Defending big retailers is hard enough. We don't need to set artificially high standards for ourselves in the form of policies that demand more than reason.

Are we going to win? *Could* we lose? *How much* could we lose?

All good questions.

"It depends." But let's talk. And let's also consider the alternative—the status quo—i.e., all the things we are doing except daring to make policies more permissive, if one wants to think about it that way.

You're getting sued anyway.

You're getting sued because it is *unreasonable* to have a policy that never allows for touching, or pursuit, or what is arguably "profiling," which you will be accused of anyway even in the best-intentioned cases.

You're getting sued because you're hiring third-party security contractors who do not share your company values, or even know or care about them for that matter.

You're getting sued for negligence premised on violations of *policies*, not the law, and you're paying those settlements and thereby encouraging more claims.

A RETAIL-POLICY REVOLUTION

The word revolution is a weird one, because its common meanings are almost diametrically opposed. In the more-familiar context, a revolution is a forcible overthrow of an established system with a presumptive new order in its wake. In the scientific or celestial sense on the other hand, "a revolution" denotes a return to an initial position. I guess what I'm proposing here is kind of both: a revolution *and* a revolution.

The status quo of setting unreasonable marks in the form of policies is broken. We should return to reason.

Recently selected to the Washington Rising Stars list in back-to-back years, Eddy Silverman of Williams Kastner is a creative, zealous advocate who specializes in premises liability and personal injury defense for corporate retail clients, but defends cases of all kinds—including professional liability (malpractice) matters and transportation defense cases.

FACES of USLAW

SPRING 2024 USLAW NETWORK CLIENT CONFERENCE
ARIZONA BILTMORE • PHOENIX, AZ

USLAW Chair Oscar Cabanas *of Wicker Smith (South and Central Florida) with former Captain, U.S. Army and Congressional Medal of Honor Recipient* ***Florent Groberg****, keynote speaker for the Spring 2024 USLAW NETWORK Client Conference at the Arizona Biltmore in Phoenix.*

USLAW current and past chairs of USLAW NETWORK gather before the start of the Spring 2024 USLAW NETWORK Client Conference.

Attendees stayed active while playing pickleball and rappelling the mountains around the Spring 2024 USLAW NETWORK Client Conference. (above)

On the tee: Litigation Academy golf clinic in Phoenix. (left)

Tune in: ***2024 USLAW Medical Law Forum*** *attendees visit Nashville recording studio with #1 Billboard recording artist Meghan Linsey and Nashville record producer Tyler Cain.*

FRANKLIN & PROKOPIK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

In April, ***Franklin & Prokopik, P.C****. staff members joined principal Heather Rice's "Heather's Heroes" team and participated in the National Multiple Sclerosis Society's Walk MS: Baltimore 2024 and a pre-event fundraiser. The team ranked second in total donations!*

Carr Allison attorney Austin Sherman (pictured third from left) coordinated the annual "Pin Pals: Strikes for Special Olympics" through the Jacksonville Bar Association Young Lawyers, raising thousands of dollars for Special Olympics of Florida. Over 15 law firms participated, and many local businesses donated items for raffle.

CARR ALLISON

Rivkin Radler's Fabulous February games raise money for charity
Each year, Rivkin Radler splits into teams for a month-long friendly competition called "Fabulous February." Each team selects a charity to support and raises money for their charity over the course of the month while playing a variety of games. This year, the firm raised $7,000, which was distributed to St. Jude Children's Research Hospital, Renewal.org, American Red Cross of Long Island, Homes for our Troops, and Ronald McDonald House.

RIVKIN RADLER LLP
ATTORNEYS AT LAW

*Members of **Baird Holm LLP** joined together to support Special Olympics Nebraska's field event competitions for their 2024 Summer Games.*

Baird Holm's team hit the pavement at the 43rd Annual Corporate Cup in Omaha, supporting the American Lung Association's vital mission.

BAIRD HOLM LLP
ATTORNEYS AT LAW

Black Marjieh & Sanford LLP *sponsored and participated in the 2024 SPCA Westchester Dog Walk and Pet Fair held on Saturday, May 18, at FDR State Park in Yorktown Heights. The event raised money for the work being carried out by SPCA Westchester, a no-kill, 501(c)3 not-for-profit animal welfare organization dedicated to saving homeless, abused, and abandoned animals and to protecting animals from cruelty and neglect through education and enforcement of humane laws.*

BMS BLACK MARJIEH & SANFORD LLP

*On April 27, **Hanson Bridgett** once again partnered with Rebuilding Together SF. The firm had a team of attorneys and professional staff supporting their mission: Repairing homes, revitalizing communities, and rebuilding lives. Alan Bishop, Rebecca Webb, Cindy Ha, Kate Bendick, Bianca Velez, Dalouny Phannavong, and Brendan Adams helped with the volunteer effort.*

HansonBridgett

p.s. Poyner Spruill LLP ATTORNEYS AT LAW

***Poyner Spruill LLP** honored the life and legacy of late colleague Cheslie Kryst during their second annual Service Week held May 6-10, 2024. Kryst worked as an attorney and was the firm's diversity advisor. She was passionate about volunteering at nonprofits and advocating for those in underserved communities. Kryst had a life-long battle with mental illness and died by suicide in January 2022. Each year, Poyner Spruill raises awareness for mental health resources and gives back to local communities in Kryst's honor.*

Kryst's mother and mental health advocate, April Simpkins, began the week with a presentation about her involvement in the National Alliance on Mental Illness (NAMI) in Kryst's honor and the importance of mental health wellness. On Tuesday, the firm's Charlotte office volunteered at the Hospitality House of Charlotte, doing yard work to improve the grounds of their facility. The Raleigh office partnered with the Green Chair Project on Wednesday to pack furniture and computers for needy families. On Thursday, Poyner Spruill's Rocky Mount office worked with Meals on Wheels to deliver meals to seniors in the community. To end the week, the Raleigh office helped Haven House Services by organizing and cleaning their Essentials Pantry.

SPMB SIMMONS PERRINE MOYER BERGMAN PLC

*The 2024 United Way Day of Caring was held on Thursday, May 9. **Simmons Perrine Moyer Bergman PLC** had volunteers help with improvement projects at the Girl Scouts of Eastern Iowa and Western Illinois, the Indian Creek Nature Center, and The Salvation Army of Cedar Rapids.*

*Nick AbouAssaly, **Simmons Perrine Moyer Bergman PLC** real estate attorney (and mayor of Marion, Iowa), was guest of honor at a fundraiser for the Cedar Rapids History Center on May 17. At the Famous Last Words – A Celebrity Roast of Nick AbouAssaly, The History Center put the "fun" in funeral as Nick lived through his own mocking (but loving!) eulogy, all to raise funds for this great organization.*

*During the **Spring 2024 USLAW NETWORK Client Conference** in Phoenix, USLAW recognized its official corporate partners, whose expertise and services are instrumental in the management and success of a client's legal needs.*

S-E-A Know.

*USLAW CEO Roger Yaffe, left, USLAW Chair Oscar Cabanas, right, and **S-E-A**'s Chris Torrens, Ami Dwyer, Ben Potter and and Steve Price. S-E-A has been USLAW's official technical forensic engineering and legal visualization services **partner since 2004.***

AMERICAN LEGAL RECORDS

*USLAW CEO Roger Yaffe, left, USLAW Chair Oscar Cabanas, right, with Jeff Bygrave and Michael Funk from **American Legal Records**, USLAW's official record retrieval **partner since 2022**.*

ARCADIA The Structured Settlements Company

*USLAW CEO Roger Yaffe, left, and USLAW Chair Oscar Cabanas, right, with Richard Regna, Iliana Valtchanova and Rachel Grant from **Arcadia Settlements Group**, USLAW's official structured settlement **partner since 2018.***

IMS LEGAL STRATEGIES

*USLAW CEO Roger Yaffe, left, and USLAW Chair Oscar Cabanas, right, with Alan Ritchie and Sabrina Nordquist from **IMS Legal Strategies**, USLAW's official jury consultant and courtroom technology **partner since 2015**.*

MARSHALL RECORD INVESTIGATIVE

*USLAW CEO Roger Yaffe, left, and USLAW Chair Oscar Cabanas, right, with Adam Kabarec, Shannon Petroni, Thom Kramer and Doug Marshall from **Marshall Investigative Group**, USLAW's official investigative **partner since 2012**.*

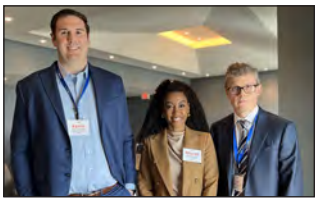
MDD A Davies Company

*USLAW CEO Roger Yaffe, left, and USLAW Chair Oscar Cabanas, right, with Alison Wise and David Elmore from **MDD Forensic Accountants**, USLAW's official forensic accountant **partner since 2012.***

Faces from around the USLAW circuit...

Throughout the year, USLAW members and clients lead facilitated discussions at USLAW events from coast to coast. Here are some of the recent leading voices.

Keely E. Duke, Duke Evett PLLC (Boise, ID); Oscar J. Cabanas, Wicker Smith (Miami, FL); Nicholas Polavin, IMS Legal Strategies (Charlotte, NC)



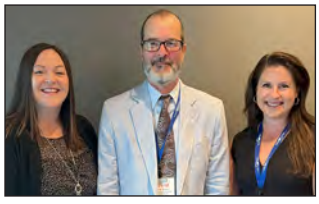
Kevin McCarthy, Larson King LLP (St. Paul, MN); Shyrell A. Reed, Moran Reeves & Conn, P.C. (Richmond, VA); Lea Richmond, IV, Carr Allison (Birmingham, AL)

Leslie D. Parker, Adler, Pollock & Sheehan, P.C. (Providence, RI); Lynn L. Audie, Wicker Smith (Miami, FL); Moses Suarez, Amundsen Davis LLC (Chicago, IL)

Heidi L. Mandt, Williams Kastner (Portland, OR); Richards H. Ford, Wicker Smith (Orlando, FL)

Robert E. Paradela, Wicker Smith (Ft. Lauderdale, FL); Kimberly A. Stevens, Pierce Couch Hendrickson Baysinger & Green, L.L.P. (Oklahoma City, OK)

Nichole Koford, Wicker Smith (Tampa, FL); Steve LaForte, Cascadia Healthcare; Heidi L. Mandt, Williams Kastner (Portland, OR)



Jessica Sanderson, Roetzel & Andress (Cleveland, OH); David S. Givens, Flaherty Sensabaugh Bonasso (Wheeling, WV); Christina M. Hesse, Duke Evett, PLLC (Boise, ID)

Molly E. Mitchell, Duke Evett, PLLC (Boise, ID); Michael J. Judy, Dysart Taylor (Kansas City, MO); Jessica L. Dark, Pierce Couch Hendrickson Baysinger & Green, L.L.P. (Oklahoma City, OK); Kyle Weaver, Carr Allison (Tallahassee, FL)

USLAW FACES

Julie A. Brennan, Pion, Nerone, Girman & Smith, P.C. (Pittsburgh, PA); Kevin McCarthy, Larson • King, LLP (St. Paul, MN); Jeffrey C. Hendrickson, Pierce Couch Hendrickson Baysinger & Green, L.L.P. (Oklahoma City, OK); Eddy Silverman, Williams Kastner (Seattle, WA)

Adam R. Forest, Sr. Mechanical Engineer – S-E-A, Ltd. (St. Louis, MO); Kevin McCarthy, Larson • King, LLP (St. Paul, MN); Meghan A. Litecky, Dysart Taylor (Kansas City, MO); Marion Stampley, Jr., Senior Jury Consultant – IMS Legal Strategies (Dallas, TX); Eddy Silverman, Williams Kastner (Seattle, WA)

Julie A. Brennan, Pion, Nerone, Girman & Smith, P.C. (Pittsburgh, PA) • Jennifer Cuculich, JD, Jury Consultant – IMS Legal Strategies (Columbus, OH) • Kyle Weaver, Carr Allison (Tallahassee, FL); Michael J. Judy, Dysart Taylor (Kansas City, MO); Adam R. Forest, Sr. Mechanical Engineer – S-E-A, Ltd. (St. Louis, MO)

Krista Cammack, Wicker Smith (Orlando, FL); Jessica L. Dark, Pierce Couch Hendrickson Baysinger & Green, L.L.P. (Oklahoma City, OK)

Kim M. Jackson, Bovis Kyle Burch & Medlin, LLC (Atlanta, GA); Kyle Weynand, MehaffyWeber (Houston, TX); Thomas A. Ped, Williams Kastner (Portland, OR)

Bret A. Sanders, Fee Smith & Sharp (Dallas, TX); Caryn A. Boisen, Larson • King LLP (St. Paul, MN)

John F. Wilcox, Jr., Dysart Taylor (Kansas City, MO); Roland M. "Ron" Lowell, general counsel, Western Express, Inc.; Patrick E. Foppe, Lashly & Baer, P.C. (St. Louis, MO)

Christine Viggiano, corporate counsel-litigation, Caesars Entertainment; Karen P. Randall, Connell Foley LLP (Roseland, NJ)

William M. Davis, Bovis Kyle Burch & Medlin, LLC (Atlanta, GA); Michael P. Sharp, Fee, Smith & Sharp, L.L.P. (Dallas, TX) • Meghan Hvzidos, vice president commercial auto claims, ISC (Integrated Specialty Coverages, LLC)

Virginia A. Murphy, manager-risk & insurance, Energy Transfer LP/Sunoco LP; Ryan C. Holt, Sweeny, Wingate & Barrow, P.A. (Columbia, SC); Kristin A. VanOrman, Strong & Hanni, PC (Salt Lake City, UT); Jacqueline Bushwack, Rivkin Radler LLP (Uniondale, NY)

Jeffrey Y. Choi, Snyder Burnett Egerer, LLP (Santa Barbara, CA); Penny Sturdevant, director of claims, STG Logistics; Peter T. DeMasters, Flaherty Sensabaugh Bonasso PLLC (Morgantown, WV)

Andrew B. McDaniel, Strong & Hanni, PC (Salt Lake City, UT); John C. Lennon, Pierce Couch Hendrickson Baysinger & Green, LLP (Oklahoma City, OK); Lisa Langevin, Kelly Santini LLP (Ottawa, Ontario, Canada)

Constantine "Dean" G. Nickas, Wicker Smith (Coral Gables, FL); Jennifer Cuculich, jury consultant, IMS Legal Strategies; Michael P. Sharp, Fee, Smith & Sharp, L.L.P. (Dallas, TX); C. Dewayne Lonas, Moran Reeves & Conn, PC (Richmond, VA)

Mark M. Leitner, Laffey, Leitner & Goode LLC (Milwaukee, WI); Keely E. Duke, Duke Evett, PLLC (Boise, ID); Theodore J. Folkman, Rubin and Rudman LLP (Boston, MA)

Jack Sanker, Amundsen Davis LLC (Chicago, IL); Albert B. Randall, Jr., Franklin & Prokopik, P.C. (Baltimore, MD)

Hailey M. Hopper, Pierce Couch Hendrickson Baysinger & Green, L.L.P. (Oklahoma City, OK); Shaun Jackson, executive director, Panda Restaurant Group, Inc.); Lloyd Brown, claims manager, Wawa; Thomas S. Thornton, III, Carr Allison (Birmingham, AL); Amanda Moore, EHS program manager, Advance Auto Parts, Inc.

Nichole Koford, Wicker Smith (Tampa, FL); Christine V. Anto, Amundsen Davis LLC (Chicago, IL)

Ben M. Ochoa, Lewis Roca (Denver, CO); Jason A Webber, Rubin and Rudman LLP (Boston, MA); Louis J. Vogel, Sweeney & Sheehan, P.C. (Philadelphia, PA)

Earl W. Houston, II, Martin, Tate, Morrow & Marston, P.C. (Memphis, TN); Tamara B. Goorevitz, Franklin & Prokopik, P.C. (Baltimore, MD); Scott E. Ortiz, Williams, Porter, Day and Neville PC (Casper, WY)

Maryalyce Cox, MehaffyWeber (Houston, TX); Anne Umberger, Nordstrom, Inc. (Seattle, WA); Eddy Silverman, Williams Kastner (Seattle, WA); Nicholas P. Resetar, Roetzel & Andress (Cleveland, OH)

Joseph F. Moore, Hanson Bridgett LLP (San Francisco, CA); Matthew C. Bouchard, Poyner Spruill LLP (Raleigh, NC)

John T. Pion, Pion, Nerone, Girman & Smith, P.C. (Pittsburgh, PA); Mindy J. White, chief counsel, litigation and employment, Quanta Services, Inc.; Rocky Coe, director of claims, McLane Company, Inc.

firms ON THE MOVE

Brandt Madsen, a member of Amundsen Davis LLC's Aerospace Industry Group, was selected to the Aviation Insurance Association's prestigious Eagle Society Class of 2024. Each year, a select group of professionals are nominated and inducted into the AIA's prestigious Eagle Society. These industry leaders have made substantial contributions to the aviation insurance industry, demonstrated achievements in their careers and dedication to the AIA's mission.

