# LITIGATION MANAGEMENT: NEW TRENDS AND TECHNIQUES

~ A Litigation Management CLE SuperCourse ~

PRESENTED BY
THE NETWORK OF TRIAL LAW FIRMS

APRIL 27-30, 2017
THE EAU PALM BEACH RESORT AND SPA

# New Trends and Techniques

- Litigation Management SuperCourse -
April 27-30, 2017
The Eau Pam Beach Resort and Spa

THE NETWORK trial.com

***Focusing on Trial and Litigation, Dedicated to Continuing Legal Education***

**Over 5,000 Attorneys in 20 Separate and Independent Trial Law Firms Praticing in Over 120 Offices Throughout the United States**

**The Network is a not-for-profit corporation producing cutting-edge CLE.**
The Network of Trial Law Firms, Inc. is a not-for-profit membership association. The goal of the 20 law firms participating in the Network is to provide their clients with high-quality trial and litigation representation through advances in education, technology, business and science. The Network sponsors activities to accomplish that goal, including research and study of advances in the state-of-the-art of legal representation, and sponsors continuing legal education seminars for corporate and outside counsel and insurance professionals. Our CLE programs aid in the dissemination of new information and effective techniques and technologies to attorneys and claims professionals serving corporations and insurers.

Since 1993 we have conducted two three-day CLE seminars each year. In 2000, we added one-day CLE seminars to our offerings. Our focus is always excellence in litigation management and trial results. We are the home of the "Litigation Management Supercourse," a program that our attorneys created in 1993 and have produced and updated more than 60 times since then together with various not-for-profit CLE organizations and bar associations.

The Network does not practice law and is neither a law firm nor a partnership of law firms. The Network does not render legal advice nor make referrals. Only the individual lawyers within each member law firm practice law and render legal advice. Each member law firm is solely responsible for the matters entrusted to its care. No member law firm is responsible for the work, professional service or legal advice provided by any other member law firm. The Network does not refer clients to law firms or to attorneys. The listing in these materials of any law firm's name is not an endorsement or recommendation of that law firm by The Network or by any law firm that may be a member of the Network.

Note: Each member law firm of The Network of Trial Law Firms, Inc. has attorneys who are licensed to practice in that firm's home office state. In addition, many member law firms have attorneys who are licensed to practice in other states. Please check with the individual firm in which you are interested for those states in which some or all of its attorneys are licensed to practice law.

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## Member Firm Profile

Akerman LLP is a leading transactions and trial law firm known for its core strengths in middle market M&A, within the financial services and real estate industries, and for a diverse Latin America practice. With more than 600 lawyers and government affairs professionals and a network of 20 offices, Akerman is ranked among the top 100 law firms in the United States by The American Lawyer (2015). Akerman also is ranked among the top 50 law firms for diversity in The American Lawyer's Diversity Scorecard (2015). More information can be found at akerman.com or twitter.com/akerman_law.

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**akerman.com**

## Firm Contacts

**Christine Welstead**
305.374.5600
Miami, FL

**Larry Rochefort**
561-671-3603
West Palm Beach, FL

**James Miller**
305.982.5624
Miami, FL

**David Spector**
561.653.5000
West Palm Beach, FL

**Timothy McDermott**
904.598.8611
Jacksonville, FL

**Michael Marsh**
305.982.5507
Miami, FL

BASS BERRY SIMS

CENTERED TO DELIVER.

For more than 85 years, the law firm of Bass, Berry & Sims PLC has provided superior client service and unsurpassed legal representation. Our more than 200 attorneys represent and advise Fortune 500 companies as well as regional and local businesses, including acting as the principal corporate counsel for approximately 30 public companies.

Our team of more than 80 litigators is ready to serve our clients' best interests and has a long track record of not only winning, but also understanding clients' business objectives.

We approach disputes by addressing not only the matter at hand, but also by analyzing litigation trends facing the client and suggesting creative solutions to minimize risk over the long term. Our focus is to serve each of our clients' best interests as efficiently and effectively as possible. We establish a course of action, propose alternative fee arrangements and evaluate early settlement possibilities or opportunities for an early dismissal to avoid expense and protracted litigation. That said, we are prepared to serve as resolution negotiator or staunch advocate; whichever is necessary. We utilize the latest advances in technology to improve communication, discovery and trial preparation, all leading to sound victories.

Our Litigation & Dispute Resolution Practice Group is built on great reputations in corporate and securities, government investigations, healthcare, financial services and commercial litigation. From that foundation, we are especially focused on significant and growing areas of litigation that affect our clients, and align with our unique strengths.

A few of our many representative matters include:

Lead counsel for a major retailer in successful and much-publicized prosecution of the company's rights under a $1.6 billion merger agreement; obtained order of specific performance and ultimately achieved a favorable settlement valued at approximately $215 million prior to the commencement of a related solvency proceeding in New York federal court.

Lead counsel for a nursing home company in consolidated litigation involving a multi-fatality nursing home fire, resulting in the successful resolution of 30 of the 32 cases within one year from the date of the fire and the two remaining cases within three years. The mediator, in his report to the court, described this process as "the most successful mass tort mediation in the jurisprudence of Tennessee.".

Defense of a major pharmaceutical company in 2,500 Federal Court lawsuits involving diet drug litigation; a team of 45 attorneys and legal professionals conducted fact discovery in the individual cases, expert selection and retention for nation-wide litigation, and discovery of plaintiff's experts.

Representation of numerous public companies in shareholder and securities class action litigation in Tennessee.

**Nashville, TN | Knoxville, TN | Memphis, TN**
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**bassberry.com**



**Jessie Zeigler**
615-742-6289
Nashville, TN

**Overton Thompson**
615.742.7730
Nashville, TN

**David Esquivel**
615-742-6285
Nashville, TN

**David King**
615.742.7890
Nashville, TN

## Member Firm Profile

CORR CRONIN MICHELSON BAUMGARDNER FOGG & MOORE LLP

CCMBFM

Corr Cronin Michelson Baumgardner Fogg & Moore LLP is recognized as one of the premier trial law firms in the Pacific Northwest, handling major cases in Washington, Oregon, Alaska, and Idaho for clients of all sizes – from individuals and regional companies to Fortune 500 corporations.

We combine the legal talent normally found in large law firms with the responsiveness and service of a boutique. Our founding partners are all former partners from the 200-lawyer firm of Bogle & Gates (including the former co-chairs of Bogle & Gates' Litigation Department).

We have been fortunate to have been recognized for our work by the following publications:

Global Law Experts: Named us 2011 Washington Litigation Law Firm of the Year. Chambers USA: Picked us as one of its "Leading Firms" in Washington for commercial litigation every year since 2003, and, in 2010, called us an "outstanding group" (the highest rating) and noted us as having been praised by sources as "lawyer-for-lawyer ... the finest firm in town."

Benchmark America's Leading Litigation Firms and Attorneys: Listed us as "Highly Recommended" (the highest rating) every year since 2008.

U.S. News & World Report: Included us in its 2010 and 2011 "Best Law Firms" editions with a "Tier 1" ranking (the highest possible) in Seattle for commercial litigation.

Best Lawyers: Called us among Washington's best for commercial litigation, injury defense litigation, and "bet-the-company litigation."

**Seattle, WA**

**corrcronin.com**

## Firm Contacts

**Steve Fogg**
206.274.8669
Seattle, WA

**Michael Moore**
206.621.1502
Seattle, WA

**Emily Harris**
206.621.1477
Seattle, WA

**Kevin Baumgardner**
206.621.1480
Seattle, WA

DeutschKerrigan

Deutsch Kerrigan views the task of resolving a legal problem as a partnership between the client and its outside counsel. Our goal is to work closely with each client to provide high quality, effective legal service which exceeds the client's expectations.

Our clients have the confidence in us to represent them beyond Louisiana for the same reasons they trust us with their problems in Louisiana: we get results, and we get them efficiently. To do this, we begin by knowing our clients. We learn our clients' business, their business philosophy, their goals and how they achieve them. When faced with a particular problem, we combine this knowledge with our knowledge of the law and our familiarity with the agency, court or other tribunal that will apply that law to craft a solution that will best meet the client's goals.

With over 60 attorneys and a substantial support staff of paralegals and legal assistants, we apply our legal and support resources carefully to most effectively meet the needs of our clients. Every file is assigned to an experienced attorney who coordinates all work on the case and maintains ongoing communication with the client. With the client's permission, that attorney may handle the case alone or draw on the talents and skills of other attorneys in the firm.