Baird Holm Associate **Emily Tosoni** has been named to the board of directors of FAMILY, Inc., a human services organization that strives to inspire a healthy future through literacy, family and public services.

Shandyn H. Pierce, an associate in the Appellate Practice Group at Hanson Bridgett LLP in San Francisco, was elected as a California Academy of Appellate Lawyers Fellow.

Hanson Bridgett Partner **Jonathan S. Storper** was named a 2024 MO Top Impact CEO, recognizing industry leaders who champion a new vision of capitalism, demonstrating that every transaction represents an opportunity to create positive outcomes for all stakeholders.

Patrick E. Foppe of Lashly & Baer, P.C. in St. Louis, Missouri, was elected to the first vice president position for the Transportation Lawyers Association, an independent bar association comprising in-house, government and private practice attorneys.

Lawrence H. Han, a partner of Rivkin Radler, has been recognized by PoliticsNY and amNY Metro in their inaugural AAPI Power Players list, published in honor of Asian American and Pacific Islander Heritage Month.

Rivkin Radler Partner **Louis Vlahos** was voted number one in JD Supra's 2024 Readers' Choice Awards on the topic of tax. **Nancy Del Pizzo** of Rivkin Radler has been reappointed to Law360 IP Editorial Advisory Board.

Chris Kutner, a partner of Rivkin Radler LLP, has been invited by President James Lentini of Molloy University to serve on the President's Advisory Council, where he will serve an initial three-year renewable term. The council members are all executive-level individuals who are leaders in the community from business, health care, the arts, and industry

Name change for TELFA's Baltic member firms

TELFA member firms in the Baltic nations of Estonia, Latvia and Lithuania have come together under a new name – WIDEN - while continuing to offer a broad spectrum of legal professionals representing a diverse range of industries and practice areas. WIDEN is the new name for the LEXTAL Legal group, which was established by merging Lithuanian law firm ILAW, Latvian law firm RER, and Estonian law firm LEXTAL. WIDEN offers the quality and value of a full-service law firm while emphasizing personal client service and business-minded practical thinking. Learn more at *widen.legal*.

Plauché Maselli Parkerson named USLAW NETWORK Louisiana member firm

USLAW NETWORK names Louisiana-based law firm *Plauché Maselli Parkerson LLP* as its newest member firm. With offices in New Orleans and Baton Rouge, Plauché Maselli Parkerson specializes in defending corporate entities, individuals, and insurers across Louisiana in state and federal courts. For more information, visit *pmpllp.com*.

successful

RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

Black Marjieh & Sanford LLP (Westchester, NY)

BM&S attorneys Paslow and Luke secure defense victories for construction clients

Black Marjieh & Sanford LLP Partner Nicholas Paslow received a successful arbitration defense victory for the firm's clients, a property owner and contractor. The case involved the firm's clients' construction project, which was located adjacent to the plaintiff's building. Plaintiff claimed structural damage to its property as a result of excavation at the neighboring project. Prior to the arbitration, the plaintiff received approximately $2 million in prior payments from its first-party insurance carrier and settling parties not represented by our firm. At the arbitration, the plaintiff claimed damages exceeding $22 million, inclusive of property damage, lost rent and statutory interest. The arbitration panel determined the plaintiff's damages were less than its prior recovery and awarded plaintiff a total award of $0, after a set-off for insurance proceeds and settlement payments.

In a separate matter, Black Marjieh & Sanford LLP Associate Leslie Luke successfully defeated the plaintiff's appeal of the denial of a motion for summary judgment in the First Department. The case involved a construction accident in which the plaintiff alleges to have fallen on debris and a wet, greasy substance in a claimed passageway. Plaintiff moved for summary judgment under Labor Law 241(6), claiming a violation of New York Industrial Code 23-1.7(d). The plaintiff's motion was denied in the lower court. Plaintiff appealed, and Luke successfully argued that the plaintiff had failed to meet his burden and that a question of fact existed as to whether the claimed substance constituted a foreign substance under the Industrial Code. On behalf of their contractor client, thanks to Luke's compelling arguments, the First Department unanimously affirmed the lower court's denial of the plaintiff's motion for summary judgment.

Bovis, Kyle, Burch & Medlin, LLC (Atlanta, GA)

Jackson and Lewis prevail in defense of lawyer liability lawsuit; Lewis obtains dismissal in negligence and gross negligence claims against closing law firm client

Kim Jackson and Zack Lewis of Bovis, Kyle, Burch & Medlin, LLC in Georgia recently prevailed in their defense of a hotly contested and wide-ranging lawyer liability lawsuit. In moving to strike the plaintiff's 191-paragraph complaint, Jackson and Lewis advocated that the plaintiff's lawsuit violated Georgia's Anti-SLAPP Statute because it was aimed at punishing legitimate speech and was not meant to vindicate any legal rights. Following multiple rounds of briefing and a lengthy evidentiary hearing, the Superior Court of Fannin County, Georgia, entered an eight-page Order granting the defendant's motion and dismissing the plaintiff's lawsuit.

In a separate matter, Zack Lewis obtained a dismissal of a plaintiff's negligence and gross negligence claims against a closing law firm. The plaintiff's claims arose out of a third-party fraudster's orchestration of a home title scam. In asserting liability against the closing law firm, the plaintiff alleged that the firm negligently failed to ferret out the fraud. In moving for an early dismissal, Lewis advocated that despite the labels the plaintiff had assigned to his claims, they actually sounded in professional negligence because they called into question the closing law firm's professional practices in presiding over a closing. Unlike claims for ordinary negligence and gross negligence, Georgia law requires a plaintiff to support a professional negligence claim with an expert affidavit. Agreeing with the defense's argument, the Superior Court of Fulton County, Georgia, entered an Order dismissing the claims—finding that they sounded in professional negligence and, thus, failed due to a lack of expert support.

Carr Allison (Birmingham, AL)

Carr Allison attorneys obtain multiple defense results for motor carrier clients

Carr Allison attorneys Pam Hallford, Tom Oliver and Brook Meadows obtained a defense verdict on behalf of one of the South's most prominent motor carriers. In 2018, an accident involving a pedestrian and a commercial motor vehicle resulted in severe injury. A claim was almost immediately brought against the motor carrier who quickly retained Oliver and Hallford.

After a forensic investigation and rapid response, prison depositions, hours of witness preparation and an unsuccessful mediation, the case finally went to trial. Hallford and Meadows actively defended the trial in Elmore County, Alabama. Five years of litigation culminated in a verdict for the defense.

Also, Tom Oliver and Dennis Vann successfully defended a hazmat motor carrier in a grueling, week-long trial in Birmingham, Alabama, in a case brought following a highly publicized 2019 incident that alleged the motor carrier unloaded a chemical into the wrong tank, creating a hazardous gas cloud affecting numerous employees on site. The jury returned a verdict that reduced the plaintiff's requested damages by 90 percent.

In a separate matter, Tom Oliver and Glenn Smith successfully tried a serious injury case in Mobile, Alabama, for one of the firm's motor carrier clients.

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

Flaherty Sensabaugh Bonasso PLLC (Charleston, WV)

Flaherty's Alonzo Washington obtains summary judgment in a fraud and unjust enrichment case

The U.S.D.C. for the Northern District of West Virginia granted summary judgment in a fraud and unjust enrichment case. Alonzo D. Washington of Flaherty Sensabaugh Bonasso PLLC represented the Defendants, a professional land management company and one of its limited partners. The plaintiffs were a limited liability company and its sole member.

The parties entered into an independent contractor agreement in 2007. Plaintiffs argued that the agreement expired in December 2012 when plaintiffs were promised a percentage equity interest in the defendants' land management company. Plaintiffs alleged to have been promised a larger equity share in the company in October 2014. The defendants argued that the plaintiffs received a profit-sharing bonus— not an equity interest in the company. In an April 2015 email exchange, the defendants advised the plaintiffs that they were not equity owners of the company. Plaintiffs continued to work for the company until 2021. Under West Virginia law, claims of fraud are subject to a two-year statute of limitations. The Court determined that the plaintiffs became aware of the alleged fraud in April 2015, when the defendants notified them that they were not equity owners. However, the plaintiffs did not file suit until December 2021, thereby exceeding the statute of limitations and rendering their fraud claim time barred.

Claims of unjust enrichment operate under a five-year statute of limitations period. The Court found that even if the statute of limitations began in October 2014 when the plaintiffs relied on the defendants' alleged promise of "equity," the statute of limitations would have tolled in October 2019. Because the plaintiffs did not file suit until December 2021, their unjust enrichment claim was untimely. As such, the Northern District of West Virginia granted summary judgment on this ground and dismissed the plaintiffs' complaint against the defendants with prejudice.

Hanson Bridgett LLP (San Francisco, CA)

Hanson Bridgett secures two appellate victories for City of San Jose and Federated Retirement System; $7.75 million victory for construction company

A Hanson Bridgett team led by partners Raymond Lynch, Matthew Peck, and Judith Boyette secured two unanimous appellate decisions in favor of clients, the City of San Jose, the city manager and the Board of the Federated City Employees Retirement System.

"This case was procedurally complex and hotly litigated," said partner Raymond Lynch. "It was a complete team victory, resulting in two successful summary judgment motions following extensive written and deposition discovery."

In July 2017, a group of 19 retired employees from the City of San Jose, including five attorneys, alongside a retirement association, initiated legal action against the city. The plaintiffs/appellants sought to compel the city to create and fund an independent supplemental pension plan. This supplemental pension was intended to provide additional pension benefits beyond the limits set by the Internal Revenue Code available under the city's retirement program, a benefit they argued was owed to them based on the Plan formula and protected under the California Constitution's vested rights doctrine.

Additionally, the plaintiffs claimed they were owed several million in alleged unpaid benefits. A number of the plaintiffs had previously mistakenly received pension benefits in excess of what was allowed, and plaintiffs sought to recover such benefits as damages under alternative legal theories. These claims were grounded on alternative theories, including promissory and equitable estoppel, as well as breaches of fiduciary duty.

In a separate matter, a team of appellate attorneys, including partner Gary A. Watt and senior counsel Rosanna Gan and David Casarrubias, secured an all-out victory on behalf of client D.A. McCosker Construction Co., dba Independent Construction Co. (ICC). California's Department of Water Resources (DWR) agreed to drop any further litigation and paid the firm's client $7.75 million in costs and interest related to the construction of Dyer Reservoir near Livermore, California.

"The appellate opinion rejected every single argument asserted by DWR for upholding the trial court's order vacating the award," said Watt, referring to the Superior Court's prior proceeding that vacated ICC's $5.2 million arbitration award.

Larson • King, LLP (St. Paul, MN)

Larson • King attorneys obtain defense verdict in mass tort trial

Several Larson • King lawyers recently helped secure a trial win for a large manufacturing client in a mass tort case. Following a multi-week trial in Magoffin County, Kentucky, where the plaintiff asked for compensatory and punitive damages totaling $75 million, the jury returned a defense verdict, finding no defect in the product.

The trial team was led by Angela Beranek Brandt and

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

included Brad Bultman. Larson • King attorney Dan Adams played a significant role in developing experts and strategy for this and other mass tort cases for the firm's client. Larson • King associate Annika Petty and paralegal Theresa Boquist played key support roles at trial.

This is Brandt's second mass tort trial win in Kentucky in 2024.

MehaffyWeber (Houston, TX)

Mike Magee of MehaffyWeber obtains huge transportation appellate win for client

Mike Magee of MehaffyWeber had a huge transportation appellate win. The Supreme Court of Texas in a per curiam decision on May 10, 2024, determined whether an accusation of race and gender prejudice directed at opposing counsel was incurably harmful. In the case, MehaffyWeber's client's tractor-tailer rear-ended the plaintiffs. They sued the truck driver's owner and requested $12 million in non-economic damages. MehaffyWeber argued that the jury should award her $250,000. In closing, Plaintiff's counsel argued that "we certainly don't want this $250,000" and then remarked: "Because it's a woman, she should get less money? Because she's African American, she should get less money?" The defense moved for a mistrial, but the motion was overruled. The jury awarded the plaintiff $12 million for physical pain and mental anguish, and the trial court rendered judgment on the verdict. The court of appeals affirmed. The Supreme Court of Texas reversed and remanded to the trial court, holding that defense counsel was entitled to suggest smaller damages amount than the plaintiff sought without an uninvited accusation of race and gender bias. The resulting harm was incurable by withdrawal or instruction because the argument struck at the heart of the jury trial system and was designed to turn the jury against opposing counsel and their clients. The case has been reversed and remanded for another full trial.

Murchison & Cumming LLP (Los Angeles, CA)

Jury rejects $12 million demand against Murchison & Cumming LLP client

Following a five-week trial in plaintiff-friendly San Bernardino County Superior Court, a defense verdict was reached in a case involving a boat crash on the Colorado River. Partners Russell S. Wollman and Todd A. Chamberlain of Murchison & Cumming represented the boat manufacturer. Darin W. Flagg, senior associate, also provided law and motion contributions to the trial victory.

The incident occurred when the driver of the power boat lost control at speeds between 60 and 80 miles per hour, resulting in the loss of control upon hitting a wave. Subsequently, the boat nosedived, causing it to come apart in the front and eject the plaintiff into the water, resulting in a fracture to his thoracic spine.

The plaintiff filed a lawsuit citing negligence on the part of the boat driver and alleging negligence and certain product liability against the boat itself. The plaintiff sought substantial compensation totaling $12 million.

After a thorough deliberation period lasting five days, the jury returned with a defense verdict, finding no fault on the part of either defendant. The plaintiff's claims have been dismissed, and no damages have been awarded.

Rivkin Radler LLP (Uniondale, NY)

Rivkin Radler attorneys secure dismissal of fraud and civil conspiracy claims and pre-answer dismissal of an action for contribution and indemnification

Jonathan Bruno and William Schleifer secured a pre-answer dismissal of claims for fraud and civil conspiracy against Rivkin Radler's client, a real estate attorney. The plaintiff/seller alleged that their client was fraudulently caused to sell his property based upon false statements and a fraudulent appraisal. Rivkin represented the plaintiff/seller's attorney at the closing. The plaintiff alleged that the firm's client failed to advise him that he would be forced to leave the property after it was sold or that he was losing all equity he had in the property.

Bruno and Schleifer used documentary evidence, including affidavits that the plaintiff had submitted in a related eviction proceeding, to show that the Plaintiff did not rely on anything that the client stated and that any alleged omissions/failure to speak were insufficient to state a cause of action for fraud in the present circumstances. Additionally, the court found that the allegations of fraud were duplicative of a legal malpractice cause of action, which would have been barred by the statute of limitations. The court further agreed with the firm's argument that the plaintiff's conclusory allegations were insufficient to state a claim for civil conspiracy to commit fraud.

Therefore, the court granted Rivkin Radler's motion to dismiss in its entirety.

In a separate matter, David Wilck and William Schleifer secured a pre-answer dismissal of claims for contribution and indemnification against its client, ICA Risk, an insurance and risk consulting company. The action stemmed from the fact that ICA

successful

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Risk's client, American Pipe, was denied more than $1 million in liability coverage when an excess insurer disclaimed coverage on the grounds that it did not receive timely notice of a claim.

As a result, an action was commenced with numerous parties to determine who was at fault for the failure to give proper notice and whether any other excess insurance coverage was available to American Pipe. Wilck and Schleifer successfully argued that all claims for contribution against ICA Risk must be dismissed as a matter of law because the underlying claims were for breach of contract. The firm was also able to get the claims for common-law indemnification dismissed.

Wicker Smith (Orlando, FL)

Wicker Smith's Cammack and Draughn obtain defense verdict in a premises liability matter

WICKER SMITH

Partner Krista Cammack and Associate Oscar Draughn of Wicker Smith's Orlando office obtained a defense verdict in a premises liability matter on behalf of a major department store client in Volusia County, Florida, in May.

This case arose from an incident outside the department store's location at a Daytona Beach shopping mall. While exiting the store on a rainy day, Plaintiff slipped and fell on an access ramp, allegedly sustaining injuries to her back, right knee, right ankle and right foot. She underwent extensive chiropractic care, a microdiscectomy surgery, nerve root decompression and steroid injections as a result of her alleged injuries. Her medical bills were in excess of $120,000, mostly paid via letters of protection.

Plaintiff alleged that the defendants failed to maintain the premises in a reasonably safe condition and also failed to warn of the dangerous condition. The trial team argued, and defense experts testified, that the defendants met industry safety standards by painting the ramp yellow and including additives in the paint to give it a non-slip finish; and, further, that the plaintiff failed to prove that the paint or the maintenance of the ramp was the cause of her fall and her subsequent injuries. The plaintiff's medical records showed that she had sustained prior back injuries and undergone a prior back surgery as a result of a car accident several years ago, and her current injuries were degenerative and not a result of the incident at the store.

After a four-day trial, the jury found no liability on the part of Wicker Smith's client. Due to a pending Proposal for Settlement, the firm's client will be entitled to seek fees and costs.

Williams Kastner (Seattle, WA)

Eddy Silverman prevailed in a motion to recover fees for client

WILLIAMS KASTNER

Attorney Eddy Silverman of Williams Kastner in Washington successfully prevailed on a motion to recover attorneys' fees and costs, recovering nearly $400,000 for his client as a sanction for opposing counsel's bad faith litigation tactics. This award is currently among the largest of such in Washington state history.

Williams, Porter, Day and Neville, P.C. (Casper, WY)

WPDN attorneys obtain summary judgment in favor of insurance client

WP D&N
WILLIAMS, PORTER, DAY & NEVILLE P.C.
Wyoming's Law Firm

A Wyoming Federal Court ruled in favor of a Williams, Porter, Day, and Neville (WPDN) client represented by attorneys Erica Day, Stuart Day, and Keith Dodson.

WPDN represented an insurance company sued by a client who said that the company failed to make appropriate payments under an uninsured motorist coverage provision. The plaintiff asserted breach of contract claims and bad faith claims.

The plaintiff argued that they had underinsured motorist coverage, and the insurer breached the duty of good faith by failing to offer a policy limits settlement based on the accident.

WPDN filed a dispositive motion arguing that the plaintiffs did not meet the legal standard nor have enough facts to move the claim forward before a jury.

During a summary judgment hearing, Stuart Day argued that there was no evidence to support either claim. The court agreed and ruled in their favor.

The Honorable Judge Scott W. Skavdahl ruled that there was no evidence that the insurance company had acted inappropriately and hadn't declined to provide coverage or payment unreasonably.

DIVERSITY, EQUITY AND INCLUSION

Noble Allen of Hinckley Allen participates in DEI panel discussion

Noble F. Allen, partner at Hinckley Allen in Connecticut, participated in a moderated discussion about the erosion of diversity, equity and inclusion in America hosted at the University of Kansas School of Law. Allen was joined by Alvin B. Tillery Jr., professor of political science and director of the Center for the Study of Diversity and Democracy, and Zabrina Jenkins, executive advisor to CEO and former acting general counsel of Starbucks, Inc. The Dru Mort Sampson Center for Diversity, Equity and Inclusion at the University of Kansas School of Law presented the event. Allen (pictured fourth from left) was invited to participate in the panel by **Sheryl Willert** (pictured fifth from right), past USLAW Chair from USLAW member firm Williams Kastner, who is a Board member of the Dru Mort Sampson Center for Diversity & Inclusion at the University of Kansas.

Rivkin Radler's Hardy recognized for diversity, equity and inclusion efforts

On March 19, Rivkin Radler Partner **Tamika Hardy** received a Diversity in Business award from Long Island Business News. The award highlights the outstanding achievements of professionals who actively support the growth of diversity and equality in the community.

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pro bono SPOTLIGHT

Hinckley Allen's Zaccardelli awarded 2024 Pro Bono Award

HINCKLEY ALLEN

The Hartford County Bar Association (HCBA) honored **Lisa Zaccardelli**, partner and chair of the Labor and Employment Practice at Hinckley Allen, with its 2024 Pro Bono Award at this year's annual Law Day. The formal ceremony took place at the Hartford Superior Courthouse on May 10, 2024, and was attended by judges, attorneys, dignitaries, awardees and keynote speaker Secretary of State Stephanie Thomas.

The HCBA is a voluntary, not-for-profit association of lawyers and judges in Hartford County dedicated to both furthering the principles of law and justice and promoting public service. The Pro Bono Award presented to Zaccardelli recognizes an attorney each year who exemplifies the professional ideal to serve their community and help ensure access to justice for all.

Zaccardelli is an executive board member of both Greater Hartford Legal Aid and the Greater Hartford Legal Aid Foundation and is highly aligned with their mission to impact the community through advocacy to address critical needs. The presenters of the award noted that she not only helps to address the area's pro bono needs structurally, but also on a granular level where she often handles individual matters that allow disadvantaged clients to both receive justice, and more importantly, retain their dignity.

Hanson Bridgett LLP awarded Beacon of Justice Award

HansonBridgett

Hanson Bridgett LLP has been selected by the National Legal Aid & Defender Association (NLADA) for a 2024 Beacon of Justice Award, which recognizes law firms for their efforts to address issues related to civil and human rights. This is the third year in a row that the firm has received this award.

"It is once again an honor to have our pro bono work recognized by NLADA," said **Samir J. Abdelnour,** Hanson Bridgett's director of pro bono and social impact. "In 2023, we devoted nearly a third of our pro bono hours to civil and human rights, handling matters ranging from limited scope clinics to impact litigation, including successfully challenging a client's unconstitutional detention in a privately-run ICE facility and assisting more than a dozen Afghan refugees access immigration relief and benefits."

Hanson Bridgett negotiates deal to ensure continued support for low-income children and families

In a significant development that underscores a Bay Area community commitment, Hanson Bridgett partner and former managing partner **Andrew Giacomini** has helped finalize the sale of the property that houses the Fairfax-San Anselmo Children's Center, which was founded nearly 50 years ago by community leader Ethel Seiderman. The Center provides high-quality early care and education to children, supporting a diverse population of families and community for under-resourced families and children. The deal concludes a controversial two-year saga that involved the Ross Valley School District and left the future of the beloved childcare center hanging in the balance.

"The District had lost confidence in the Children's Center's ability to acquire and operate the facility and was moving to evict them," explained Giacomini, who got involved last year and, working with several community leaders and funders, was able to get the project back on track. Giacomini relied on his legal expertise and personal and professional network to develop an idea that a new nonprofit, the Seiderman Legacy Children's Fund – be formed to act as the purchaser of the property, with a long-term lease back to the Children's Center. That structure, together with increased support from the Marin Community Foundation, the County of Marin, the Town of Fairfax, the Town of San Anselmo and other supporters persuaded the Ross Valley School District to move forward with the sale.

"It's a big win and a big save," said Giacomini, explaining that the nonprofit acquired the funds necessary to purchase the Center, prevent a potential catastrophic eviction, and is currently raising funds to make additional capital improvements. As president and CEO of the Fund and the chairman of the nonprofit's board, Giacomini promises "the site will forever be used for childcare."

"I was excited and thrilled to see that Andrew stepped up, the deal required his negotiation skills," said partner Allison Schutte, Hanson Bridgett's Government Section Leader. "This is something that embodies our values – a win-win for the community and for children."

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.

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The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client's legal success. Now as a diverse network with more than 6,000 attorneys from more than 80 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.

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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 and programming opportunities – onsite and virtual – and online resources, including webinars, jurisdictional updates, *USLAW Magazine* and compendia of law. 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.

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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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ALABAMA | BIRMINGHAM
Carr Allison
Charles F. Carr ..... (251) 626-9340
ccarr@carrallison.com

ARIZONA | PHOENIX
Jones, Skelton & Hochuli, P.L.C.
Phillip H. Stanfield..... (602) 263-1745
pstanfield@jshfirm.com

ARKANSAS | LITTLE ROCK
Quattlebaum, Grooms & Tull PLLC
John E. Tull, III ..... (501) 379-1705
jtull@qgtlaw.com

CALIFORNIA | LOS ANGELES
Murchison & Cumming LLP
Dan L. Longo..... (714) 953-2244
dlongo@murchisonlaw.com

CALIFORNIA | SAN DIEGO
Klinedinst PC
John D. Klinedinst..... (619) 239-8131
jklinedinst@klinedinstlaw.com

CALIFORNIA | SAN FRANCISCO
Hanson Bridgett LLP
Merton A. Howard ..... (415) 995-5033
mhoward@hansonbridgett.com

CALIFORNIA | SANTA BARBARA
Snyder Burnett Egerer, LLP
Sean R. Burnett ..... (805) 683-7758
sburnett@sbelaw.com

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Noble F. Allen ..... (860) 725-6237
nallen@hinckleyallen.com

DELAWARE | WILMINGTON
Cooch and Taylor P.A.
C. Scott Reese..... (302) 984-3811
sreese@coochtaylor.com

FLORIDA | CENTRAL FLORIDA
Wicker Smith
Richards H. Ford ..... (407) 843-3939
rford@wickersmith.com

FLORIDA | SOUTH FLORIDA
Wicker Smith
Nicholas E. Christin..... (305) 448-3939
nchristin@wickersmith.com

FLORIDA | NORTHWEST FLORIDA
Carr Allison
Christopher Barkas..... (850) 222-2107
cbarkas@carrallison.com

GEORGIA | ATLANTA
Bovis Kyle Burch & Medlin LLC
Kim M. Jackson ..... (678) 338-3975
kjackson@boviskyle.com

HAWAII | HONOLULU
Goodsill Anderson Quinn & Stifel LLP
Edmund K. Saffery..... (808) 547-5736
esaffery@goodsill.com

IDAHO | BOISE
Duke Evett, PLLC
Keely E. Duke ..... (208) 342-3310
ked@dukeevett.com

ILLINOIS | CHICAGO
AmundsenDavis LLC
Lew R.C. Bricker..... (312) 894-3224
lbricker@amundsendavislaw.com

IOWA | CEDAR RAPIDS
Simmons Perrine Moyer Bergman PLC
Kevin J. Visser..... (319) 366-7641
kvisser@spmblaw.com

KANSAS/WESTERN MISSOURI | KANSAS CITY
Dysart Taylor
Amanda Pennington Ketchum.... (816) 714-3066
aketchum@dysarttaylor.com

LOUISIANA | NEW ORLEANS
Plauché Maselli Parkerson LLP
G. Bruce Parkerson..... (504) 586-5227
bparkerson@pmpllp.com

MARYLAND | BALTIMORE
Franklin & Prokopik, PC
Albert B. Randall, Jr..... (410) 230-3622
arandall@fandpnet.com

MASSACHUSETTS | BOSTON
Rubin and Rudman LLP
John J. McGivney..... (617) 330-7000
jmcgivney@rubinrudman.com

MINNESOTA | ST. PAUL
Larson • King, LLP
Mark A. Solheim..... (651) 312-6503
msolheim@larsonking.com

MISSISSIPPI | SOUTHERN MISSISSIPPI
Carr Allison
Nicole M. Harlan..... (228) 678-1009
nharlan@carrallison.com

MISSISSIPPI | RIDGELAND
Copeland, Cook, Taylor & Bush, P.A.
James R. Moore, Jr..... (601) 427-1301
jmoore@cctb.com

MISSOURI | ST. LOUIS
Lashly & Baer, P.C.
Stephen L. Beimdiek ..... (314) 436-8303
sbeim@lashlybaer.com

MONTANA | GREAT FALLS
Davis, Hatley, Haffeman & Tighe, P.C.
Maxon R. Davis ..... (406) 761-5243
max.davis@dhhtlaw.com

NEBRASKA | OMAHA
Baird Holm LLP
Jennifer D. Tricker..... (402) 636-8348
jtricker@bairdholm.com

NEVADA | LAS VEGAS
Thorndal Armstrong, PC
Brian K. Terry ..... (702) 366-0622
bkt@thorndal.com

NEW JERSEY | ROSELAND
Connell Foley LLP
Kevin R. Gardner..... (973) 840-2415
kgardner@connellfoley.com

NEW MEXICO | ALBUQUERQUE
Modrall Sperling
Jennifer G. Anderson ..... (505) 848-1809
jennifer.anderson@modrall.com

NEW YORK | UNIONDALE
Rivkin Radler LLP
David S. Wilck ..... (516) 357-3347
David.Wilck@rivkin.com

NEW YORK | WESTCHESTER
Black Marjieh & Sanford LLP
Lisa J. Black ..... (914) 704-4402
lblack@bmslegal.com

NORTH CAROLINA | RALEIGH
Poyner Spruill LLP
Deborah E. Sperati..... (252) 972-7095
dsperati@poynerspruill.com

NORTH DAKOTA | FARGO
Larson • King, LLP
Jack E. Zuger..... (877) 373-5501
jzuger@larsonking.com

OHIO | CLEVELAND
Roetzel & Andress
Bradley A. Wright ..... (330) 849-6629
bwright@ralaw.com

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Pierce Couch Hendrickson Baysinger & Green, L.L.P.
Gerald P. Green..... (405) 552-5271
jgreen@piercecouch.com

OREGON | PORTLAND
Williams Kastner
Thomas A. Ped ..... (503) 944-6988
tped@williamskastner.com

PENNSYLVANIA | PHILADELPHIA
Sweeney & Sheehan, P.C.
J. Michael Kunsch ..... (215) 963-2481
michael.kunsch@sweeneyfirm.com

PENNSYLVANIA | PITTSBURGH
Pion, Nerone, Girman & Smith, P.C.
John T. Pion ..... (412) 281-2288
jpion@pionlaw.com

RHODE ISLAND | PROVIDENCE
Adler Pollock & Sheehan P.C.
Richard R. Beretta, Jr. ..... (401) 427-6228
rberetta@apslaw.com

SOUTH CAROLINA | COLUMBIA
Sweeny, Wingate & Barrow, P.A.
Mark S. Barrow..... (803) 256-2233
msb@swblaw.com

SOUTH DAKOTA | PIERRE
Riter Rogers, LLP
Lindsey L. Riter-Rapp..... (605) 224-5825
l.riter-rapp@riterlaw.com

TENNESSEE | MEMPHIS
Martin, Tate, Morrow & Marston, P.C.
Lee L. Piovarcy ..... (901) 522-9000
lpiovarcy@martintate.com

TEXAS | DALLAS
Fee, Smith & Sharp, L.L.P.
Michael P. Sharp..... (972) 980-3255
msharp@feesmith.com

TEXAS | HOUSTON
MehaffyWeber
Barbara J. Barron ..... (713) 655-1200
BarbaraBarron@mehaffyweber.com

UTAH | SALT LAKE CITY
Strong & Hanni, PC
Kristin A. VanOrman..... (801) 323-2020
kvanorman@strongandhanni.com

VIRGINIA | RICHMOND
Moran Reeves & Conn PC
C. Dewayne Lonas ..... (804) 864-4820
dlonas@moranreevesconn.com

WASHINGTON | SEATTLE
Williams Kastner
Rodney L. Umberger ..... (206) 628-2421
rumberger@williamskastner.com

WEST VIRGINIA | CHARLESTON
Flaherty Sensabaugh Bonasso PLLC
Peter T. DeMasters..... (304) 225-3058
pdemasters@flahertylegal.com

WISCONSIN | MILWAUKEE
Laffey, Leitner & Goode LLC
Jack Laffey ..... (414) 881-3539
jlaffey@llgmke.com

WYOMING | CASPER
Williams, Porter, Day and Neville PC
Scott E. Ortiz ..... (307) 265-0700
sortiz@wpdn.net

USLAW INTERNATIONAL

ARGENTINA | BUENOS AIRES
Barreiro, Olivas, De Luca, Jaca & Nicastro
Nicolás Jaca Otaño..... (54 11) 4814-1746
njaca@bodlegal.com

BRAZIL | SÃO PAULO
Mundie e Advogados
Rodolpho Protasio ..... (55 11) 3040-2923
rofp@mundie.com

CANADA | ONTARIO | OTTAWA
Kelly Santini
Lisa Langevin ..... (613) 238-6321 ext 276
llangevin@kellysantini.com

CANADA | QUEBEC | MONTREAL
Therrien Couture Joli-Coeur
Douglas W. Clarke ..... (450) 462-8555
douglas.clarke@groupetcj.ca

CHINA | SHANGHAI
Duan&Duan
George Wang 8621 6219 1103
george@duanduan.com

MEXICO | MEXICO CITY
EC Rubio
René Mauricio Alva ..... +52 55 5251 5023
ralva@ecrubio.com

TELFA

AUSTRIA
Oberhammer Rechtsanwälte GmbH
Christian Pindeus ..... +43 1 5033000
c.pindeus@oberhammer.co.at