Because regular communication with our clients is essential, in addition to meetings and telephone conversations, we use the latest technology to communicate. Each of our attorneys has access through a state-of-the-art network to e-mail, the Internet, database, word processing and calendaring programs. Our dial-up networking and Internet capabilities also allow us to share the information on our network with our clients. We are also developing an Extranet to expand this ability and provide for the management of complex litigation. Through our membership in The Network of Trial Law Firms, a separate non-profit organization that includes 2,700 attorneys nationwide practicing in 75 local offices in 24 separate and independent trial law firms, we use an Intranet to share information with other attorneys throughout the country. Our use of technology also extends to our communication with judges and juries. Our trial presentation capabilities were featured in a major California criminal trial, in which a Deutsch Kerrigan paralegal operated the same system that we use in our own cases.

The firm utilizes creative alternatives to traditional litigation procedures. We have successfully engaged ad hoc judges, arbitrators and mediators in resolution of such matters. We have convinced the courts to use mini-trials or selected issue resolution to bring practicality to complicated cases.

We provide our clients with a wide variety of legal services in most major practice areas, including, aviation, bankruptcy, commercial, commercial litigation, construction, energy, environmental, estate planning, fidelity & surety, franchising & distribution, intellectual property and technology, labor & employment, litigation, oil & gas, products liability, real estate, tax and toxic torts.

**New Orleans, LA | Gulfport, MS**

**deutschkerrigan.com**

## Firm Contacts

**Robert Kerrigan**
504.593.0619
New Orleans, LA

**Jerry Glas**
504.593.0627
New Orleans, LA

**Ted LeClercq**
504.593.0647
New Orleans, LA

**William Wright**
504.593.0623
New Orleans, LA

**Joe McReynolds**
514.593.0606
New Orleans, LA

**Nancy Marshall**
504.593.0602
New Orleans, LA

FARELLA BRAUN + MARTEL LLP

Farella Braun + Martel LLP represents clients throughout the United States and abroad in sophisticated business transactions and complex commercial, civil and criminal litigation. We are known for our imaginative legal solutions and the dynamism and intellectual creativity of our lawyers. The attorneys in each practice group work cohesively in interdisciplinary teams to advance the clients' objectives in the most effective, coordinated and efficient manner. Founded in 1962, we are headquartered in San Francisco and maintain an office in the Napa Valley that is focused on the wine industry.

We are practiced trial lawyers. Our experience includes complex litigation involving class actions, antitrust, and unfair competition; business litigation involving securities, commodities and M&A disputes; intellectual property and technology litigation involving patents, trademarks, trade secrets and copyrights; and environmental litigation involving natural resources, federal and state cost recovery, CEQA, Proposition 65 and complex toxic torts. Farella Braun + Martel is regarded highly for our employment, construction, insurance coverage, and white collar criminal experience, and is regularly sourced for our proven appellate capabilities.

Our business attorneys advise clients in all aspects of corporate, partnership and LLC law. We represent public and family held companies with corporate and securities needs including public and private financing, international transactions, asset securitization, insolvency and loan workouts, tax and wealth succession planning. Our team works closely with our employment and intellectual property practice groups to provide a full complement of services to deal makers. We also offer comprehensive real estate, land use, environmental and construction departments that work together on commercial, brownfields, mixed used, industrial and large scale residential project development.

Since our inception, Farella Braun + Martel has received industry and peer recognition equal to any firm in the country. Our attorneys include fellows of the American College of Trial Lawyers, American College of Appellate Lawyers, American College of Construction Lawyers, American College of Environmental Lawyers and American College of Investment Counsel. Our environmental, construction, insurance, intellectual property, litigation and wine industry practices have been recognized in peer reviewed sources as the top in their practice including Best Lawyers, Chambers USA, U.S News and various practice specific honors.

**San Francisco, CA | St. Helena, CA**

**fbm.com**



**Sandra Edwards**
415.954.4428
San Francisco, CA

**Brandon Wisoff**
415.954.4449
San Francisco, CA

**Jeff Fisher**
415.954.4912
San Francisco, CA

# FormanWatkins

Forman Watkins & Krutz was established in Jackson in December 1986 as a civil practice firm with a strong emphasis in product liability and commercial litigation.

Our firm is national and regional counsel for a number of major companies in many fields. Our clients include manufacturers, distributors, insurers, and financial and educational institutions. We practice in all courts and jurisdictions at all levels.

Our attorneys have substantial expertise in mass tort cases, commercial matters, environmental litigation, insurance, and anti-trust, bankruptcy, transportation, labor-management relations, securities, mergers and real estate. Many of our trial attorneys are nationally recognized in their fields and are often asked to assume responsibilities far outside of Mississippi in substantive areas involving widespread litigation.

**Jackson, MS | New Orleans, LA | Houston, TX**
**Detroit, MI | Red Bank, NJ**

**formanwatkins.com**



**Joshua Metcalf**
601.974.8722
Jackson, MS

**Brian Hannula**
601.974.8783
Jackson, MS

**Tanya Ellis**
601.960.3210
Jackson, MS

**Jennifer Studebaker**
601.973.5983
Jackson, MS

Freeborn

*Your Future Is Our Purpose*

Freeborn & Peters LLP is a full-service law firm, headquartered in Chicago, with international capabilities.

Freeborn & Peters supports its clients in the following legal disciplines: Litigation, Corporate Law, Real Estate, Bankruptcy and Financial Restructuring, and Government and Regulatory Law.

The firm is highly regarded for its ability to handle particularly complex commercial disputes, including those in the fields of antitrust, environmental, shareholders' rights, directors' and officers' liability, restrictive covenants and trade secrets, and intellectual property.

Freeborn & Peters is always looking ahead and seeking to find better ways to serve its clients. It takes a proactive approach to ensure its clients are more informed, prepared and able to achieve greater success – not just now, but also in the future.

While the firm serves clients across a broad range of sectors, it has also pioneered an interdisciplinary approach that serves the specific needs of targeted industries, including insurance and reinsurance; food; transportation, including railroads, trucking, and logistics; and private equity.

Freeborn & Peters is an organization that genuinely lives up to its core values of integrity, caring, effectiveness, teamwork, and commitment, and embodies these values through high standards of client service and responsive action. Its lawyers build close and lasting relationships with clients and are driven to help them achieve their legal and business objectives.

**Chicago, IL | Springfield, IL | Richmond, VA**

**freeborn.com**



**David Gustman**
312.360.6515
Chicago, IL

**Jennifer Fitzgerald**
312.360.3585
Chicago, IL

GIBBONS

Founded in 1926, Gibbons is ranked among the nation's top 250 firms by The National Law Journal. The firm provides transactional, litigation and counseling services to leading businesses regionally, nationally and internationally.

Gibbons expanded its Philadelphia office with the addition of 25 attorneys from Hecker Brown Sherry and Johnson, a prominent Philadelphia civil litigation boutique. This expansion is a key aspect of Gibbons' strategic plan to enhance its ability to serve clients from offices throughout the region.

Gibbons was recently ranked one of the top 100 firms in the nation for diversity by Multi-Cultural Law magazine, and Gibbons' attorneys are recognized among the nation's leading business attorneys by The Best Lawyers in America, Chambers USA Guide to America's Leading Business Lawyers and Super Lawyers publications.

The firm's 200+ attorneys counsel businesses and business owners in all legal areas including Business & Commercial Litigation, Corporate, Criminal Defense, Employment Law, Financial Restructuring & Creditors' Rights, Government Affairs, Intellectual Property, Products Liability, and Real Property & Environmental.

**Philadelphia, PA | Newark, NJ | Trenton, NJ**
**New York, NY | Wilmington, DE**

**gibbonslaw.com**



**Alan Gries**
215.446.6267
Philadelphia, PA

**John Romeo**
215.446.6223
Philadelphia, PA

**Madeline Sherry**
215.446.6201
Philadelphia, PA

**Steve Imbriglia**
215.446.6209
Philadelphia, PA

GOODELL DEVRIES

Goodell, DeVries, Leech & Dann specializes in litigation and litigation management. Our firm was founded in 1988 by experienced trial lawyers who successfully defended product liability, professional malpractice, commercial, toxic tort and insurance coverage litigation. We offer our clients aggressive, high quality representation in the management and trial of sophisticated litigation traditionally handled by only the largest law firms while providing the personalized, cost-efficient service usually associated with smaller law firms.

Our firm's 65 attorneys offer a rich diversity of litigation expertise and experience, representing clients in the pharmaceutical and medical device, industrial and consumer products, healthcare, insurance, consumer finance, technology, electronics, automobile and construction industries.

The diversity of the specialized knowledge of our firm's lawyers allows complex litigation matters to be handled by an interdisciplinary team of lawyers able to contribute specific individual skills as needed. At the same time, the depth of litigation experience among the individual attorneys enables us to avoid overstaffing litigation matters. This flexibility in staffing, combined with a commitment to controlled, quality growth, permits Goodell, DeVries, Leech & Dann to provide effective representation at a reasonable overall cost.

**Baltimore, MD | Philadelphia, PA**

**gdldlaw.com**



**Linda Woolf**
410.783.4011
Baltimore, MD

**Jeff Hines**
410.783.4041
Baltimore, MD

**Nikki Nesbitt**
410.783.4026
Baltimore, MD

**Rick Barnes**
410.783.4004
Baltimore, MD

**Donald DeVries**
410.783.4006
Baltimore, MD

**Tom Cullen**
410.783.4019
Baltimore, MD

HOOD LAW FIRM LLC

The Hood Law Firm offers a wide variety of litigation services in all State and Federal Courts throughout South Carolina and the United States. The goal of the Hood Law Firm is to provide the highest quality legal services to our clients in a cost effective and professional manner. The firm combines the personal attention of the partners in every case with the assistance of well qualified associates and legal assistants as well as state-of-the-art computer technology.

The Hood Law Firm was established in 1985 by Charleston attorney Robert H. Hood, formerly a partner in the law firm of Sinkler, Gibbs & Simons. Specializing exclusively in civil litigation cases, the firm has grown rapidly since its inception and continues to grow to meet the needs of its diverse clients.

The majority of the firm's cases involve the defense of personal injury cases, specifically in the areas of professional malpractice, insurance (including coverage disputes), toxic torts, automobile accidents, general negligence, and products liability. Other types of cases include commercial, banking, business litigation, employment disputes, sexual harassment, civil rights and constitutional claims, collection and construction cases. The firm also handles plaintiff's cases involving contract disputes, commercial litigation, personal injury and product liability.

The firm and Mr. Hood are rated AV by Martindale-Hubbell. The firm is listed in the Bar Register of Preeminent Lawyers and in A.M. Best's Directory of Recommended Insurance Firms. Mr. Hood has been listed in The Best Lawyers in America since its first edition in 1978.

**Charleston, SC**

**hoodlaw.com**



**Bobby Hood, Sr.**
843.577.1201
Charleston, SC

**Molly Craig**
843.577.1215
Charleston, SC

**Bobby Hood, Jr.**
843.577.1219
Charleston, SC

**James Hood**
843.577.1223
Charleston, SC

**Blanton O'Neal**
843.577.1211
Charleston, SC

**Barbara Showers**
843.577.1207
Charleston, SC

LIGHTFOOT

Ranked as one of the top commercial litigation firms in Alabama by the current edition of Chambers USA: America's Leading Lawyers for Business, Lightfoot Franklin & White, LLC was founded on January 15, 1990 and we presently have over 60 lawyers. In order to focus on what we do best, we have restricted our practice to civil litigation matters, with the exceptions of environmental compliance advice, white-collar crime and internal investigations. Although we handle all types of civil litigation in state and federal courts, our primary areas of practice include commercial disputes, product liability, antitrust, consumer fraud, appeals, intellectual property, catastrophic personal injury and death, environmental/ toxic torts, class actions, professional malpractice, securities fraud, employment and communications.

Our stock in trade is our reputation of being able to take the most difficult cases to trial, when necessary, and to achieve excellent results. We will furnish, upon request, a summary of every jury verdict we have received since 1987, which demonstrates our trial record. While we are dedicated to trying and winning cases, we understand the need to control the cost of litigation. Therefore we only perform work that materially advances the interests of our clients, and we staff cases with the minimum number of attorneys necessary to perform that work. Additionally, we understand the importance of a client's desire sometimes to target certain cases for early settlement, and when that is the case, we expeditiously get those cases in a posture for early resolution. We are committed to the utilization of all forms of Alternative Dispute Resolution. Several of our partners serve frequently as mediators and arbitrators, and virtually all of our attorneys have successfully employed all types of ADR.

Our appellate practice also has a tremendous reputation. We are regularly retained post-verdict to handle post-trial motions and appeals of multi-million dollar verdicts. We have literally handled the largest appeals in the history of the state and take pride in our track record in the Supreme Court of Alabama, the Eleventh Circuit Court of Appeals and other appellate courts. We have participated in approximately 400 reported appellate decisions since the firm's formation in 1990.

We employ the latest technology and are committed to improving and upgrading to keep up with new technological advancements. All of our attorneys regularly communicate with clients electronically, not only by e-mail, but also via our secure extranet and our in-house video conference center, which improves communication and the speed with which legal services can be delivered. We use the latest research and presentation tools and have our own in-house document management and trial technology departments. These capabilities enable us to present our cases more effectively and at less expense. We are on the cutting edge of successful litigation capability, whether the criterion is technological, tactical or jury rapport.

**Birmingham, AL**

**lightfootlaw.com**



**Lee Hollis**
205.581.0766
Birmingham, AL

**Jack Sharman**
205.581.0789
Birmingham, AL

**J. Chandler Bailey**
205.581.1515
Birmingham, AL

**Kevin Clark**
205-581.5808
Birmingham, AL

**Haley Cox**
205-581.1519
Birmingham, AL

# MASLON

Through decades of dedicated service, Maslon's Litigation Group has earned a reputation for being the lawyers to call when clients are facing the most complex legal issues and high stakes litigation matters. That's why Chambers USA ranks Maslon as one of the top commercial litigation firms in Minnesota. Past editions have described Maslon's Litigation Group as "[r]esponsive, insightful, innovative and intellectually strong, with attorneys who are loyal to the client and service-oriented" (2011), and have featured the following client statements:

"I have been extremely impressed with [Maslon's] litigation group as a whole. They are quick to assess a case and are extremely realistic about the likelihood of success. When they engage in litigation, they are outcome-focused." (Chambers USA, 2013)

"They have a broad range of commercial litigators and great products lawyers. They are rock-solid." (Chambers USA, 2012)

We offer clients a broad range and depth of experience, and regularly represent major manufacturers, financial institutions, utility companies, and corporate and individual clients in a wide variety of commercial cases. We have successfully resolved disputes in state and federal trial and appellate courts, as well as in various alternative forums and administrative agencies.

Maslon clients can expect to have a litigation strategy tailored to fit their specific needs, taking into account the amount or matter in controversy, each client's distinct business needs, its relationship with the community and employees, and its litigation philosophy. We also recognize that not every dispute requires litigation and are committed to thoughtful exploration of alternatives to litigation where practical. When litigation is necessary, we inform clients about innovative strategies to reduce the expense and uncertainty of litigation, such as arbitration, mediation, mini-trials and summary jury trials.

Our broad litigation experience includes: Appeals; Business Litigation; Competitive Practices/Unfair Competition; Construction and Real Estate Litigation; Corporate Trust Litigation, Employment Litigation; Insurance Coverage Litigation; Intellectual Property Litigation; Probate and Trust Litigation; and Tort and Product Liability.

With over fifty years in practice and more than 80 attorneys, Maslon is dedicated to achieving excellence in the practice of law, helping clients reach their most ambitious personal and business goals. In addition to our litigation services, Maslon offers extensive experience in the areas of advertising & marketing, business & securities, estate planning, financial services, labor & employment, and real estate.

**Minneapolis, MN**

**maslon.com**




**David Suchar**
612.672.8321
Minneapolis, MN

**Terry Newby**
612.672.8328
Minneapolis, MN

**Nicole Narotzky**
612.672.8373
Minneapolis, MN

**Jason Lien**
612.672.8319
Minneapolis, MN

**Cooper Ashley**
612.672.8363
Minneapolis, MN

# Moore&VanAllen

Litigation: The firm conducts a broad civil litigation practice. Clients include businesses of all sizes, institutions, insurers, and self-insured companies. Our attorneys regularly appear in state and federal courts and before administrative agencies. We have experience in all alternate forms of dispute resolution, including mini-trials, mediation, and arbitration. We also have defended a large number of class actions. Our attorneys provide preventive counseling and litigation services on contract disputes; bankruptcy; lender liability; employment matters; product liability; construction disputes; entertainment; securities; franchising; collection of foreign debts and execution of foreign judgments in North Carolina; intellectual property disputes, including trade secrets, patents, trademarks and copyrights; environmental matters, including toxic torts; unfair trade practices, including antitrust, tying agreements, competitive bidding practices, promotional programs and practice, and exclusive dealing arrangements; confidentiality agreements; medical malpractice; suretyship; tax and estate matters; and title matters.

Employment: Moore & Van Allen Employment and Labor attorneys work hard to defend our clients' rights before government agencies, and arbitrators, courts and to solve our clients' problems short of litigation.