BELGIUM
Delsol Avocats
Sébastien Popijn .....(+32) 479 30 84 58
spopijn@delsolavocats.com

CYPRUS
Demetrios A. Demetriades LLC
Demetrios A. Demetriades.....+357 22 769 000
dadlaw@dadlaw.com.cy

CZECH REPUBLIC
Vyskocil, Kroslak & spol. Advocates and Patent Attorneys
Jiri Spousta ..... (00 420) 224 819 133
spousta@akvk.cz

DENMARK
Lund Elmer Sandager
Jacob Roesen..... +45 33 300 268
jro@les.dk

ENGLAND
Wedlake Bell
Edward Craft ..... +44 20 7395 3099
ecraft@wedlakebell.com

ESTONIA
WIDEN
Urmas Ustav..... +372 50 48 341
urmas.ustav@widen.legal

FINLAND
Lexia Attorneys Ltd.
Peter Jaari..... ++358 (0)10 4244 210
peter.jaari@lexia.fi

FRANCE
Delsol Avocats
Emmanuel Kaeppelin..... +33(0)4 72 10 20 30
ekaeppelin@delsolavocats.com

GERMANY
Buse
René-Alexander Hirth ..... +49 711 2249825
hirth@buse.de

GREECE
Corina Fassouli-Grafanaki & Associates Law Firm
Korina Fassouli-Grafanaki ..... (+30) 210-3628512
korina.grafanaki@lawofmf.gr

HUNGARY
Bihary Balassa & Partners Attorneys at Law
Agnes Balassa..... +36 1 391 44 91
agnes.balassa@biharybalassa.hu

IRELAND
Kane Tuohy
Sarah Reynolds .....+353 1 672 2233
sreynolds@kanetuohy.ie

ITALY
RPLT RP legalitax
Andrea Rescigno ..... +39 02 45381201
andrea.rescigno@rplt.it

LATVIA
WIDEN
Janis Esenvalds ..... +371 26 458 754
esenvalds@widen.legal

LITHUANIA
WIDEN
Lina SikSniute-Vaitiekuniene ..... +370 652 135 93
lina.vaitiekuniene@widen.legal

LUXEMBOURG
Tabery & Wauthier
Véronique Wauthier ..... (00352) 251 51 51
avocats@tabery.eu

NETHERLANDS
Dirkzwager
Karen A. Verkerk..... +31 26 365 55 57
Verkerk@dirkzwager.nl

NORWAY
Advokatfirmaet Berngaard
Tom Eivind Haug ..... +47 906 53 609
haug@berngaard.no

POLAND
GWW
Aldona Leszczyńska-Mikulska..... +48 22 212 00 00
warszawa@gww.pl

PORTUGAL
Carvalho, Matias & Associados
Antonio Alfaia de Carvalho .....(351) 21 8855440
acarvalho@cmasa.pt

SERBIA AND WESTERN BALKANS
Vukovic & Partners
Dejan Vuković .....(351) 21 8855440
acarvalho@cmasa.pt

SLOVAKIA
Alianciaadvokátov
Gerta Sámelová Flassiková ..... +421 2 57101313
flassikova@aliancia.sk

SPAIN
Adarve Abogados SLP
Juan José García .....+34 91 591 30 60
Juanjose.garcia@adarve.com

SWEDEN
Wesslau Söderqvist Advokatbyrå
Max Bjorkbom ..... +46 8 407 88 00
max.bjorkbom@hsa.se

SWITZERLAND
Meyerlustenberger Lachenal
Nadine von Büren-Maier.....+41 22 737 10 00
nadine.vonburen-maier@mll-legal.com

TURKEY
Baysal & Demir
Pelin Baysal ..... +90 212 813 19 31
pelin@baysaldemir.com

the complete USLAW SOURCEBOOK

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

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

VIRTUAL OFFERINGS

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

EDUCATION

It's no secret – USLAW can host a great event. We are very proud of the timely industry-leading interactive roundtable discussions at our semi-annual client conferences, forums and client exchanges. Reaching from national to more localized offerings, USLAW member attorneys and the clients they serve meet throughout the year at USLAW-hosted events and at many legal industry conferences. USLAW also offers industry and practice group-focused virtual programming. CLE accreditation is provided for most USLAW educational offerings.

A TEAM OF EXPERTS

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

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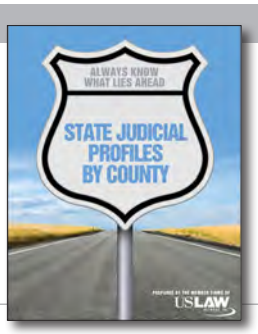
LAWMOBILE

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

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. Visit the Client Toolkit 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 today's corporate leaders and legal decision-makers. Recent topics have covered cyber-security & data privacy, artificial intelligence, medical marijuana & employer drug policies, management liability issues in the face of a cyberattack, defending motor carriers performing oversized load & heavy haul operations, nuclear verdicts, employee wellness programs, social media & the law, effects of electronic healthcare records, allocating risk by contract and much more.

USLAW CONNECTIVITY

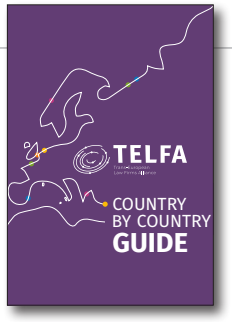
In today's digital world there are many ways to connect, share, communicate, engage, interact and collaborate. Through any one of our various communication channels, sign on, ask a question, offer insight, share comments, and collaborate with others connected to USLAW. Please connect with us via LinkedIn, Instagram, Facebook and X, formerly known as Twitter.

TELFA CORPORATE PRACTICE GROUP COUNTRY-BY-COUNTRY GUIDE

The Trans European Law Firms Alliance (TELFA) Corporate Practice Group Country-by-Country Guide provides legal decision-makers with relevant info for creating corporate structures in jurisdictions across Europe. The corporate structure guide is intended to:

- Provide an overview of the different corporate structures and requirements in the EU.
- Inform about directors' liabilities.
- Supplement company law aspects by always considering issues of tax.

To view and download the TELFA Country-by-Country Guide, visit the Client Toolkit section of uslaw.org.



PRACTICE GROUPS

USLAW prides itself on variety. Its 6,000+ attorneys excel in all areas of legal practice and participate in USLAW's 25+ substantive active practice groups and communities, including Appellate Law, Banking and Financial Services, Business Litigation and Class Actions, Business Transactions/Mergers and Acquisitions, Cannabis Law, Complex Tort and Product Liability, Construction Law, Data Privacy and Security, eDiscovery, Energy/Environmental, Insurance Law, International Business and Trade, IP and Technology, Labor and Employment Law, Medical Law, Professional Liability, Real Estate, Retail and Hospitality Law, Tax Law, Transportation and Logistics, Trust and Estates, 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.

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.

USLAW NETWORK MEMBERSHIP ROSTER

AL CARR ALLISON

ADDRESS
100 Vestavia Parkway
Birmingham, AL 35216

PH
(205) 949-2925
FAX
(205) 822-2057
WEB
www.carrallison.com

PRIMARY
Charles F. Carr
(205) 949-2925
ccarr@carrallison.com

ALTERNATE
Thomas L. Oliver, II
(205) 949-2942
toliver@carrallison.com

ALTERNATE
Thomas S. Thornton, III
(205) 949-2936
tthornton@carrallison.com

MEMBER SINCE 2001 Carr Allison, one of the fastest growing firms in the Southeast, has offices strategically located throughout Alabama, Mississippi and Florida to provide our clients with sophisticated, effective and efficient legal representation.

We are the largest pure litigation firm in Alabama and have been recognized as a top five law firm by the Alabama Trial Court Review. From complex class actions to the defense of professionals, retailers, transportation companies, manufacturers, builders, employers and insurers, we represent clients of all sizes. Our attorneys include two former USLAW Chairs, the Executive Director of the Alabama Self-Insurers Association, adjunct faculty in Alabama's law schools and several national speakers and writers on legal subjects ranging from punitive damages in Mississippi to quantifying death verdict values in Alabama and around the country.

Additional Offices:
Daphne, AL • PH (251) 626-9340 | Dothan, AL • PH (334) 712-6459 | Florence, AL • PH (256) 718-6040
Jacksonville, FL • PH (904) 328-6456 | Tallahassee, FL • PH (850) 222-2107 | Gulfport, MS • PH (228) 864-1060

AZ JONES, SKELTON & HOCHULI, PLC

ADDRESS
40 North Central Avenue
Suite 2700
Phoenix, AZ 85004

PH
(602) 263-1700
FAX
(602) 651-7599
WEB
www.jshfirm.com

PRIMARY
Phillip H. Stanfield
(602) 263-1745
pstanfield@jshfirm.com

ALTERNATE
Michael A. Ludwig
(602) 263-7342
mludwig@jshfirm.com

ALTERNATE
Clarice A. Spicker
(602) 263-1706
cspicker@jshfirm.com

MEMBER SINCE 2001 Jones, Skelton & Hochuli, PLC is the largest and most experienced law firm of trial and appellate lawyers in Arizona practicing in the areas of insurance and insurance coverage defense. The firm's 100+ attorneys defend insureds, self-insureds, government entities, corporations, and professional liability insureds throughout Arizona, New Mexico, and Utah.

Recognized as highly skilled, aggressive defenders of the legal and business communities, JSH lawyers have extensive trial and appellate experience in both state and federal courts. We present a vigorous defense in settlement negotiations and the deterrence of frivolous claims, as well as cost-effective arbitration and mediation services. With over 75 years of collective experience, our nationally-recognized in-house appellate team has handled over 800 appeals in state and federal courts.

AR QUATTLEBAUM, GROOMS & TULL PLLC

ADDRESS
111 Center St., Ste. 1900
Little Rock, AR 72201

PH
(501) 379-1700
FAX
(501) 379-1701
WEB
www.QGTlaw.com

PRIMARY
John E. Tull, III
(501) 379-1705
jtull@qgtlaw.com

ALTERNATE
Thomas G. Williams
(501) 379-1722
twilliams@qgtlaw.com

ALTERNATE
Michael N. Shannon
(501) 379-1716
mshannon@qgtlaw.com

MEMBER SINCE 2004 With offices in Northwest and Central Arkansas, Quattlebaum, Grooms & Tull PLLC is a full-service law firm that can meet virtually any litigation, transactional, regulatory or dispute-resolution need. The firm's clients include Fortune 500 companies, regional businesses, small entities, governmental bodies, and individuals. Our goal is to provide legal expertise with honesty, integrity, and respect to all clients, always keeping our client's best interests in the forefront. Whether engaging in business formation, commercial transactions, or complex litigation, clients look to our over 40 attorneys for sound counsel, guidance and dependable advice, which has led to many long-term client relationships founded on mutual trust and respect.

Additional Office: Springdale, AR • (479) 444-5200

CA MURCHISON & CUMMING, LLP

ADDRESS
801 South Grand Avenue
Ninth Floor
Los Angeles, CA 90017

PH
(213) 623-7400
FAX
(213) 623-6336
WEB
www.murchisonlaw.com

PRIMARY
Dan L. Longo
(714) 501-2838
dlongo@murchisonlaw.com

ALTERNATE
Richard C. Moreno
(213) 630-1085
rmoreno@murchisonlaw.com

ALTERNATE
Jean A. Dalmore
(213) 630-1005
jdalmore@murchisonlaw.com

MEMBER SINCE 2001 Founded in 1930, Murchison & Cumming, LLP is an AV-rated AmLaw 500 "Go To" law firm for litigation in California. One third of the firm's shareholders are from diverse backgrounds. We have the resources of a large firm while ensuring the level of personalized service one would expect to receive from a small firm. We represent domestic and international businesses, insurers, professionals and individuals in litigated, non-litigated and transactional matters.

We value our reputation for excellence and approach our work with enthusiasm and passion. What truly sets us apart is our ability to provide our clients with an early evaluation of liability, damages, settlement value and strategy. Together with our clients we develop an appropriate strategy as we pursue the targeted result in a focused, efficient, and effective manner.

Additional Office: Irvine, CA • PH (714) 972-9977

CA KLINEDINST PC

ADDRESS
501 West Broadway
Suite 1100
San Diego, CA 92101

PH
(619) 400-8000
FAX
(619) 238-8707
WEB
www.Klinedinstlaw.com

PRIMARY
Frederick M. Heiser
(949) 868-2606
fheiser@klinedinstlaw.com

ALTERNATE
Heather L. Rosing
(619) 488-8888
hrosing@klinedinstlaw.com

MEMBER SINCE 2002 Klinedinst PC serves domestic and international clients in a broad range of civil litigation, corporate defense, white collar, and transactional law matters. Klinedinst attorneys are highly skilled and experienced individuals who provide a range of sophisticated legal services to corporations, institutions, and individuals at both the trial and appellate levels in federal and state courts. Each matter is diligently and effectively managed, from simple transactions to complex document-intensive matters requiring attorneys from multiple disciplines across the West. Klinedinst is firmly committed to providing only the highest quality legal services, drawing upon the individual background and collective energies and efforts of each member of the firm. Klinedinst's overriding goal is to efficiently and effectively achieve optimal results for each client's legal and business interests.

Additional Office: Irvine, CA • PH (949) 868-2600

CA HANSON BRIDGETT LLP

ADDRESS
425 Market Street
26th Floor
San Francisco, CA 94105

PH
(415) 777-3200
FAX
(415) 541-9366
WEB
www.hansonbridgett.com

PRIMARY
Mert A. Howard
(415) 995-5033
MHoward@hansonbridgett.com

ALTERNATE
Sandra Rappaport
(415) 995-5053
SRappaport@hansonbridgett.com

ALTERNATE
Jonathan S. Storper
(415) 995-5040
JStorper@hansonbridgett.com

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Additional Offices:
Sacramento, CA • PH (916) 442-3333 | San Rafael, CA • PH (415) 925-8400 | Walnut Creek, CA • PH (925) 746-8460

CA SNYDER BURNETT EGERER, LLP

ADDRESS
3757 State Street
Suite 2A
Santa Barbara, CA 93105

PH
(805) 692-2800
FAX
(805) 692-2801
WEB
www.sbelaw.com

PRIMARY
Sean R. Burnett
(805) 683-7758
sburnett@sbelaw.com

ALTERNATE
Ashley Dorris Egerer
(805) 683-7746
aegerer@sbelaw.com

ALTERNATE
Christopher M. Cotter
(805) 692-2800
ccotter@sbelaw.com

MEMBER SINCE 2001 Snyder Burnett Egerer, LLP is an AV rated firm which concentrates its practice on the defense and prosecution of civil litigation matters. The firm handles matters in state and federal courts throughout Central and Southern California, primarily for self-insured clients. Our very active trial practice includes actions in personal injury, premises liability, professional malpractice, business and complex litigation, employment law, products/drug liability, environmental, toxic tort, property, land use and development. Because the firm is staffed with trial lawyers, discovery does not involve "turning over every rock" and then billing the client for the effort. Rather, we direct discovery and investigation to the issues that will move the case toward resolution. If the case does not settle, we relish protecting our client's rights at trial. The firm's trial record is enviable – a winning percentage of over 85% for over 300 jury trials in the past decade.

CA COLEMAN CHAVEZ & ASSOCIATES
FOR WORKERS' COMPENSATION ONLY

ADDRESS
1731 E. Roseville Parkway
Suite 200
Roseville CA 95661

PH
(916) 787-2312
FAX
(916) 787-2301
WEB
www.cca-law.com

PRIMARY
Richard Chavez
(916) 607-3300
rchavez@cca-law.com

ALTERNATE
Chad Coleman
(916) 300-4323
ccoleman@cca-law.com

ALTERNATE
Noelle Sage
(714) 742-0782
nsage@cca-law.com

MEMBER SINCE 2023 Coleman Chavez & Associates, LLP is a 65+ attorney law firm focused on the defense of workers' compensation claims and related litigation in California. Coleman Chavez & Associates was established in 2008, and we recently celebrated our 15th anniversary.

Coleman Chavez & Associates represents a variety of clients, including employers, insurance carriers and third-party administrators. We take pride in the quality of our work, and we are committed to providing thorough and effective representation to our clients. We believe that we can achieve the best results by staying well informed on the law, being thoroughly prepared, negotiating assertively and effectively, and keeping an open line of communication with our clients.

From our offices throughout the state, we service all Northern California and Southern California WCAB District Offices. The attorneys at Coleman Chavez & Associates look forward to working with you and your team members.

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CO LEWIS ROCA

ADDRESS
1601 19th Street
Suite 1000
Denver, CO 80202

PH
(303) 623-9000
FAX
(303) 623-9222
WEB
www.lewisroca.com

ALTERNATE
Ben M. Ochoa
(303) 628-9574
BOchoa@lewisroca.com

ALTERNATE
Michael D. Plachy
(303) 628-9532
MPlachy@lewisroca.com

MEMBER SINCE 2005 Established and emerging companies, across key Colorado industries, consistently look to Lewis Roca Rothgerber Christie for informed and experienced counsel on the issues that matter most to their businesses. Our attorneys serve a diverse base of local, regional, national and international clients, including some of the world's largest corporations, with transactional and litigation guidance. And from a service perspective, we immerse ourselves in your industry, business, and matter to solve your problems and anticipate the ones that lie ahead. We believe that every client deserves an exceptional experience and we've made it our mission to continuously exceed expectations in order to help you meet the unique business challenges of a rapidly evolving global marketplace. What matters to you, matters to us.

Additional Office: Colorado Springs, CO • PH (719) 386-3000

CT HINCKLEY ALLEN

ADDRESS
20 Church Street, 18th Floor
Hartford, CT 06103

PH
(860) 331-2610
FAX
(860) 278-3802
WEB
www.hinckleyallen.com

PRIMARY
Noble F. Allen
(860) 331-2610
nallen@hinckleyallen.com

ALTERNATE
William S. Fish, Jr.
(860) 331-2700
wfish@hinckleyallen.com

ALTERNATE
Peter J. Martin
(860) 331-2726
pmartin@hinckleyallen.com

MEMBER SINCE 2009 Hinckley Allen is a client-driven, forward-thinking law firm with one common goal: to provide great value and deliver outstanding results for our clients. We collaborate across practices and continuously pursue operational excellence to deliver cost-effective, exceptional service. Structured to serve our clients based on their industries and how they do business, we offer a rare combination of agility, responsiveness, full-service capabilities, and depth of experience.

Recognized as an AmLaw 200 Firm, Hinckley Allen offers pragmatic legal counsel, strategic thinking, and tireless advocacy to a diverse clientele. Our clients include regional, national, and international privately held and public companies and emerging businesses in a wide range of industries. Leading utilities, financial institutions, manufacturing companies, educational institutions, academic medical centers, health care institutions, hospitals, real estate developers, and construction companies depend on us for counsel. We have been a vital force in businesses, government, and our communities since 1906.

Additional Office: Manchester, NH • PH (603) 225-4334

DE COOCH AND TAYLOR

ADDRESS
1000 N. West Street
Suite 1500
Wilmington, DE 19899

PH
(302) 984-3800
FAX
(302) 984-3939
WEB
www.coochtaylor.com
www.delawarelitigator.com

PRIMARY
C. Scott Reese
(302) 984-3811
sreese@coochtaylor.com

ALTERNATE
Blake A. Bennett
(302) 984-3889
bbennett@coochtaylor.com

ALTERNATE
R. Grant Dick IV
(302) 984-3867
gdick@coochtaylor.com

MEMBER SINCE 2015 Cooch and Taylor, established in 1960, has long been regarded as one of Delaware's best litigation firms. The firm's attorneys spend a significant amount of time in the courtroom and have achieved many significant bench and jury verdicts, but recognize that to the vast majority of clients, success is defined by getting the best possible outcome long before a jury is ever seated. Delaware's judiciary has a reputation as one of the best in the country based on factors such as judicial competence, treatment of litigation and timeliness. As a result, Delaware's judges have strict expectations for all counsel appearing before them and Cooch and Taylor has over half a century of experience in ensuring its clients and co-counsel meet those expectations.

FL WICKER SMITH | CENTRAL FLORIDA

ADDRESS
390 North Orange Street,
Suite 1000
Orlando. FL 32801

PH
(407) 317-2170
FAX
(407) 649-8118
WEB
www.wickersmith.com

PRIMARY
Richards H. Ford
(407) 317-2170
rford@wickersmith.com

ALTERNATE
Kurt M. Spengler
(407) 317-2186
kspengler@wickersmith.com

MEMBER SINCE 2001 Founded in 1952, Wicker Smith O'Hara McCoy & Ford P.A. is a full-service trial firm deeply experienced in handling significant and complex litigation for a broad variety of clients including multinational corporations to individuals. With more than 260 attorneys, Wicker Smith services clients throughout Central and South Florida and beyond. Our Central Florida region serves Melbourne, Orlando, Tampa, and Sarasota. In South Florida, we serve Fort Lauderdale, Key Largo, Miami, Naples, Palmetto Bay, and West Palm Beach. The backbone of our relationship with clients is built upon integrity and stability. We strive to establish long-term relationships with our clients built upon a partnership of communication and trust by listening to our clients, understanding their businesses, and developing legal solutions to best meet their individual needs.

Additional Offices: Fort Lauderdale, FL • PH (954) 847-4800 Jacksonville, FL • PH (904) 355-0225
Key Largo, FL • PH (305) 448-3939 | Melbourne, FL • PH (321) 610-5800 | Naples, FL • PH (239) 552-5300
Orlando, FL • PH (407) 843-3939 | Palmetto Bay, FL • PH (305) 448-3939 | Sarasota, FL • PH (941) 366-4200
Tampa, FL • PH (813) 222-3939 | West Palm Beach, FL • PH (561) 689-3800

FL WICKER SMITH | SOUTH FLORIDA

ADDRESS
2800 Ponce de Leon Blvd.
Suite 800
Coral Gables, FL 33134

PH
(305) 461-8718
FAX
(305) 441-1745
WEB
www.wickersmith.com

PRIMARY
Nicholas E. Christin
(305) 461-8710
nchristin@wickersmith.com

ALTERNATE
Oscar J. Cabanas
((305)461-8710
ocabanas@wickersmith.com

ALTERNATE
Constantine "Dean" Nickas
(305) 461-8703
cnickas@wickersmith.com

MEMBER SINCE 2001 Founded in 1952, Wicker Smith O'Hara McCoy & Ford P.A. is a full-service trial firm deeply experienced in handling significant and complex litigation for a broad variety of clients including multinational corporations to individuals. With more than 260 attorneys, Wicker Smith services clients throughout Central and South Florida and beyond. Our Central Florida region serves Melbourne, Orlando, Tampa, and Sarasota. In South Florida, we serve Fort Lauderdale, Key Largo, Miami, Naples, Palmetto Bay, and West Palm Beach. The backbone of our relationship with clients is built upon integrity and stability. We strive to establish long-term relationships with our clients built upon a partnership of communication and trust by listening to our clients, understanding their businesses, and developing legal solutions to best meet their individual needs.

Additional Offices: Fort Lauderdale, FL • PH (954) 847-4800 Jacksonville, FL • PH (904) 355-0225
Key Largo, FL • PH (305) 448-3939 | Melbourne, FL • PH (321) 610-5800 | Naples, FL • PH (239) 552-5300
Orlando, FL • PH (407) 843-3939 | Palmetto Bay, FL • PH (305) 448-3939 | Sarasota, FL • PH (941) 366-4200
Tampa, FL • PH (813) 222-3939 | West Palm Beach, FL • PH (561) 689-3800

FL CARR ALLISON | NORTHWEST FLORIDA

ADDRESS
305 South Gadsden St.
Tallahassee, FL 32301

PH
(850) 518-6913
FAX
(850) 222-8475
WEB
www.carrallison.com

PRIMARY
Christopher Barkas
(850) 518-6913
cbarkas@carrallison.com

ALTERNATE
William B. Graham
(850) 518-6917
bgraham@carrallison.com

MEMBER SINCE 2001 The Tallahassee office of Carr Allison brings a legacy of more than 40 years of providing quality legal service to north Florida. A member of USLAW since 2001, Carr Allison has increased the scope of services available to its clientele, covering the Gulf Coast from Mississippi through Alabama and across the northern Florida panhandle to Jacksonville on the Atlantic coast.The lawyers handle all insurance issues from licensing to litigation. Firm members have extensive trial experience in the event matters can't be resolved. Clients of the firm include insurance carriers as well as self-insured companies. Having a unique location in Florida's Capital gives us the ability to lobby the legislature and influence public policy.With the resources of more than 120 lawyers in Alabama, Florida and Mississippi behind it, Carr Allison's offices in Tallahassee and Jacksonville stand ready to serve the national and international client faced with legal exposure in Florida.

Additional Offices:
Birmingham, AL • PH (205) 822-2006 | Daphne, AL • PH (251) 626-9340 | Dothan, AL • PH (334) 712-6459
Florence, AL • PH (256) 718-6040 | Jacksonville, FL • PH (904) 328-6456 | Gulfport, MS • PH (228) 864-1060

GA BOVIS KYLE BURCH & MEDLIN LLC

ADDRESS
200 Ashford Center North
Suite 500
Atlanta, GA 30338

PH
(770) 391-9100
FAX
(770) 668-0878
WEB
www.boviskyle.com

PRIMARY
Kim M. Jackson
(678) 338-3975
kjackson@boviskyle.com

ALTERNATE
Christina L. Gulas
(678) 338-3982
clg@boviskyle.com

ALTERNATE
William M. Davis
(678) 338-3981
wdavis@boviskyle.com

MEMBER SINCE 2023 Bovis, Kyle, Burch & Medlin, LLC was founded over 50 years ago, when John Bovis joined the firm's predecessor started by federal Senior Judge William C. O'Kelley. Encouraged by our clients' needs, the firm has grown to include attorneys dedicated to a wide variety of practice areas. In 2008, that growth spurred the firm's move to a larger main office that includes state-of-the-art mediation space and advanced technology, helping us to better serve our clients' needs. Bovis, Kyle, Burch & Medlin, LLC is a multi-practice firm with its main office located in the growing Perimeter Center area, north of downtown Atlanta, Georgia.

Additional Offices:
Cumming, GA • PH (770) 391-9100

HI GOODSILL ANDERSON QUINN & STIFEL LLP

ADDRESS
First Hawaiian Center
Suite 1600
999 Bishop Street
Honolulu, HI 96813

PH
(808) 547-5600
FAX
(808) 547-5880
WEB
www.goodsill.com

PRIMARY
Edmund K. Saffery
(808) 547-5736
esaffery@goodsill.com

ALTERNATE
Johnathan C. Bolton
(808) 547-5854
jbolton@goodsill.com

MEMBER SINCE 2004 With more than 50 attorneys located in downtown Honolulu, Goodsill offers knowledge and experience in all aspects of civil law, including business and securities law, banking, real estate, tax, trusts and estates, public utilities, immigration, international transactions and civil litigation. In addition to representing clients in alternative dispute resolution, a number of our trial lawyers are trained mediators and are retained to resolve disputes. Goodsill's litigation department also handles appeals in both state and federal courts.

Goodsill attorneys provide innovative, solutions-oriented legal and general business counsel to an impressive list of domestic and international clients. We work closely with each client to identify and deploy the right mix of legal and business expertise, talented support staff and technology.

ID DUKE EVETT PLLC

ADDRESS
1087 W River Street
Suite 300
Boise, ID 83702

PH
(208) 342-3310
FAX
(208) 342-3299
WEB
www.dukeevett.com

PRIMARY
Keely E. Duke
(208) 342-3310
ked@dukeevett.com

ALTERNATE
Joshua S. Evett
(208) 342-3310
jse@dukeevett.com

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IL AMUNDSEN DAVIS LLC

ADDRESS
150 North Michigan Ave.
Suite 3300
Chicago, IL 60601

PH
(312) 894-3200
FAX
(312) 894-3210
WEB
www.amundsendavislaw.com

PRIMARY
Lew R.C. Bricker
(312) 894-3224
lbricker@amundsendavislaw.com

ALTERNATE
Larry A. Schechtman
(312) 894-3253
lschechtman@amundsendavislaw.com

ALTERNATE
Julie A. Proscia
(630) 587-7911
jproscia@amundsendavislaw.com

MEMBER SINCE 2001 Amundsen Davis is a full service business law firm of more than 230 attorneys serving companies of all sizes throughout the U.S. and beyond. Our attorneys are prepared to handle a multitude of diverse legal services from the inception of business, to labor and employment issues, and litigation. We understand the entrepreneurial thinking that drives business decisions for our clients. Amundsen Davis attorneys combine experience with a practical business approach to offer client-centered services efficiently and effectively. The foundation for our success is the integrity, quality and experience of our attorneys and staff, an understanding of the relationship between legal risks and business objectives, and the desire to explore new and innovative ways to solve client problems.

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Crystal Lake, IL • PH (815) 337-4900 | Rockford, IL • PH (815) 987-0441 | St. Charles, IL • PH (630) 587-7910

IA SIMMONS PERRINE MOYER BERGMAN PLC

ADDRESS
115 Third Street SE
Suite 1200
Cedar Rapids, IA 52401

PH
(319) 896-4059
FAX
(319) 366-1917
WEB
www.spmblaw.com

PRIMARY
Kevin J. Visser
(319) 366-7641
kvisser@spmblaw.com

ALTERNATE
Lynn W. Hartman
(319) 366-7641
lhartman@spmblaw.com

ALTERNATE
Brian J. Fagan
(319) 366-7641
bfagan@spmblaw.com

MEMBER SINCE 2005 Simmons Perrine Moyer Bergman PLC is a full-service law firm headquartered in Cedar Rapids, Iowa with an additional office located in Coralville, Iowa. The firm's deep history dates back to 1916, having more than a century of experience representing national (and international) clients in matters from complex transportation, construction and intellectual property litigation to business transactions of all sizes. We are also home to one of the largest banking practices in Iowa and are known for our long history of serving the needs of families and their businesses, including estate and succession planning. Our attorneys work together to find the most efficient solutions for the best outcomes for our clients.

Additional Office: Coralville, IA • PH (319) 354-1019

KS/MO DYSART TAYLOR

ADDRESS
700 West 47th Street
Suite 410
Kansas City, MO 64112

PH
(816) 931-2700
FAX
(816) 931-7377
WEB
www.dysarttaylor.com

PRIMARY
Amanda Pennington Ketchum
(816) 714-3066
aketchum@dysarttaylor.com

ALTERNATE
Michael Judy
(816) 714-3031
mjudy@dysarttaylor.com

ALTERNATE
John F. Wilcox, Jr.
(816) 714-3046
jwilcox@dysarttaylor.com

MEMBER SINCE 2014 Dysart Taylor was founded in 1934. It is a highly respected Midwestern law firm with broad expertise to support its clients' growth and success in a myriad of industries. It is also touted as one of the nation's leading transportation law firms. Six members of the firm have served as Presidents of the Transportation Lawyers Association, the leading bar association for attorneys in the transportation industry.

Our attorneys are active in the community and have held governing positions in local and state bar associations and community organizations. Our AV-rated law firm is proud of its reputation for zealous advocacy, high ethical standards, and outstanding results. We are equally proud of the trust our local and national clients place in us.

LA PLAUCHÉ MASELLI PARKERSON LLP

ADDRESS
701 Poydras Street
Suite 3800
New Orleans, LA 70130

PH
(504) 582-1142
FAX
(504) 582-1142
WEB
www.pmpllp.com

PRIMARY
G. Bruce Parkerson
(504) 586-5227
bparkerson@pmpllp.com

ALTERNATE
R. Heath Savant
(225) 406-7303
hsavant@pmpllp.com

ALTERNATE
Lauren Dietzen
(504) 586-5285
ldietzen@pmpllp.com

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Additional Offices: | Baton Rouge, LA

MD FRANKLIN & PROKOPIK P.C.

ADDRESS
2 North Charles Street,
Suite 600
Baltimore, MD 21201

PH
(410) 752-8700
FAX
(410) 752-6868
WEB
www.fandpnet.com

PRIMARY
Albert B. Randall, Jr.
(410) 230-3622
arandall@fandpnet.com

ALTERNATE
Tamara B. Goorevitz
(410) 230-3625
tgoorevitz@fandpnet.com

ALTERNATE
Stephen J. Marshall
(410) 230-3612
smarshall@fandpnet.com

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Additional Offices: | Easton, MD • PH (410) 820-0600 | Hagerstown, MD • PH (301) 745-3900

MA RUBIN AND RUDMAN LLP

ADDRESS
53 State Street
Boston, MA 02109

PH
(617) 330-7017
FAX
(617) 330-7550
WEB
www.rubinrudman.com

PRIMARY
John J. McGivney
(617) 330-7017
jmcgivney@rubinrudman.com

ALTERNATE
Michael D. Riseberg
(617) 330-7180
mriseberg@rubinrudman.com

ALTERNATE
Michael F. Connolly
(617) 330-7101
mconnolly@rubinrudman.com

MEMBER SINCE 2020 Founded over a century ago, Rubin and Rudman LLP is a full-service law firm with more than 75 lawyers in Boston, Massachusetts. With a diverse mix of practices, Rubin and Rudman serves national and international companies, including large public companies and closely held businesses; real estate developers; biotechnology, pharmaceutical and medical device makers; regulated industries, public entities and municipalities; insurance companies and their insureds; educational and other institutions; non-profit organizations; families and high net worth individuals. Rubin and Rudman also has a suburban office in Woburn, Massachusetts. Web: www.rubinrudman.com.