We take a proactive approach to labor and employment relations by understanding each client's business objectives, identifying risks, and assisting in developing strategies to achieve those objectives. In addition to providing management training and policy development, we advise clients daily on responses to labor and employment issues. This combination of education, guidance and prevention results in significant cost savings, as well as establishing a more productive work place.

We regularly represent clients from coast to coast in various state and federal courts, as well as before administrative bodies-- handling claims of unfair labor practices, discrimination, sexual harassment, employee misclassification and pay disputes, wage and hour disputes, wrongful termination, workers' compensation, denial of benefits, fiduciary liability, and employment contract disputes.

Our attorneys also represent companies in complex employment litigation involving class actions, collective actions, and actions concerning unfair competition, employee non-compete, nonsolicitation, and confidentiality covenants, as well as trade secret, tortious interference, and employee raiding claims.

Because we are part of a full service law firm, our clients also receive the benefit of the experience of attorneys in Moore & Van Allen's Employee Benefits, Immigration, Corporate, and Tax teams when any of these issues arises in an employment matter.

**Charlotte, NC | Research Triangle Park, NC | Charleston, SC**

**mvalaw.com**




**Tony Lathrop**
704.331.3596
Charlotte, NC

**Tom Myrick**
704.331.1128
Charlotte, NC

**Bobby Bowers**
704.331.3560
Charlotte, NC

**Valecia McDowell**
704.331.1188
Charlotte, NC

**Scott Tyler**
704.331.2463
Charlotte, NC

Nixon Peabody LLP is recognized as a “Global 100” law firm—one of the largest in the world. With 800 attorneys collaborating across major practice areas in 17 cities, including Boston, Chicago, London, Los Angeles, New York, Rochester, San Francisco, Shanghai, Silicon Valley, and Washington, DC, the firm’s size, diversity, and advanced technological resources enable it to offer comprehensive legal services to individuals and organizations of all sizes in local, state, national, and international matters. Our clients include emerging and middle-market businesses, national and multinational corporations, financial institutions, public entities, educational and not-for-profit institutions, and individuals.

While some firms possess litigators, few offer experienced and proven trial lawyers that keep clients trial-ready for any challenge across a broad spectrum of practices. And Nixon Peabody is one of the few firms with the experience and capability—and successful trial results—to serve as national trial counsel for clients who require a consistent approach to class action and aggregate litigation matters filed in multiple states.

Starting on day one, our clients are paired with courtroom veterans from Nixon Peabody’s trial team (NP Trial) who have a proven record of success trying cases to verdict in some of the most challenging venues. Our dedicated trial team provides early input on case strategy and contributes to the client’s case through all aspects of the life cycle until the matter is resolved. The unique approach of NP Trial not only keeps clients protected in and out of the courtroom, it offers the most efficient and effective means possible to reach a successful outcome—so our clients can get back to business.

Our diverse people and points of view allow us to attract the best people, and provide a rich and stimulating work environment that fosters innovation and a high-performance culture. Our atmosphere of mutual respect has helped Nixon Peabody earn recognition as a top employer. The firm has been ranked among the “Top 100 Law Firms for Diversity” (Multicultural Law Magazine 2009) and has earned the highest rating (100%) by the Human Rights Campaign Foundation’s Corporate Equality Index on lesbian, gay, bisexual, and transgender equality in corporate America. Nixon Peabody was recognized by FORTUNE magazine as one of the “FORTUNE 100 Best Companies to Work For®” in 2008, 2007, and 2006.

**New York, NY | Boston, MA | Albany, NY**
**Buffalo, NY | Jericho, NY | Manchester, NH**
**Rochester, NY | Providence, RI | Chicago, IL**
**Hong Kong | London, UK | Los Angeles, CA**
**San Francisco, CA | Shanghai, China | Silicon Valley, CA**
**Washington, DC**

**nixonpeabody.com**



**Joseph Ortego**
212.940.3045
New York, NY

**Scott O’Connell**
617.345.1150
Boston, MA

**Vivian Quinn**
716.853.8134
Buffalo, NY

**Kevin Fitzgerald**
603.628.4016
Manchester, NH

**David Tennant**
585.263.1021
Rochester, NY

**Louis Dolan**
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**David Walton**
214.237.4335
Dallas, TX

**Kristen McDanald**
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**Diane Averell**
973.889.4150
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**Vito Gagliardi, Jr.**
973.889.4151
Morristown, NJ

**Charles Stoia**
973.889.4106
Morristown, NJ

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**Teresa Bartosiak**
314.446.4283
St. Louis, MO

**John Sandberg**
314.446.4214
St. Louis, MO

**Jon Barton**
314.446.4201
St. Louis, MO

**Lyndon Sommer**
314.446.4264
St. Louis, MO

**Mary Anne Mellow**
314.446.4226
St. Louis, MO

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**Joel Hoxie**
602.382.6264
Phoenix, AZ

**Amy Sorenson**
801.257.1907
Salt Lake City, UT

**Greg Marshall**
602.382.6514
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**Warren Platt**
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Columbus, OH

**Tony Rospert**
216.566.5861
Cleveland, OH

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**Mike O'Donnell**
303.244.1850
Denver, CO

**Hugh Gottschalk**
303.244.1858
Denver, CO

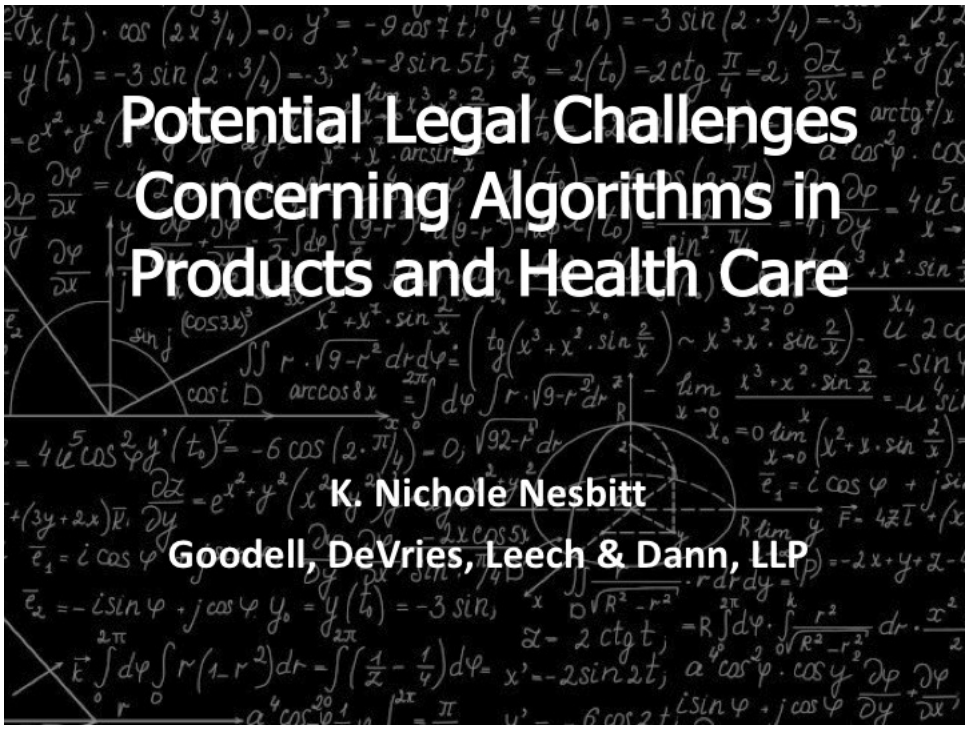
**Mike Williams**
303.244.1867
Denver, CO

**Carolyn Fairless**
303.244.1852
Denver, CO

**John Fitzpatrick**
303.244.1874
Denver, CO

# The Legal Implications Of Using Safety Algorithms In Products And Health Care

**Nikki Nesbitt**
**Goodell DeVries Leech & Dann (Baltimore, MD)**
**410.783.4026 | knn@gdldlaw.com**



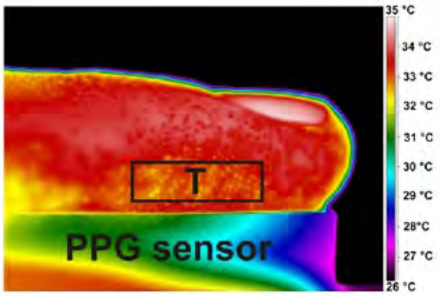
## Algorithm

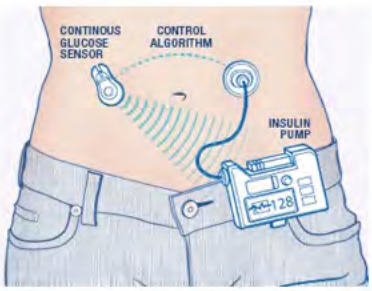
A procedure or formula for solving a problem, based on conducting a sequence of specified actions.