Our years of experience and continuing dedication to providing high quality legal advice has earned us client loyalty and respect amongst our peers. Our attorneys thrive on challenging assignments across diverse areas of the law. We offer innovation and responsiveness, with a collaborative team approach to solving problems that get results.

Additional Office: | Woburn, MA • PH (781) 933-5505

MN LARSON·KING, LLP

ADDRESS
30 East Seventh Street
Suite 2800
St. Paul, MN 55101

PH
(651) 312-6500
FAX
(651) 312-6618
WEB
www.larsonking.com

PRIMARY
Mark A. Solheim
(651) 312-6503
msolheim@larsonking.com

ALTERNATE
David M. Wilk
(651) 312-6521
dwilk@larsonking.com

ALTERNATE
Shawn M. Raiter
(651) 312-6518
sraiter@larsonking.com

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MS CARR ALLISON | SOUTHERN MISSISSIPPI

ADDRESS
1319 26th Avenue
Gulfport, MS 39501

PH
(228) 678-1005
FAX
(228) 864-9160
WEB
www.carrallison.com

PRIMARY
Nicole M. Harlan
(228) 864-1060
nharlan@carrallison.com

MEMBER SINCE 2001 Carr Allison is one of the fastest growing firms in the Southeast. Why? Our clients tell us the fact that we have lawyers with a lifetime of ties in the seven cities in Alabama, Florida and Mississippi where our offices are located is the primary reason they come to us for legal problems in those areas. In Mississippi, we provide litigation services to national clients in the southern part of Mississippi from our office in Gulfport. When clients face litigation exposure in Mississippi they often hear the horror stories involving the imposition of punitive damages. We like to think we "wrote the book" on the subject of punitive damages in Mississippi. With the resources of more than 120 lawyers in Alabama, Florida and Mississippi behind it, the Carr Allison office in Gulfport, Mississippi stands ready to serve the national and international client faced with legal exposure in southern Mississippi.

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Birmingham, AL • PH (205) 822-2006 | Daphne, AL • PH (251) 626-9340 | Dothan, AL • PH (334) 712-6459
Florence, AL • PH (256) 718-6040 | Jacksonville, FL • PH (904) 328-6456 | Tallahassee, FL • PH (850) 222-2107

MS COPELAND, COOK, TAYLOR AND BUSH, P.A.

ADDRESS
600 Concourse, Suite 200
1076 Highland Colony Pkwy.
Ridgeland, MS 39157

PH
(601) 856-7200
FAX
(601) 856-7626
WEB
www.copelandcook.com

PRIMARY
James R. Moore, Jr.
(601) 427-1301
jmoore@cctb.com

ALTERNATE
J. Ryan Perkins
(601) 427-1365
rperkins@cctb.com

MEMBER SINCE 2004 Copeland, Cook, Taylor and Bush, P.A. is a full-service AV-rated law firm based in the Metro Jackson area of Mississippi. Founded in 1985 by the four named shareholders, the firm's original practice was based principally on Commercial Litigation, Oil and Gas, and Insurance Defense. The firm's growth has resulted from strategic planning in direct response to the diverse needs of our clients.

CCTB has built a reputation for strong client relationships as a result of its lawyers' skills in communication and counseling. If litigation cannot be avoided, our seasoned litigation group is prepared to aggressively defend the interests of our clients in state and federal courts. While Mississippi can be a challenging jurisdiction, the record of CCTB clients speaks well for the quality of our representation.

MO LASHLY & BAER, P.C.

ADDRESS
714 Locust Street
St. Louis, MO 63101

PH
(314) 621-2939
FAX
(314) 621-6844
WEB
www.lashlybaer.com

PRIMARY
Stephen L. Beimdiek
(314) 436-8303
sbeim@lashlybaer.com

ALTERNATE
Kevin L. Fritz
(314) 436-8309
klfritz@lashlybaer.com

ALTERNATE
Julie Z. Devine
(314) 436-8329
jdevine@lashlybaer.com

MEMBER SINCE 2002 Lashly & Baer, P.C. is a mid-size Missouri law firm with deep roots in St. Louis and surrounding areas. As a full-service firm, we have been fortunate to develop a very diverse and extremely loyal base of national, regional and local clients. Our clients have learned to expect a high level of service and a great degree of satisfaction, regardless of their size. Whether it's a publicly-owned or private business, government institution, hospital or an individual – to each client, there is no more important legal matter than theirs. We know this and work hard to achieve results and help our clients reach their goals. Given the complexities of today's business environment, lawyers develop experience in specific practice areas, such as: civil litigation, corporate, product liability, retail, transportation, professional liability, labor and employment, education, estate planning, government, health care, medical malpractice defense, personal injury, toxic tort and real estate.

Since 1912 our simple philosophy has never changed: at the core of every case is the client. The client's goals become our goals, and our firm works tirelessly to find the most efficient and cost-effective solution to each legal issue.

MT DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.

ADDRESS
The Milwaukee Station
Third Floor
101 River Drive North
Great Falls, MT 59401

PH
(406) 761-5243
FAX
(406) 761-4126
WEB
www.dhhtlaw.com

PRIMARY
Maxon R. Davis
(406) 761-5243
max.davis@dhhtlaw.com

ALTERNATE
Paul R. Haffeman
(406) 761-5243
paul.haffeman@dhhtlaw.com

ALTERNATE
Stephanie Hollar
(406) 761-5243
steph.hollar@dhhtlaw.com

MEMBER SINCE 2007 Davis, Hatley, Haffeman & Tighe, P.C., is a business and litigation law firm located in Great Falls, Montana. It has been in continuous existence since 1912. Originally the firm focused on insurance defense work. While the defense of insureds and insurers remains a primary component of DHHT's practice, the firm's work has expanded over the years to include business litigation, representation of national and multi-national corporations in class actions, products liability, employment, environmental, toxic tort and commercial litigation, and the defense of public entities, including the State of Montana and numerous cities and counties, as well as a wide range of transactional work, running the gamut of business formations, farm and ranch sales, commercial leasing, oil and gas, and business consulting. There is also an active estate planning and probate practice. The firm carries on a state-wide trial practice. The lawyers at DHHT are proud of their reputation in the Montana legal community as attorneys who are always willing to go the distance for their clients. Since 2007, DHHT lawyers tried cases to verdict in federal and state courts all over Montana, including Great Falls, Billings, Missoula, Helena, Bozeman, Kalispell, Lewistown, Glasgow, Deer Lodge and Shelby. That reputation assures clients of experienced representation through all phases of litigation and instant creditability with the Montana bench & bar.

NE BAIRD HOLM LLP

ADDRESS
1700 Farnam Street
Suite 1500
Omaha, NE 68102

PH
(402) 344-0500
FAX
(402) 344-0588
WEB
www.bairdholm.com

PRIMARY
Jennifer D. Tricker
(402) 636-8348
jtricker@bairdholm.com

ALTERNATE
J. Scott Searl
(402) 636-8265
ssearl@bairdholm.com

ALTERNATE
Christopher R. Hedican
(402) 636-8311
chedican@bairdholm.com

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NV THORNDAL ARMSTRONG, PC

ADDRESS
1100 E. Bridger Avenue
Las Vegas, NV 89101

PH
(702) 366-0622
FAX
(702) 366-0327
WEB
www.thorndal.com

PRIMARY
Brian K. Terry
(702) 366-0622
bkt@thorndal.com

ALTERNATE
Katherine F. Parks
(775) 786-2882
kfp@thorndal.com

ALTERNATE
Michael C. Hetey
(702) 366-0622
mch@thorndal.com

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Additional Office: Reno, NV • PH (775) 786-2882

NJ CONNELL FOLEY LLP

ADDRESS
56 Livingston Avenue
Roseland, NJ 07068

PH
(973) 535-0500
FAX
(973) 535-9217
WEB
www.connellfoley.com

PRIMARY
Kevin R. Gardner
(973) 840-2415
kgardner@connellfoley.com

ALTERNATE
John D. Cromie
(973) 840-2425
jcromie@connellfoley.com

ALTERNATE
Karen P. Randall
(973) 840-2423
krandall@connellfoley.com

MEMBER SINCE 2005 A leading full-service regional law firm headquartered in New Jersey, Connell Foley LLP has more than 140 attorneys across seven offices. We take a hands-on approach to provide outstanding legal services while maintaining a firm culture predicated on service and teamwork. Our clients range from Fortune 500 corporations, to government entities, middle market and start-up businesses, and entrepreneurs. With experience in the various industries in which our clients operate, we offer innovative and cost-effective solutions. Connell Foley is recognized as a leader in numerous areas of law, including: banking and finance, bankruptcy and restructuring, commercial litigation, construction, corporate law, cybersecurity, environmental, immigration, insurance, labor and employment, product liability, professional liability, real estate, zoning and land use, transportation, trusts and estates, and white collar criminal defense.

Additional Offices: Cherry Hill, NJ • PH (856) 317-7100 | Jersey City, NJ • PH (201) 521-1000
Newark, NJ • PH (973) 436-5800 | New York, NY • PH (212) 307-3700

NM MODRALL SPERLING

ADDRESS
500 Fourth Street N.W.
Suite 1000
Albuquerque, NM 87102

PH
(505) 848-1800
FAX
(505) 848-9710
WEB
www.modrall.com

PRIMARY
Jennifer G. Anderson
(505) 848-1809
jennifer.anderson@modrall.com

ALTERNATE
Megan T. Muirhead
(505) 848-1888
megan.muirhead@modrall.com

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Additional Office: Santa Fe, NM • PH (505) 983-2020

NY RIVKIN RADLER LLP

ADDRESS
926 RXR Plaza
Uniondale, NY 11556-0926

PH
(516) 357-3000
FAX
(516) 357-3333
WEB
www.rivkinradler.com

PRIMARY
David S. Wilck
(516) 357-3347
david.wilck@rivkin.com

ALTERNATE
Jacqueline Bushwack
(516) 357-3239
jacqueline.bushwack@rivkin.com

ALTERNATE
Stella Lellos
(516) 357-3373
stella.lellos@rivkin.com

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Additional Office: New York, NY • PH (212) 455-9555

NY BLACK MARJIEH & SANFORD LLP

ADDRESS
100 Clearbrook Road
Elmsford, NY 10523

PH
(914) 704-4400
FAX
(914) 704-4450
WEB
www.bmslegal.com

PRIMARY
Lisa J. Black
(914) 704-4402
lblack@bmslegal.com

ALTERNATE
Dana K. Marjieh
(914) 704-4403
dkmarjieh@bmslegal.com

ALTERNATE
Sheryl A. Sanford
(914) 704-4404
ssanford@bmslegal.com

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NC POYNER SPRUILL LLP

ADDRESS
301 Fayetteville St.
Ste. 1900
P.O. Box 1801 (27602)
Raleigh, NC 27601

PH
(919) 783-6400
FAX
(919) 783-1075
WEB
www.poynerspruill.com

PRIMARY
Deborah E. Sperati
(252) 972-7095
dsperati@poynerspruill.com

ALTERNATE
Randall R. Adams
(252) 972-7094
radams@poynerspruill.com

ALTERNATE
Sarah DiFranco
(704) 342-5330
sdifranco@poynerspruill.com

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Additional Offices:
Charlotte, NC • PH (704) 342-5250 | Rocky Mount, NC • PH (252) 446-2341 | Southern Pines, NC • PH (910) 692-6866

ND LARSON • KING

ADDRESS
10 Roberts Street North
Fargo, ND 58102

PH
(877) 373-5501
FAX
(651) 312-6618
WEB
www.larsonking.com

PRIMARY
Jack E. Zuger
(701) 400-1423
jzuger@larsonking.com

ALTERNATE
Nicholas A. Rauch
(701)
jnrauch@larsonking.com

ALTERNATE
John A. Markert
(701)
jmarkert@larsonking.com

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OH ROETZEL & ANDRESS

ADDRESS
1375 East Ninth Street
One Cleveland Center
10th Floor
Cleveland, OH 44114

PH
(216) 623-0150
FAX
(216) 623-0134
WEB
www.ralaw.com

PRIMARY
Bradley A. Wright
(330) 849-6629
bwright@ralaw.com

ALTERNATE
Moira H. Pietrowski
(330) 849-6761
MPietrowski@ralaw.com

ALTERNATE
Chris Cotter
(330) 819-1127
ccotter@ralaw.com

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Akron, OH • PH (330) 376-2700 | Cincinnati, OH • PH (513) 361-0200 | Columbus, OH • PH (614) 463-9770
Toledo, OH • PH (419) 242-7985 | Wooster, OH • PH (330) 376-2700 | Detroit, MI • PH (313) 309-7033

OK PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P.

ADDRESS
1109 North Francis
Pierce Memorial Building
Oklahoma City, OK 73106

PH
(405) 235-1611
FAX
(405) 235-2904
WEB
www.piercecouch.com

PRIMARY
Gerald P. Green
(405) 552-5271
jgreen@piercecouch.com

ALTERNATE
Mark E. Hardin
(918) 583-8100
mhardin@piercecouch.com

ALTERNATE
Amy Bradley-Waters
(918) 583-8100
abradley-waters@
piercecouch.com

MEMBER SINCE 2002 Pierce Couch Hendrickson Baysinger & Green, L.L.P. was founded in 1923 and is the largest litigation defense firm in the state of Oklahoma. The Firm has offices in Oklahoma City and Tulsa and is engaged in the representation of clients in all 77 Oklahoma Counties and all three federal district courts. Our attorneys have expertise in the areas listed below and prides itself in developing strategies for the defense of its clients, delivering advice and counsel to deal with claims ranging from the defensible to the catastrophic. Our attorneys have tried hundreds of cases to jury verdict and have mediated and/or arbitrated thousands of disputes. We attribute the success and longevity of our firm to our steadfast philosophy of combining the best in cost-efficient legal services with client-tailored strategies.

Additional Office: Tulsa, OK • PH (918) 583-8100

OR WILLIAMS KASTNER

ADDRESS
1515 SW Fifth Avenue
Suite 600
Portland, OR 97201-5449

PH
(503) 228-7967
FAX
(503) 222-7261
WEB
www.williamskastner.com

PRIMARY
Thomas A. Ped
(503) 944-6988
tped@williamskastner.com

ALTERNATE
Heidi L. Mandt
(503) 228-7967
hmandt@williamskastner.com

MEMBER SINCE 2002 Williams Kastner has been providing legal and business advice to a broad mix of clients since our Seattle office opened in 1929. With more than 65 lawyers in Washington and Oregon, the firm combines the resources and experience to offer national and regional capabilities with the client service and sensibility a local firm can provide. The firm culture is characterized by hard work, high-performance teamwork, diversity and partnerships with our clients and the local community. Our commitment to our clients is reflected through our quality legal work, personalized approach to servicing our clients and the integrity and pride we devote towards the practice of law.

Additional Office: Seattle, WA • PH (206) 628-6600

PA SWEENEY & SHEEHAN, P.C.

ADDRESS
1515 Market Street
Suite 1900
Philadelphia, PA 19102

PH
(215) 563-9811
FAX
(215) 557-0999
WEB
www.sweeneyfirm.com

PRIMARY
J. Michael Kunsch
(215) 963-2481
michael.kunsch@
sweeneyfirm.com

ALTERNATE
Robyn F. McGrath
(215) 963-2485
robyn.mcgrath@
sweeneyfirm.com

ALTERNATE
Frank Gattuso
(856) 671-6407
frank.gattuso@
sweeneyfirm.com

MEMBER SINCE 2003 Founded in 1971, Sweeney & Sheehan is a litigation firm of experienced and dedicated trial attorneys and other professionals working in partnership with our clients to meet their changing and increasingly sophisticated particular needs. With client satisfaction our primary goal, we are committed to delivering superior legal services and pursuing excellence in all aspects of our practice.

Our success is achieved without compromising the ideals which define the best in our profession: integrity, loyalty and expertise. We constantly enhance our firm to meet the expectations of our clients. Committed to these principles, we have a reputation as skillful and effective litigators in a broad range of practice areas, providing the talent and experience of larger firms while maintaining flexibility to deliver personalized, cost-effective quality service.

PA PION, NERONE, GIRMAN & SMITH, P.C.