## Everyday Uses

## Safety Features in Products

## Safety Features in Products



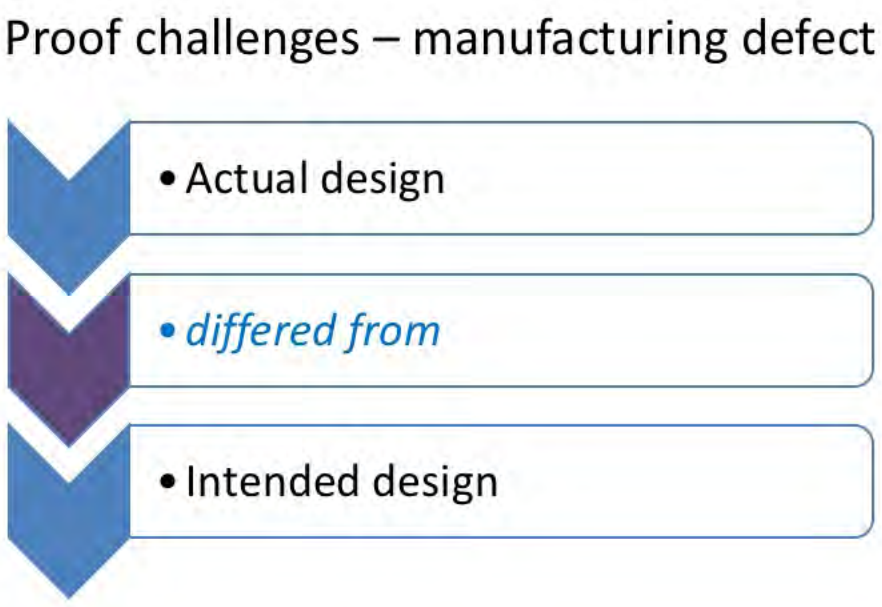
## What happens if they fail?

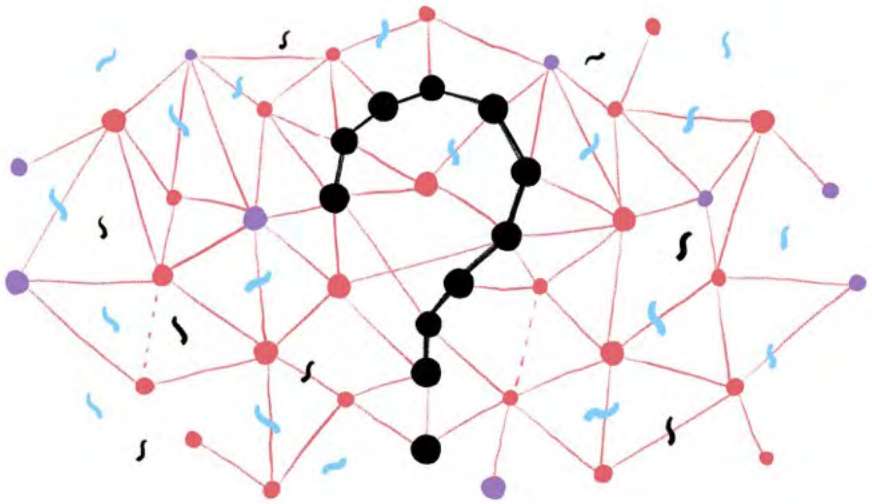
## What happens if they fail?

Product liability claims:

- Design defect
- Manufacturing defect
- Marketing defect / failure to warn


Proof challenges – design defect
• Unreasonably dangerous
• Unsafe for intended use
• Safer alternative exists

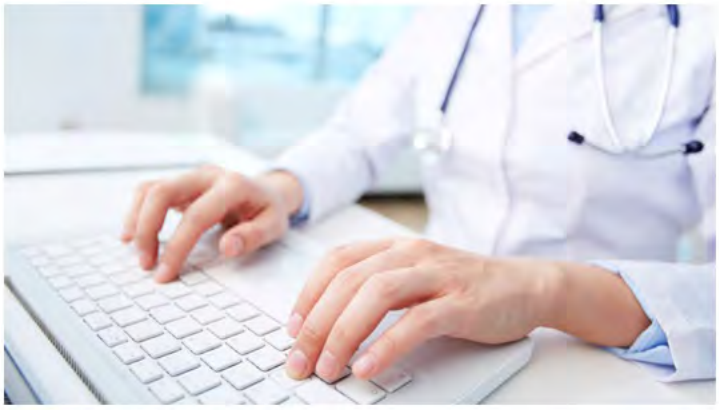

Proof challenges – manufacturing defect
• Actual design
• differed from
• Intended design



The better understood the algorithm, the more appreciable its “defects”

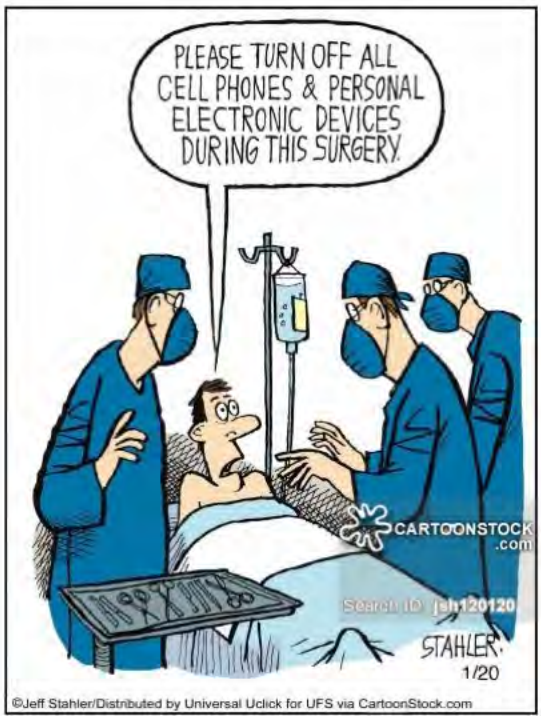
## Consensus in courts unlikely

## Algorithms in Health Care



## Decision support algorithms

- Typically only make suggestions for action
- Human intervention still required




Algorithm suggestion

=

Standard of care?

Algorithm suggestion

≠

Standard of care

Algorithms as guidelines

**Table 7 Recommendations for Managing Hyperglycemia**

**Medical nutrition therapy:**

- Medical nutrition therapy should be included as a component of the glycemic management program for all hospitalized patients with diabetes and hyperglycemia.
- Providing meals with a consistent amount of carbohydrate at each meal can be useful in coordinating doses of rapid-acting insulin to carbohydrate ingestion.

**Pharmacologic therapy:**

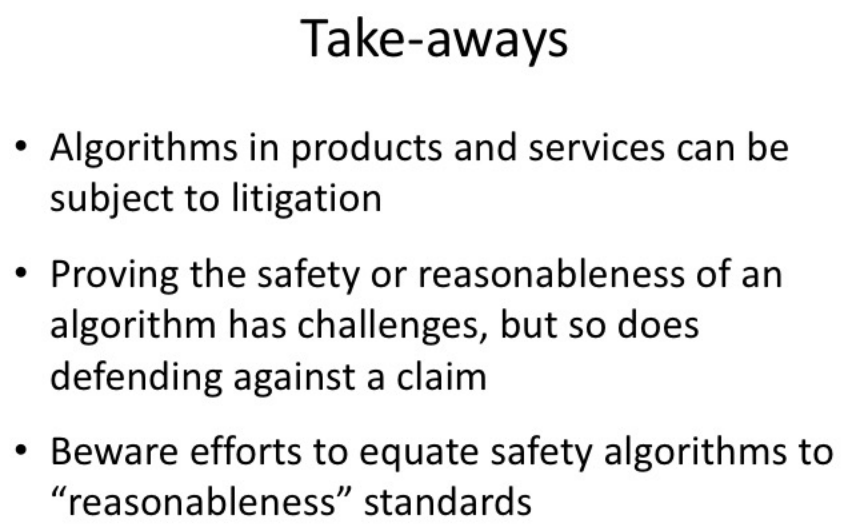
- All patients with diabetes treated with insulin at home should be treated with a scheduled subcutaneous insulin regimen in the hospital.
- Prolonged use of sliding-scale insulin therapy should be avoided as the sole method for glycemic control in hyperglycemic patients with history of diabetes during hospitalization.
- Scheduled subcutaneous insulin therapy should consist of basal or intermediate-acting insulin given once or twice a day in combination with rapid- or short-acting insulin administered before meals in patients who are eating.
- Correction insulin is suggested to be included as a component of a scheduled insulin regimen for treatment of blood glucose values above the desired target.

**Transitions from hospital to home:**

- Insulin therapy should be the preferred method for achieving glycemic control in hospitalized patients with hyperglycemia.
- Discontinuation of oral hypoglycemic agents and initiation of insulin therapy is suggested for the majority of patients with type 2 diabetes at the time of hospital admission for an acute illness.
- Patients treated with insulin before admissions are suggested to have their insulin dose modified according to clinical status as a way of reducing the risk for hypoglycemia and hyperglycemia.
- Reinstitution of pre-admission insulin regimens or oral and non-insulin injectable antidiabetic drugs at discharge is suggested for patients with acceptable pre-admission glycemic control and without a contraindication to their continued use.
- Initiation of insulin administration is suggested to be instituted at least 1 day before discharge to allow assessment of the efficacy and safety of this transition.
- Patients and their family or caregivers should receive both written and oral instructions regarding their glycemic management regimen at the time of hospital discharge.
  - These instructions need to be clearly written in a manner that is understandable to the person who will administer these medications.

## Algorithms and impeachment

## Take-aways




## Introduction

The use of algorithms in business is developing at a rapid pace, and we are starting to see how these algorithms can give rise to legal issues that are at once difficult to prove and difficult to defend.

Algorithms are a step-by-step procedure for solving a problem or accomplishing some end, especially by a computer.[1] They are unique in that the bases for their solutions are essentially unknown and unknowable.[2] Algorithms can find complex underlying patterns in complex data sets but cannot state what those patterns are or explain how they came to be.[3] Sometimes the patterns found are too complex or hidden for explicit understanding.[4]

Using algorithms in business has numerous potential benefits in terms of making products and services safer, but the vagueness of their basis presents risks. If an algorithm fails to accomplish its goal, who is to blame for any damages that result? If a plaintiff seeks to sue the creator or employer of an algorithm, how does the plaintiff prove the inappropriateness of the algorithm if the basis of the algorithm is unknowable? This paper summarizes the benefits and risks of using algorithms through two main examples: black box medicine, where computational models are used to make decisions related to health care,[5] and autonomous cars.

## What Algorithms Do in These Contexts

Algorithms were designed to assist with the allocation of resources, developing hypotheses, and providing recommendations or predictions quickly.[6]

In the context of black box medicine, algorithms can direct patient care.[7] They can predict a patient's risk profile, help choose the best interventions, or suggest an off-label use of an approved intervention.[8] For example, a doctor might input a genetic sequence of a patient's tumor into an algorithm and quickly receive a recommendation as to what drug is most likely to work best.[9] Black box medicine can also lower costs for both consumers and businesses. It can diminish the cost of unnecessary medical interventions and help with the

1 Algorithm, Merriam-Webster, https://www.merriam-webster.com/dictionary/algorithm.

2 W. Nicholson Price II, Medical Malpractice and Black-Box Medicine, in Big Data, Health Law, and Bioethics (I. Glenn Cohen et al., eds., forthcoming).

3 Id.

4 Id.

5 W. Nicholson Price II, Black-Box Medicine, 28 Harv. J.L. & Tech. 419, 421 (2015).

6 W. Nicholson Price II, Medical Malpractice and Black-Box Medicine, in Big Data, Health Law, and Bioethics (I. Glenn Cohen et al., eds., forthcoming).

7 Id.

8 Id.

9 Id.

costly development of new drugs.[10]

The benefits of algorithms are also seen when examining autonomous cars. The main benefit of autonomous cars is their life-saving potential. They can "see" everything surrounding them, react quickly, and constantly check the performance of the car.[11] These features appeal to a wide consumer base of people looking for greater safety on the roadway.[12]

Algorithms have ever-growing sophistication and application. While black box medicine and autonomous cars are already in place, the use of algorithms can be applied in countless other contexts, which raises the question of whether they may also give rise to legal challenges and how such challenges are likely to be handled in our tort system.

**Predicting the Legal Ramifications of Algorithms**

Because the use of algorithmic technology is relatively new, the theories of legal challenge from a tort standpoint are immature and untested, but we have some indication of what may be to come.

It is unlikely that a failing algorithm will give rise to an intentional tort against a company utilizing the technology, presuming that the technology is used for its intended purpose. Algorithms are designed to minimize and mitigate harm to the end-user.[13] Unless a company intentionally misrepresents the capability of its algorithms in an effort to appeal to its customer base, the theories of liability are likely to be negligence and strict liability-based.

**Medical Negligence Cases**

In the context of black box medicine, the use of algorithms implicates the concept of "standard of care" in multiple ways. Some cases may attack the algorithm itself as negligently-created, thereby resulting in injury.[14] Other cases may attack the application of (or failure to apply) algorithms that are available.

With regard to the latter scenario, algorithms could present a catch-22. Health care entities that have access to medical algorithms for patient safety but do not utilize such algorithms could potentially be sued for their failure to implement the algorithms. On the other hand, health care entities could be sued for damages that arise from the decision to favor a generic medical algorithm over a provider's own discretion.[15]

To date, there is no clear legal consensus regarding the standard of care as it relates to algorithms, but this has not stopped experts from speculating on what the standard of care might eventually be. Some suggest that the use of available algorithms for given medical procedures or problems ought to <u>be</u> the standard of care, and any deviation from it negligence.[16] But skepticism abounds with regard to when an algorithm is reliable enough to establish a standard of care for medical treatment.[17] For minimal-risk interventions, such as increased monitoring, it may be simple enough for a patient to argue that the standard of care requires a health care provider to comply with the algorithm's suggestion without exercising independent judgment,[18] whereas for riskier interventions (such as taking higher doses of a powerful drug), the standard of care might require a human being's discretion before the algorithm's suggestion is applied.[19]

One case out of New York, *Hinlicky v. Dreyfuss*, suggests that some courts may take a middle-ground approach.[20] *Hinlicky* is a medical malpractice case where a patient passed away following a surgery. The court held that the algorithm used by the anesthesiologist could be admitted to explain the decision-making process, rather than as per se evidence of the standard of care.[21] This is in keeping with how medical guidelines and hospital policies are typically dealt with in a trial setting; they are not sufficient to establish the applicable standard of care by themselves, but they may be admissible on the issue of the reasonableness (or lack thereof) of the health care provider's action or inaction.

On a similar note, it is likely the case that algorithms could be used to impeach a witness who testified it was

10 Id.

11 Jeffrey K. Gurney, Crashing into the Unknown: An Examination of Crash-Optimization Algorithms Through the Two Lanes of Ethics and Law, 79 Alb. L. Rev. 183, 191–2 (2016).

12 Id. at 193.

13 For example, manufacturers of autonomous cars would program the crash-optimization algorithm to avoid both harm and damage. Id. at 225–7.

14 Section B below lays out the considerations in that context.

15 W. Nicholson Price II, Medical Malpractice and Black-Box Medicine, in Big Data, Health Law, and Bioethics (I. Glenn Cohen et al., eds., forthcoming).

16 Amanda Swanson & Fazal Khan, The Legal Challenge of Incorporating Artificial Intelligence into Medical Practice, 6 J. Health & Life Sci. L. 90, 121–2 (2012).

17 W. Nicholson Price II, Medical Malpractice and Black-Box Medicine, in Big Data, Health Law, and Bioethics (I. Glenn Cohen et al., eds., forthcoming).

18 Id.

19 Id.

20 848 N.E. 2d 1285 (2006).

21 Id.

appropriate to take certain action that was contrary to what the algorithm provides. In *Fragogiannis v. Sisters of St. Francis Health Servs., Inc.*, for example, an Illinois appellate court held that an algorithm concerning proper airway management was admissible for impeachment purposes notwithstanding the opposing party's argument that it was not scientifically valid. The court held that because the proponent of the evidence established that the manual containing the algorithm was relied upon in the field, it could be used, and any argument concerning its scientific validity would go to the weight of the evidence and not its admissibility.[22]

**Product Liability Cases**

Products liability claims present a similar set of legal complexities surrounding algorithms. These cases may be brought based upon manufacturing defects, design defects, or a marketing defect,[23] and all three types of claims might involve criticism of an algorithm. But the vagueness underlying algorithms might actually make these claims harder to prove for plaintiffs.