ADDRESS
1500 One Gateway Center
420 Ft. Duquesne Blvd.
Pittsburgh, PA 15222

PH
(412) 281-2288
FAX
(412) 281-3388
WEB
www.pionlaw.com

PRIMARY
John T. Pion
(412) 667-6200
jpion@pionlaw.com

ALTERNATE
Michael F. Nerone
(412) 667-6234
mnerone@pionlaw.com

ALTERNATE
Timothy R. Smith
(412) 667-6212
tsmith@pionlaw.com

MEMBER SINCE 2011 Pion, Nerone, Girman & Smith, P.C. is a civil litigation firm with offices in Pittsburgh and Harrisburg.

Our practice areas include transportation, railroad, asbestos, premises liability, products liability, family law, estate, Medicare Set-Aside, workers' compensation, and general liability. In addition to trial representation, catastrophic response and business consulting, the firm has an appellate and complex research group. The Partners of the firm have more than 150 years of collective experience.

Most of our lawyers and staff were born and raised in Pennsylvania and we are proud to be part of the distinguished Pittsburgh and Harrisburg legal communities. The emergency response telephone number (412-600-0217) is answered by a lawyer 24/7 and allows us to provide high quality service to our clients. We urge our clients to utilize this number should the need arise.

RI ADLER POLLOCK & SHEEHAN P.C.

ADDRESS
One Citizens Plaza
8th Floor
Providence, RI 02903

PH
(401) 274-7200
FAX
(401) 751-0604
WEB
www.apslaw.com

PRIMARY
Richard R. Beretta, Jr.
(401) 427-6228
rberetta@apslaw.com

ALTERNATE
Robert P. Brooks
(401) 274-7200
rbrooks@apslaw.com

ALTERNATE
Elizabeth M. Noonan
(401) 274-7200
bnoonan@apslaw.com

MEMBER SINCE 2008 Since 1960, Adler Pollock & Sheehan P.C. has delivered client-focused business law services designed to achieve cost-effective solutions for today's complex challenges. Based in Providence, the firm is a full-service regional law firm, featuring a sophisticated corporate practice and a nationally-renowned litigation practice. The firm successfully combines the depth and breadth of expertise of a large law firm with the advantages of responsive and direct personal service by partners found in smaller firms.

Among the firm's more than 60 attorneys are several former leaders of the Rhode Island legislature as well as former senior members of state administrations who are able to provide a unique understanding of governmental processes for clients. The firm's client base includes Fortune 500 and 100 companies, small and medium-sized businesses, individuals, public and quasi-public agencies, and private not for- profit organizations.

Additional Office: Newport, RI • PH (401) 847-1919

SC SWEENY, WINGATE & BARROW, P.A.

ADDRESS
1515 Lady Street
Columbia, SC 29201
PO Box 12129 (29211)

PH
(803) 256-2233
FAX
(803) 256-9177
WEB
www.swblaw.com

PRIMARY
Mark S. Barrow
(803) 256-2233
msb@swblaw.com

ALTERNATE
Kenneth B. Wingate
(803) 256-2233
kbw@swblaw.com

ALTERNATE
Christy E. Mahon
(803) 256-2233
cem@swblaw.com

MEMBER SINCE 2002 Sweeny, Wingate & Barrow, P.A. is a litigation and consulting law firm serving the needs of individuals, businesses and insurance companies throughout South Carolina. We are committed to a philosophy of excellence, integrity, and service.

Cooperation, selflessness, and diligence are essential to providing high-quality service to every client. At Sweeny, Wingate and Barrow, we are committed to providing excellent representation to our clients in helping achieve their legal goals. Our relationships with our clients are honest, open, and fair.

Our practice covers many legal issues in two distinct areas. As a business and tort litigation defense firm, we provide defense representation to corporations and individuals in trucking litigation, construction defect litigation, product liability cases, medical malpractice cases, and insurance coverage matters, including opinion letters and defense of accident claims, professional liability, construction defect, and product liability defense.

The other section of our practice includes the transactions and litigation situations that arise in connection with business planning, estate planning, probate administration, and probate litigation. We handle contract drafting, incorporations, startups, wills, trusts, probate matters, and countless other business needs for our clients.

Additional Office: Hartsville, SC • PH (843) 878-0390

SD RITER ROGERS, LLP

ADDRESS
Professional &
Executive Building
319 South Coteau Street
Pierre, SD 57501

PH
(605) 224-5825
FAX
(605) 224-7102
WEB
www.riterlaw.com

PRIMARY
Lindsey Riter-Rapp
l.riter-rapp@riterlaw.com

ALTERNATE
Darla Pollman Rogers
dprogers@riterlaw.com

ALTERNATE
Jason Rumpca
j.rumpca@riterlaw.com.

MEMBER SINCE 2004 The original predecessor firm of Riter Rogers, LLP commenced the practice of law in Pierre, South Dakota over 100 years ago.

The firm has a wide and varied practice, particularly in central South Dakota, but also maintains a statewide litigation practice, regularly appears before State boards and commissions, and serves as legislative counsel for numerous associations and cooperatives.

Firm members have spent considerable time representing insurance companies in defense of casualty suits, products liability claims and similar matters.

The firm handles substantial regulatory law matters, and also does much work relating to banking, contracts, real estate, title work and probate and estate planning.

All members of the firm are active in professional activities and civic and fraternal organizations.

TN MARTIN, TATE, MORROW & MARSTON, P.C.

ADDRESS
6410 Poplar Avenue
Suite 1000
Memphis, TN 38119

PH
(901) 522-9000
FAX
(901) 527-3746
WEB
www.martintate.com

PRIMARY
Lee L. Piovarcy
(901) 522-9000
lpiovarcy@martintate.com

ALTERNATE
Earl W. Houston, II
(901) 522-9000
ehouston@martintate.com

ALTERNATE
Shea Sisk Wellford
(901) 522-9000
swellford@martintate.com

MEMBER SINCE 2002 Martin Tate was endowed by its founder, Judge John D. Martin, Sr., over 100 years ago, with a solid tradition of service to clients, the profession and the Memphis Community. Because of its long-term commitment to the Memphis community, Martin Tate projects a unique perspective in delivering legal services for Memphis businesses and national clients. The firm combines quality legal services with innovative legal thinking to create practical solutions that provide clients a competitive edge. The firm's areas of significant practice are business and commercial transactions; litigation in state and federal courts; trusts and estates; and commercial real estate. The firm's attorneys counsel clients in M&As, banking, IPOs, partnership matters, PILOT transactions, bankruptcy reorganizations and creditor's rights. Attorneys regularly deal with matters involving contracts, transportation law, insurance, products liability, and employment rights. Attorneys in the real estate section are involved in transactions regarding construction, development, leasing and operation of shopping centers, office buildings, industrial plants, and warehouse distribution centers. The firm is involved in financing techniques for real estate syndications, issuance of tax-exempt bonds, and equity participations.

Additional Office: Nashville, TN • PH (615) 627-0668

TX FEE, SMITH & SHARP LLP

ADDRESS
13155 Noel Road
Suite 1000
Dallas, TX 75240

PH
(972) 934-9100
FAX
(972) 934-9200
WEB
www.feesmith.com

PRIMARY
Michael P. Sharp
(972) 980-3255
msharp@feesmith.com

ALTERNATE
Thomas W. Fee
(972) 980-3259
tfee@feesmith.com

ALTERNATE
Jennifer M. Lee
(972) 980-3264
jlee@feesmith.com

MEMBER SINCE 2005 Fee, Smith & Sharp, LLP an AV rated firm based in Dallas, Texas, was founded to service the litigation needs of the firm's individual, corporate and insurance clients. The partners' combined experience as lead counsel in well over 200 civil jury trials allows the firm to deliver an aggressive, team-oriented approach on behalf of their valued clients. The partnership is supported by a team of talented, experienced, and professional associate attorneys and legal staff who understand the importance of delivering efficient, quality legal services. The attorneys at Fee, Smith & Sharp, LLP are actively involved in representing clients throughout Texas in a variety of commercial, property and casualty cases at the state, federal and appellate levels.

Additional Offices:
Austin, TX • PH (512) 479-8400 | San Antonio, TX • PH (210) 824-0009

TX MEHAFFY WEBER PC

ADDRESS
One Allen Center
500 Dallas, Suite 2800
Houston, Texas 77002

PH
(713) 655-1200
FAX
(713) 655-0222
WEB
www.mehaffyweber.com

PRIMARY
Barbara J. Barron
(832) 526-9728
BarbaraBarron@
mehaffyweber.com

ALTERNATE
Bernabe G. Sandoval, III
(713) 210-8906
TreySandoval@
mehaffyweber.com

ALTERNATE
Michele Y. Smith
(409) 951-7736
MicheleSmith@
mehaffyweber.com

MEMBER SINCE 2019 MehaffyWeber was founded in 1946 as a litigation firm. As our clients' needs expanded, we evolved into a broad-based law firm, still with a strong litigation emphasis. We tailor our approaches to best suit the client's individual needs. We are proud to have a long record of winning cases in tough jurisdictions, but we know that not all cases need to be tried. We use legal motions and other means to achieve positive results pre-trial, and when appropriate, we work hand in hand with our clients to secure advantageous settlements. Today, we continue to believe that hard work, ethical and innovative approaches are core values that result in success for the firm and our clients.

UT STRONG & HANNI

ADDRESS
102 South 200 East,
Suite 800
Salt Lake City, UT 84111

PH
(801) 532-7080
FAX
(801) 596-1508
WEB
www.strongandhanni.com

PRIMARY
Kristin A. VanOrman
(801) 323-2020
kvanorman@strongandhanni.com

ALTERNATE
Peter H. Christensen
(801) 323-2008
pchristensen@strongandhanni.com

ALTERNATE
Ryan P. Atkinson
(801) 323-2195
ratkinson@strongandhanni.com

MEMBER SINCE 2005 Strong & Hanni, one of Utah's most respected and experienced law firms, demonstrates exceptional legal ability and superior quality. For more than one hundred years, the firm has provided effective, efficient, and ethical legal representation to individuals, small businesses, and large corporate clients. The firm's attorneys have received awards and commendations from many national and state legal organizations. The firm's practice groups allow attorneys to focus their in-depth knowledge in specific areas of the law. The firm's organization fosters interaction with attorneys across the firm's practice groups insuring that even the most complex legal matter is handled in the most effective and efficient manner. The firm's commitment to up to date technology and case management tools allows matters to be handled with client communication and document security in mind. The firm's trial attorneys have received commendations and recognition from local, state, and national organizations. Our business is protecting your business.

Additional Office: Sandy, UT • PH (801) 532-708

VA MORAN REEVES & CONN PC

ADDRESS
1211 E. Cary Street
Richmond, VA 23219

PH
(804) 421-6250
FAX
(804) 421-6251
WEB
www.moranreevesconn.com

PRIMARY
A.C.Dewayne Lonas
(804) 864-4820
dlonas@moranreevesconn.com

ALTERNATE
Martin A. Conn
(804) 864-4804
mconn@moranreevesconn.com

ALTERNATE
Shyrell A. Reed
(804) 864-4826
sreed@moranreevesconn.com

MEMBER SINCE 2022 Richmond, Virginia-based Moran Reeves & Conn PC specializes in complex litigation, business transactions, and commercial real estate/finance. Its attorneys and legal professionals operate within a technologically advanced, nimble work environment. Client service is foremost at Moran Reeves Conn. Firm leaders also encourage community involvement and are proponents of a collaborative, inclusive culture.

The firm's litigation team handles product liability defense, toxic torts and environmental litigation, construction litigation, premises liability, commercial litigation, and general liability defense. Its award-winning healthcare team works on matters involving medical professional liability, healthcare litigation, and employment disputes. Known as experienced trial attorneys, MRC lawyers also pursue alternative means of dispute resolution when appropriate, including arbitration and mediation.

The firm's robust business transactional practice includes representation of corporate clients and developers in large-scale financing and commercial real estate deals. Team attorneys are experienced in entity formation, creditors' rights, securities offerings, tax-advantaged arrangements such as 1031 exchanges, and other complex transactions.

WA WILLIAMS KASTNER

ADDRESS
Two Union Square
601 Union Street
Suite 4100
Seattle, WA 98101-2380

PH
(206) 628-6600
FAX
(206) 628-6611
WEB
www.williamskastner.com

PRIMARY
Rodney L. Umberger
(206) 628-2421
rumberger@williamskastner.com

ALTERNATE
Sheryl J. Willert
(206) 628-2408
swillert@williamskastner.com

MEMBER SINCE 2002 Williams Kastner has been providing legal and business advice to a broad mix of clients since our Seattle office opened in 1929. With more than 65 lawyers in Washington and Oregon, the firm combines the resources and experience to offer national and regional capabilities with the client service and sensibility a local firm can provide. The firm culture is characterized by hard work, high-performance teamwork, diversity and partnerships with our clients and the local community. Our commitment to our clients is reflected through our quality legal work, personalized approach to servicing our clients and the integrity and pride we devote towards the practice of law.

Additional Office: Portland, OR • PH (503) 228-7967

WV FLAHERTY SENSABAUGH BONASSO PLLC

ADDRESS
200 Capitol Street
Charleston, WV 25301

PH
(304) 345-0200
FAX
(304) 345-0260
WEB
www.flahertylegal.com

PRIMARY
Peter T. DeMasters
(304) 225-3058
pdemasters@flahertylegal.com

ALTERNATE
Tyler Dinsmore
(304) 347-4234
tdinsmore@flahertylegal.com

ALTERNATE
Michael Bonasso
(304) 347-4259
mbonasso@flahertylegal.com

MEMBER SINCE 2015 Flaherty Sensabaugh Bonasso PLLC serves local, national and international clients in the areas of litigation and transactional law. Founded in 1991, today more than 50 attorneys provide quality counsel to turn clients' obstacles into opportunities.

At Flaherty, we are deeply committed to partnering with our clients to obtain optimum results. Throughout our history, our prime consideration has been our client's interests, with a key consideration of the costs associated with litigation.

While avoiding litigation may be desired, when necessary, our attorneys stand prepared to bring their considerable experience to the courtroom. We are experienced in trying matters ranging from simple negligence to complex, multi-party matters involving catastrophic damages.

Additional Offices:
Clarksburg, WV • PH (304) 624-5687 | Morgantown, WV • PH (304) 598-0788 | Wheeling, WV • PH (304) 230-6600

WI LAFFEY, LEITNER & GOODE LLC

ADDRESS
325 E. Chicago Street,
Suite 200
Milwaukee, WI 53202

PH
(414) 312-7003
FAX
(414) 755-7089
WEB
www.llgmke.com

PRIMARY
Jack J. Laffey
(414) 881-3539
jlaffey@llgmke.com

ALTERNATE
Joseph S. Goode
(414) 312-7181
jgoode@llgmke.com

ALTERNATE
Mark M. Leitner
(414) 312-7108
mleitner@llgmke.com

MEMBER SINCE 2019 Relentless. Inspired. Committed. Authentic. Our team of professionals share an almost fanatical commitment to practicing Law as a means of balancing the unbalanced, leveling the unleveled, and bringing big-time results to you, our client.

We want the hardest problems you can throw at us. There is nothing we love more than diving deep into complex litigation and disputes. We will solve your problems, no matter how large or how small. This team thrives under pressure, so pile it on. Our team of battle-tested attorneys brings an unmatched drive and determination to every client. We don't rest on our laurels. We innovate and create new solutions to produce winning results. We bring order and symmetry to chaos and complexity. We love what we do.

Lots of firms talk about being responsive; we live it. Our commitment to serving our clients fundamentally shapes how we view and practice law.

We are human beings. While we thrive under incredible challenges and difficult circumstances, we also care deeply about the people we work with and represent. Being authentic also means that we recognize our clients are people too. We understand them, and we know them.

WY WILLIAMS, PORTER, DAY & NEVILLE, P.C.

ADDRESS
159 North Wolcott
Suite 400
Casper, WY 82601

PH
(307) 265-0700
FAX
(307) 266-2306
WEB
www.wpdn.net

PRIMARY
Scott E. Ortiz
(307) 265-0700
sortiz@wpdn.net

ALTERNATE
Scott P. Klosterman
(307) 265-0700
sklosterman@wpdn.net

ALTERNATE
Keith J. Dodson
(307) 265-0700
kdodson@wpdn.net

MEMBER SINCE 2006 Williams, Porter, Day & Neville, P.C. (WPDN) has deep roots in Wyoming, running back over 70 years. WPDN is the pinnacle of representation in Wyoming and has been involved in Wyoming's most seminal legal decisions, across many practice areas, in state and Federal courts. WPDN represents clients from international, national, and state-based insurance providers, publically-traded to privately-held natural resource companies, national and local trucking operations, local and state governmental entities, ranches, banks and other business entities. With its high standards and integrity, WPDN offers clients a vast knowledge and understanding of the ways of Wyoming and provides the highest quality representation within its practice. WPDN attorneys and staff work as a team to ensure fairness, productive working atmosphere and high-quality representation.