To the extent the design of a product algorithm (or a product that relies upon an algorithm) is alleged to be defective, a plaintiff would need to prove that it is "unreasonably dangerous" as designed and/or is not safe for its intended or reasonably foreseeable use. An allegation of manufacturing defect, on the other hand, requires proof that the product was not manufactured as designed, regardless of whether the manufacturer acted with due care or not.

One might expect that algorithms would be vulnerable to both claims. Taking the autonomous car example, if a plaintiff were able to establish that an automatic braking system were designed in such a way that the braking did not begin in sufficient time to prevent a collision under normal driving conditions, a plaintiff could make out a design defect claim. Likewise, if the manufacturer of the automobile adjusted the algorithm settings in a way that differed from the design, a manufacturing defect claim could result.

But proving the defect is much more difficult when the design itself cannot be explained. In *Hyundai Motor Company v. Duncan*, a plaintiff sued Hyundai alleging that his car's side airbag system – including the algorithm that supported it – was defective.[24] The plaintiff introduced expert testimony that the airbag system was unreasonably dangerous because the sensor was placed in the wrong location. He acknowledged that the system depended on a combination of the structure of the vehicle, the sensors themselves, and the algorithm that communicates data from the sensors to the airbag, but he admitted he did not perform any tests of his own to determine whether a different algorithm would have offered a safer operation of the system. The Virginia Supreme Court, reversing the trial court, held the expert's testimony inadmissible on the grounds that he did not have sufficient evidentiary support for his opinion.[25]

On the other hand, the U.S. District Court for the District of South Carolina in *Wickersham v. Ford Motor Co.* denied Ford's motion for summary judgment predicated on a similar argument, finding that the plaintiff's expert sufficiently created a dispute of fact concerning the appropriateness of an algorithm notwithstanding that he could not come up with an alternative algorithm design with specificity.[26] The court found sufficient that the expert suggested that a known algorithm used in other cars would have been better. It explained that "[t]o the extent Ford argues that plaintiff can only prevail if it provides an actual algorithm that Ford could have used in the 2010 Escape, Ford seeks to impose an evidentiary burden well above any sensible interpretation of *Branham* [a case setting forth the applicable risk-utility test for alternative designs in South Carolina]."[27]

What seems clear is that the existence of algorithms and the uncertainty that underlies them is going to involve an individualized approach to defending design and manufacturing defect claims going forward.

The defective marketing / failure to warn claims are also vulnerable to the difficulty of establishing the basis for the algorithm. Under a failure to warn theory, a plaintiff must establish that the instructions or warnings on the product are inadequate to protect the consumer. In the autonomous car example, a plaintiff who sustains injury after the algorithm's safety feature failed will argue that she was not adequately warned about the circumstances under which the safety feature would not

22 Fragogiannis v. Sisters of St. Francis Health Servs., Inc., 49 N.E.3d 532, 542 (Ill. 2016).

23 Jeffrey K. Gurney, Crashing into the Unknown: An Examination of Crash-Optimization Algorithms Through the Two Lanes of Ethics and Law, 79 Alb. L. Rev. 183, 233–7 (2016).

24 Hyundai Motor Co. v. Duncan, 766 S.E.2d 893 (Va. 2015).

25 Id. at 897-88.

26 Wickersham v. Ford Motor Co., 194 F. Supp. 3d 434, 438-39 (D.S.C. 2016)

27 Id.

work. But given that the automobile company cannot explain with certainty *how* the algorithm goes about initiating protective action on any given occasion, what does an adequate warning even look like?

It should be pointed out that in the medical device context, the "learned intermediary" doctrine may also lend support to a failure to warn claim brought by a patient against a product manufacturer. This doctrine provides that as long as the professional who uses the product is adequately warned about its limitations, the end-user (or patient) cannot recover against the manufacturer. In *Banker v. Hoehn*, another New York case, the court held that the manufacturer of the medical device satisfies its duty to warn when it adequately warns medical professionals who use the device to treat the patients.[28]

## Conclusion

Algorithms are becoming more sophisticated and capable of doing more than ever before, which can lead to endless possibilities. The technology is moving faster than the law, though, which means it is hard to predict the legal ramifications that could result from the use of algorithms. For now, the courts seem to be taking it one algorithm at a time.

28 278 A.D.2d 720 (N.Y. App. Div. 2000).


## K. Nichole Nesbitt

**Partner**
**Goodell DeVries Leech & Dann (Baltimore, MD)**

**410.783.4026 | knn@gdldlaw.com**
**http://www.gdldlaw.com/attorneys/k-nichole-nesbitt**


Ms. Nesbitt is a partner with the firm. Her current practice concentrates on medical malpractice defense and complex commercial litigation, as well as cases that combine the two fields. She represents several health systems in Maryland and the District of Columbia, handling complicated malpractice cases as well as credentialing, employment, and compliance-related matters. Ms. Nesbitt also handles employment matters outside of the healthcare context for employers in this region and beyond. Ms. Nesbitt's experience as a litigator provides her with insight to counsel her employment clients on drafting guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation.

For the entirety of her 16 years at the bar, Ms. Nesbitt has worked for Goodell DeVries and has moved through the ranks from summer associate to partner. Likewise, she has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, and in non-legal organizations such as JDRF.

**Practice Areas**
- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Insurance Law
- Hospitality Law

**Publications**
- Associate editor, Practice Manual for the Maryland Lawyer, Maryland Institute for Continuing Professional Education of Lawyers, Inc., 2002 – 2009
- "Greater Than the Sum of Its Parts: Integrating Trial Evidence & Advocacy," Clinical Law Review, Fall 2000 (assistant to authors Alan D. Hornstein and Jerome E. Deise)

**Honors and Awards**
- Leading Women Award from The Daily Record (2011)

**Activities**
- Juvenile Diabetes Research Foundation, Greater Chesapeake and Potomac Chapter (Secretary 2014 – 2016; Board Member 2011-present)
- Mentor to first year law students at the University of Maryland School of Law (2002 – Present)
- Judge, Regional Intercollegiate Mock Trial Tournament (1999 – Present)

**Education**
- University of Maryland (B.A., cum laude, 1996)
- University of Maryland, School of Law (J.D. 1999) Order of the Coif

# Whose Privilege Is It Anyway?
# Thorny Issues
# In The Era Of Whistleblowers

**Scott O'Connell**
**Nixon Peabody (Boston, MA)**
**617.345.1150 | soconnell@nixonpeabody.com**

## WHOSE PRIVILEGE IS IT ANYWAY?

*THORNY ISSUES IN THE AGE OF THE WHISTLEBLOWER*

NIXON PEABODY

**W. SCOTT O'CONNELL**

## THE AGE OF THE WHISTLEBLOWER

## ANTI-RETALIATION PROVISIONS

Dodd-Frank greatly expands whistleblower protections beyond Sarbanes-Oxley:

- no employer may "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment"
  - because of any lawful act of the whistleblower
  - in providing information to the SEC under Section 21F
  - in initiating, testifying in, or assisting in any investigation or judicial action of the SEC based upon or related to such information
  - in making disclosures required or protected under Sarbanes-Oxley.

## POLICY FAVORS WHISTLEBLOWERS

U. S. SECURITIES AND EXCHANGE COMMISSION
SEC | Office of the Whistleblower

"The Whistleblower Program is designed to aid the SEC's efforts to protect investors from those who violate the securities laws by **encouraging those who are aware of misconduct to come forward to report it to us** so that prompt and effective action can be taken to prevent or stop the misconduct."