ARGENTINA | BARREIRO, OLIVA, DE LUCA, JACA & NICASTRO

ADDRESS
Av. Córdoba 1309 3° A
Ciudad de Buenos Aires
C1055AAD Argentina

PH
+54 11 4814 1746
WEB
www.bodlegal.com

PRIMARY
Nicolas Jaca Otano
+54 11 4814 1746
njaca@bodlegal.com

ALTERNATE
Gonzalo Oliva-Beltrán
+54 11 4814-1746
goliva@bodlegal.com

ALTERNATE
Ricardo Barreiro Deymonnaz
+54 11 4814-1746
rbarreiro@bodlegal.com

MEMBER SINCE 2019 BARREIRO, OLIVA, DE LUCA, JACA & NICASTRO is a law firm based in Buenos Aires, Argentina. We advise our clients on all business matters including M&A, Banking & Finance, Employment & Labor, Dispute Resolution, Regulatory and Tax. We also have special teams focused on infrastructure and construction, corporate and foreign investments, technology, energy and natural resources. As a boutique firm, we have a high involvement at partner and senior associate level, which allows us to work efficiently and to provide an outstanding level of service to our clients

BRAZIL | MUNDIE E ADVOGADOS

ADDRESS
Av. Brig. Faria Lima, 3400
CJ. 151 15.º andar
04538-132 São Paulo,
SP, Brazil

PH
(55 11) 3040-2900
WEB
www.mundie.com.br

PRIMARY
Rodolpho Protasio
(55 11) 3040-2923
rofp@mundie.com.br

ALTERNATE
Eduardo Zobaran
(55 11) 3040-2923
emz@mundie.com.br

ALTERNATE
Cesar Augusto Rodrigues
(55 11) 3040-2855
crc@mundie.com.br

MEMBER SINCE 2012 Mundie e Advogados was established with the goal of providing high quality legal services to international and domestic clients. The firm is a full service law firm, with a young and dynamic profile, and it is renowned for its professionalism and its modern and pragmatic approach to the practice of law. Since its inception, in 1996, the firm has been involved in several landmark transactions that helped shape the current Brazilian economic environment and has become a leading provider of legal services in several of its areas of practice, especially in corporate transactions, mergers & acquisitions, finance, tax, litigation, arbitration, governmental contracts and administrative law, regulated markets and antitrust.

Clients of the firm benefit from its knowledge and experience in all areas of corporate life and our commitment to excellence. The firm`s work philosophy, combined with the integration among its offices, practice groups and lawyers, put the firm in a privileged position to assist its clients with the highest quality in legal services.

Additional Offices: Brasilia • PH (55) 61 3321 2105 | Rio de Janeiro - RJ • PH (55) 21 2517 5000

CANADA | KELLY SANTINI LLP | OTTAWA

ADDRESS
160 Elgin Street
Suite 2401
Ottawa, Ontario K2P 2P7

PH
(613) 238-6321
FAX
(613) 233-4553
WEB
www.kellysantini.com

PRIMARY
Lisa Langevin
(613) 238-6321 ext 276
llangevin@kellysantini.com

ALTERNATE
Kelly Sample
(613) 238-6321, ext 227
ksample@kellysantini.com

ALTERNATE
J. P. Zubec
(613) 238-6321
jpzubec@kellysantini.com

MEMBER SINCE 2011 Kelly Santini LLP is based in the nation's capital of Ottawa and is ideally placed to advise businesses looking to establish or grow their Canadian operations. We act for many Toronto-based financial institutions and insurers and represent clients throughout the province of Ontario. We also regularly advise on procurement matters with the Canadian Federal Government and interface with regulatory bodies at both national and provincial levels on our clients' behalf. Our Business Group handles cross border transactional files throughout the US.

Our insurance defence team is amongst the largest in the region and is recognized in the Lexpert Legal Directory for Canada as a 'leading litigation firm in eastern Ontario' in the area of commercial insurance. The group regularly acts for leading insurers on insurance defence and subrogation.

Additional Office: Ottawa, Ontario • PH (613) 238-6321

CANADA | THERRIEN COUTURE JOLI-COEUR L.L.P. | QUEBEC

ADDRESS
1100 Blvd. René-Lévesque
West, Suite 2000
Montreal, Quebec H3B 4N4

PH
(514) 871-2800 /
(855) 633-6326
FAX
(514) 871-3933
WEB
www.groupetcj.ca

PRIMARY
Douglas W. Clarke
(514) 871-2800
douglas.clarke@groupetcj.ca

ALTERNATE
Eric Lazure
(450) 462-8555
eric.lazure@groupetcj.ca

ALTERNATE
Yannick Crack
(819) 791-3326
yannick.crack@groupetcj.ca

MEMBER SINCE 2013 Therrien Couture Joli-Coeur LLP is a team of more than 350 people including a multidisciplinary team of experienced professionals that consist of lawyers, notaries, tax specialists, trademark agents and human resources specialists working together to create a stimulating, collegial work environment in which to serve their clients with an approach to the law that is simple, dynamic and rigorous.

From our original focus on agri-business, the firm has grown and branched out both in terms of its size and expertise. While we have maintained our industry leadership with respect to our historical roots, we handle a wide range of matters for our clients. Our most significant ingredient for success however continues to be the professionals of our firm who commit themselves every day to serving our clients.

Additional Offices:
Brossard, QC • PH (450) 462-8555 | Laval, QC • PH (450) 682-5514 | Quebec City, QC • PH (418) 681-7007
Saint-Hyacinthe, QC • PH (450) 773-6326 | Sherbrooke, QC • PH (819) 791-3326

CHINA | DUAN&DUAN

ADDRESS
Floor 47, Maxdo Center,
8 Xing Yi Road
200336, Shanghai, China

PH
(008621) 6219 1103,
ext. 7122
FAX
(008621) 6275 2273
WEB
www.duanduan.com

PRIMARY
George Wang
(008621) 3223 0722
george@duanduan.com

MEMBER SINCE 2012 In 1992, Duan&Duan Law Firm was one of the first firm to open its doors in Shanghai and in China. From its beginning, Duan&Duan Law Firm has always offered, to selected PRC Lawyers, a unique opportunity to leave their mark on the legal community and to contribute to China's flourishing economy and developing legal environment. Due to its long history, Duan&Duan can be seen as a window reflecting the multiple changes and the rapid evolution of the legal industry in the PRC during China's reform and opening-up. Duan&Duan's success can be understood by examining closely its unique business model: • It is the first private partnership that has been established in the PRC by Chinese nationals returning to China after completing overseas studies and after gaining working experience abroad; and • It is also a small, but a representative example, of the many successful businesses that saw the need for services focusing on PRC related to foreign businesses and transactions. Duan&Duan Law Firm has grown to become a prestigious medium size PRC law firm, with an international profile and practicing law in accordance with international standards, focusing on legal issues involving foreign businesses and PRC laws and regulations.

Additional Offices: Beijing • PH 010 - 5900 3938 | Chengdu • PH 028 - 8753 1117 | Chongqing • PH 023-60333 969 Dalian • PH 0411 - 8279 9500 | Hefei • PH 0551 - 6353 0713 | Kunming • PH 0871 - 6360 1395 | Shenzhen • PH 0755 - 2515 4874 | Sichuan Province • PH 0838-2555997 | Wanchai • PH 00852 - 2973 0668 | Xiamen • PH 0592 - 2388 600

MEXICO | EC RUBIO

ADDRESS
Ejército Nacional 7695-C
32663 Ciudad Juárez,
Chihuahua
México

PH
+52 656 227 6100
FAX
+52 55 5596-9853
WEB
www.ecrubio.com

PRIMARY
René Mauricio Alva
+1 (915) 217-5673
rene.alva@ecrubio.com

ALTERNATE
Javier Ogarrio
+52 (55) 5251-5023
javier.ogarrio@ecrubio.com

ALTERNATE
Fernando Holguín
+52 (656) 227-6123
fernando.holguin@ecrubio.com

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PRIMARY
Christian Pindeu
+43 1 5033000
c.pindeus@
oberhammer.co.at

ALTERNATE
Ewald Oberhammer
+43 1 5033000
e.oberhammer@
oberhammer.co.at

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DELSOL AVOCATS

Avenue Louise 480, 1050 Brussels +32 479 30 84 58 • delsol-lawyers.com/
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(+32) 479 30 84 58
spopijn@delsolavocats.
com

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PRIMARY
Demetrios A. Demetriades
+357 22769000
ddemetriades@dadlaw.
com.cy

ALTERNATE
Harris D. Demetriades
+357 22769000
hdemetriades@dadlaw.
com.cy

ALTERNATE
Natasa Flourentzou
+357 22769000
nflourentzou@dadlaw.
com.cy

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Vorsilska 10 • 110 00 Prague 1 • Czech Republic • +420 224 819 141 • Fax: +420 224 816 366 • Web: www.akvk.cz

PRIMARY
Jiri Spousta
(00 420) 224 819 133
spousta@akvk.cz

ALTERNATE
Michaela Fuchsova
(00 420) 224 819 106
fuchsova@akvk.cz

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PRIMARY
Jacob Roesen
(+45 33 300 268)
jro@les.dk

ALTERNATE
Sebastian Rungby
(+45 33 300 255)
sru@les.dk

ALTERNATE
Carsten Brink
(+45 33 300 203)
cb@les.dk

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PRIMARY
Urmas Ustav
+372 6400 250
urmas.ustav@widen.legal

ALTERNATE
Marge Manniko
+372 510 4475
marge.manniko@widen.legal

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Lönnrotinkatu 11 • FI-00120 Helsinki, Finland • +358 104 244 200 • Fax: +358 104 244 21 • Web: www.lexia.fi

PRIMARY
Peter Jaari
+358 10 4244200
peter.jaari@lexia.fi

ALTERNATE
Markus Myhrberg
+358 10 4244200
markus.myhrberg@lexia.fi

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4 bis, rue du Colonel Moll • PARIS 75017 France • +33(0) 153706969 • 11, quai André Lassagne • LYON 69001 France • +33(0) 472102030 • Web: www.delsolavocats.com • contact@delsolavocats.com

PRIMARY
Emmanuel Kaeppelin
(+33) 472102007
ekaeppelin@
delsolavocats.com

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Sarah Reynolds
+353 1 672 2233
sreynolds@kanetuohy.ie

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(00352) 251 51 51
avocats@tabery.eu

ALTERNATE
Didier Schönberger
(00352) 251 51 51
avocats@tabery.eu

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René-Alexander Hirth
+49 711 2249825
hirth@buse.de

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PRIMARY
Andrea Rescigno
+39 0245381201
andrea.rescigno@rplt.it

ALTERNATE
Luitgard Spögler
+39 06 80913201
luitgard.spogler@rplt.it

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PRIMARY
Karen A. Verkerk
+31 26 365 55 57
Verkerk@dirkzwager.nl

ALTERNATE
Claudia van der Most
+31 26 353 83 64
Most@dirkzwager.nl

ALTERNATE
Daan Baas
+31 26 353 84 16
Baas@dirkzwager.nl

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Panepistimiou 16 • Athens 10672 Greece • +30 210-3628512 • Fax: +30 210-3640342 • Web: www.cfgalaw.com
Additional Offices: New York City

PRIMARY
Korina Fassouli-Grafanaki
(+30) 210-3628512
korina.grafanaki@
lawofmf.gr

ALTERNATE
Anastasia Aravani
(+30) 210-3628512
anastasia.aravani@
lawofmf.gr

ALTERNATE
Theodora Vafeiadou
(+30) 210-3628512
nora.vafeiadou@
lawofmf.gr

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PRIMARY
Jānis Ešenvalds
+371 67 280 685
esenvalds@widen.legal

ALTERNATE
Liene Pommere
+37129325015
liene.pommere@widen.legal

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Beddingen 8, 0250 Oslo, Norway • Telephone: +47 22 94 18 00 • Web: www.berngaard.no

PRIMARY
Tom Eivind Haug
+47 906 53 609
haug@berngaard.no

ALTERNATE
Inger Roll-Matthiesen
+47 928 81 388
irm@berngaard.no

ALTERNATE
Heidi Grette
+47 900 68 954
heidi@berngaard.no

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PRIMARY
Ágnes Dr. Balassa
0036) 391-44-91
agnes.balassa@bihary
balassa.hu

ALTERNATE
Tibor Dr. Bihary
(0036) 391-44-91
tibor.bihary@bihary
balassa.hu

LITHUANIA
WIDEN

Konstitucijos ave. 7 • LT-09308 Vilnius • Lithuania • (+370) 5 248 76 70 • Web: www.widen.legal
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PRIMARY
Lina Siksniute-Vaitiekuniene
+370 5 248 76 70
lina.vaitiekuniene@
widen.legal

ALTERNATE
Aušra Brazauskien
+370 6876 5171
ausra.brazauskiene@widen.legal

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PRIMARY
Aldona Leszczynska-Mikulska
+48 22 212 00 00
Aldona.leszczynska-mikulska@gww.pl

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Rua Júlio de Andrade, 2 • Lisboa 1150-206 Portugal • (+351) 21 8855440 • Fax: (+351) 21 8855459 Web: www.cmasa.pt

PRIMARY
António A. Carvalho
(+351) 21 8855448
acarvalho@cmasa.pt

ALTERNATE
Rita Matias
(+351) 21 8855447
rmatias@cmasa.pt

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PRIMARY
Dejan Vukovic
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vukovic@vp.rs

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PRIMARY
Gerta Sámelová Flassiková
+421 903 717431
flassikova@aliancia.sk

ALTERNATE
Jan Voloch
+421 903 297294
voloch@aliancia.sk

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PRIMARY
Juan José Garcia
(0034) 91 591 30 60
Juanjose.garcia@adarve.com

ALTERNATE
Belén Berlanga
(0034) 91 591 30 60
belen.berlanga@adarve.com

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PRIMARY
Max Björkbom
(+46) 8 407 88 00
max.bjorkbom@wsa.se

ALTERNATE
Henrik Nilsson
(+46) 8 407 88 00
henrik.nilsson@wsa.se

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PRIMARY
Nadine von Büren-Maier
(00 41) 58 552 01 50
nadine.vonburen-maier@mll-legal.com

ALTERNATE
Wolfgang Müller
(00 41) 58 552 05 70
wolfgang.muller@mll-legal.com

ALTERNATE
Guy-Philippe Rubeli
(00 41) 58 552 00 90
guy.philippe.rubeli@mll-legal.com

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Phone: (410) 766-2390
Email: ctorrens@SEAlimited.com

Ami Dwyer, Esq.
General Counsel
795 Cromwell Park Drive, Suite N
Glen Burnie, MD 12061
Phone: (410) 766-2390
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Merrie Jo Pitera, Ph.D.
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Phone: 913.339.6468
mjpitera@imslegal.com

Adam Bloomberg
Sr. Client Success Advisor
Phone: 469.437.9448
abloomberg@imslegal.com

Jill Leibold, Ph.D.
Sr. Jury Consulting Advisor
Phone: 310.809.8651
jleibold@imslegal.com

Nick Polavin, Ph.D.
Sr. Jury Consultant
Phone: 616.915.9620
npolavin@imslegal.com

Sabrina Nordquist
Sr. Director of Jury Consulting
Phone: 470.975.2188
snordquist@imslegal.com

Jennifer Cuculich, JD
Jury Consultant
Phone: 850.473.2505
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Doug Marshall
President
Email: dmarshall@mi-pi.com

Adam M. Kabarec
Vice President
Email: akabarec@mi-pi.com

Matt Mills
Vice President of Business Development
Email: mmills@mi-pi.com

Thom Kramer
Director of Business Development
and Marketing
Email: tkramer@mi-pi.com

Jake Marshall
Business Development Manager
Email: jmarshall@mi-pi.com

Shannon Thompson
Business Development Manager
Email: sthompson@mi-pi.com

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SIU Manager
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Phone: (703) 796-2200
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David Elmore, CPA, CVA, MAFF
11600 Sunrise Valley Drive, Suite 450
Reston, VA 20191
Phone: (703) 796-2200
Fax: (703) 796-0729
Email: delmore@mdd.com

Kevin Flaherty, CPA, CVA
10 High Street, Suite 1000
Boston, MA 02110
Phone: (617) 426-1551
Fax: (617) 830-9197
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