Statement of Sean X. McKessy, Chief, Office of the Whistleblower (SEC)

## SEC WHISTLEBLOWER PROGRAM

— Section 922 of Dodd-Frank created Section 21F of the 1934 Act, and the implementing regulations provide that the Commission will pay an award to one or more whistleblowers who:

- **voluntarily** provide the Commission
- with **original** information
- that **leads to the successful enforcement** by the Commission of a federal court or administrative action or certain related actions
- in which the Commission obtains **monetary sanctions** totaling more than $1,000,000

## WHAT'S THE BIG DEAL?

### 2016 By the Numbers

— SEC

- $57M awarded to 13 whistleblowers (brings program total, since 2011 inception, to $111M)
  - Six of the 10 largest-ever amounts awarded in 2016

— FCA

- $5B in recoveries in FY 2016

## PRIVILEGE BATTLES

Advice of Counsel Defense

Proof of Retaliation

## USA V. WELLS FARGO BANK, N.A., ET AL (SDNY 2015)

- USA sued bank and bank executive under FCA and FIRREA
- Claims arose from residential mortgage loans insured by the government
- Executive asserted "advice of counsel" which was an absolute defense to liability; Advice was from the Bank's counsel
- Bank did not assert defense of counsel and refused to waive the attorney client privilege
- Fairness and due process versus Attorney Client Privilege
- Is the right to present the advice-of-counsel defense sufficient to overcome the Bank's privilege

## USA V. WELLS FARGO BANK, N.A., ET AL (SDNY 2015)

In the Second Circuit, privilege wins:

*"For the reasons stated below, the Court concludes — in light of binding Supreme Court precedent — that it does not and that Lofrano may not assert an advice-of-counsel defense over Wells Fargo's objection. The Court recognizes that that result is arguably harsh in this particular case, as it may well deprive Lofrano of his best defense to liability for tens of millions of dollars. It is, however, the price that must be paid for society's commitment to the values underlying the attorney-client privilege."*

## SAME RESULT

Vanguard tax attorney attempts to sue for retaliatory discharge

- SDNY dismisses because he was prohibited from disclosing confidential information and failed to prove he engaged in protected conduct. *State of New York ex rel. Danon v. Vanguard Group, Inc.*, 2015 N.Y. Misc. LEXIS 4239, 2015 NY Slip Op 32213(U) (N.Y. Sup. Ct. Nov. 13, 2015)
- Refiled suit to pursue SOX and state law claim dismissed as collaterally estopped. *Danon v. Vanguard Grp., Inc.*, 2016 U.S. Dist. LEXIS 67773 (E.D. Pa. May 23, 2016)

## WADLER V. BIO-RAD (NDCA 2017)

- Plaintiff Sanford Wadler became Bio-Rad's general counsel in 1989 and served in that capacity for nearly 25 years.
- He was terminated by Bio-Rad in June 2013.
- Wadler asserts he was terminated because he was investigating potential FCPA violations in China and because he reported his concerns to Bio-Rad's Audit Committee —when it became clear that the company was not taking reasonable steps to investigate and remedy FCPA violations.
- Bio-Rad contends it terminated Wadler —due to poor work performance and behavior.‖

## WADLER V. BIO-RAD (NDCA 2017)

Bio-Rad jury trial in February 2017 (N.D. Cal.) awards former general counsel nearly $11 million in damages, including $5 million in punitive damages and fees:

- District court had previously rejected the argument that GC was not a WB because he had only reported internally, and allowed claims to proceed under Dodd-Frank and SOX. *Wadler v. Bio-Rad Labs., Inc.,* 141 F. Supp. 3d 1005 (N.D. Cal. 2015)
- In December 2016, trial court denied Bio-Rad's motion to exclude use of privileged information, holding in dicta that federal common law of privilege applies, including Model Rule 1.6, and that SOX preempts California ethical rules.

## WADLER V. BIO-RAD (NDCA 2017)

*"The Van Asdale court's reliance on Kachmar and the —balancing‖ approach endorsed in that case suggest to the undersigned that the Ninth Circuit envisions that there is some room for the use of privileged information, including the use of such evidence offensively, to establish whistleblower retaliation claims under Sarbanes-Oxley."*

**SEC holds businesses accountable for language in employment severance agreements**

*By Stephen LaRose, Brian Kelly, David Rosenthal, Kathleen Ceglarski Burns and Melanie Nevin*

The Securities and Exchange Commission ("SEC") has been active in recent cases to ensure that employers do not, through their actions and agreements, prevent or impede employees from exercising their rights as whistleblowers under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The whistleblower provisions of Dodd-Frank were included in the 2010 Wall Street reform legislation, but they affect a wide swath of public companies and other regulated entities far from Wall Street. As an example, on August 10, 2016, the SEC fined BlueLinx Holdings Inc. (the "Company" or "BlueLinx"), an Atlanta-based building products provider, for using language in employment severance agreements that the SEC says violated Dodd-Frank's whistleblower incentive and protection rules.

Dodd-Frank included amendments to the Securities Exchange Act known as the "Securities Whistleblower Incentives and Protection" rules, intended to provide financial incentives and protection from retaliation to whistleblowers. Section 21F of the Securities Exchange Act (the "Exchange Act") provides that employers must not "impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing or threatening to enforce, a confidentiality agreement . . . with respect to such communications." 17 CFR 240.21F-17(a).

With respect to BlueLinx, the SEC charged that many of the severance agreements, separation agreements and release agreements used by BlueLinx violated Section 21F. The majority of the BlueLinx contracts addressed by the SEC included a provision barring an employee from sharing any confidential Company information, unless they were compelled by law or legal process to do so. Furthermore, the agreements required employees to notify the Company in the event they were requested to provide information to any third party. To the SEC, this provision made it difficult for employees to voluntarily report securities fraud.

In June 2013, BlueLinx revised its severance agreements, but the new agreements included a provision that the employee "waiv[es] the right to any monetary recovery in connection with any such complaint or charge that the Employee may file with an administrative agency." The SEC found that this requirement "undermine[d] the purpose of Section 21F" as it removed the well- known financial incentive to report fraud.

As part of the settlement agreement with the SEC, BlueLinx agreed to several undertakings, including the revision of their severance agreements to include a provision outlining the protected rights employees have to communicate with government agencies, including the right to file a complaint or charge and to participate in an investigation, without notice to the Company.

Furthermore, BlueLinx agreed to make reasonable efforts to contact all former employees who signed severance agreements from August 12, 2011 (the date the law went into effect) through the date of the settlement. In addition to changing their severance agreements, BlueLinx also agreed to pay a substantial, six-figure fine to the SEC.

The SEC's settlement with BlueLinx serves as an important reminder to public companies and other regulated entities that their employment-related agreements must not impede the whistleblower incentives and protections of Section 21F of the Exchange Act. Many employers include, in standard form severance agreements, general releases that expressly do not prohibit an employee from filing claims with state and federal agencies, but the employee agrees that he or she gives up the right to recover monetary damages resulting from such claims. These provisions, in the discrimination context—involving claims at the Equal Opportunity Employment Commission or similar state or local agencies—are appropriate and have been blessed by a number of courts. But broader language—referring to all federal, state and local agencies—is too sweeping. The over breadth problem is easily remedied by referring only to "anti-discrimination" agencies. Employers should be revising their standard form severance agreements to make this change.

The broader concern that the SEC has articulated—inhibiting or barring reporting to the SEC of suspected violations of federal securities laws—implicates more than just severance agreements. Confidentiality agreements or provisions, as well as non-disparagement provisions, which routinely appear in a variety of

employment-related documents, must be examined and revised if they can be read to prohibit reporting Securities act violations. A catch-all provision, stating, in substance, that "Nothing in this agreement prohibits you from reporting possible violations of federal law or regulation to any governmental agency or regulatory authority, including but not limited to the SEC, or from making other disclosures that are protected under the whistleblower provisions of federal law or regulation," should be added to these agreements to avoid the type of sanctions imposed by the SEC on BlueLinx.

Finally, the recently enacted federal Defense of Trade Secrets Act (DTSA) mandates that a more detailed notice of whistleblower rights be included in certain employment related agreements, if an employer wishes to take advantage of the benefits (federal jurisdiction and enhanced remedies, among others) provided by the DTSA in trade secrets actions. [Inclusion of this DTSA notice language should be considered as part of the revisions recommended in this Alert.]

Nixon Peabody's team is available to discuss this important issue and help businesses evaluate their separation agreements and other employment-related agreements for compliance with Dodd-Frank and other federal and state laws addressing employee whistleblower rights.

**Groundbreaking False Claims Act decision: Unanimous Supreme Court upholds "implied false certification" theory under certain circumstances**

*By Fred Kelly, Brian French, Hannah Bornstein, Emily Harlan and Sydney Pritchett*

In a decision that will significantly impact companies that contract with the government or face heavy scrutiny under the False Claims Act ("FCA"), the United States Supreme Court, in a unanimous opinion authored by Justice Thomas, upheld the "implied false certification" theory as a viable theory of liability under certain circumstances. As explained below, the Court's opinion in Universal Health Services v. Escobar (June 16, 2016) sets a standard of liability that will hinge on the particular facts of each case, rather than on the plain language of a statute, regulation, or contract. Despite the Court's stated effort that its decision will provide fair notice and cabin open-ended FCA liability, in reality, the application of the Court's materiality and knowledge standards will continue to make it time consuming and difficult for companies and individuals to proactively assess and minimize FCA liability and risk.

The road to the Supreme Court

The case arose when a teenage girl received deficient treatment from five mental health professionals at a Massachusetts mental health facility. After the patient's death, related to misdiagnosis and improperly prescribed medication by unqualified care providers, the patient's parents brought this qui tam action claiming that when the facility submitted claims for Medicaid reimbursement, it impliedly certified that its staff was licensed as required by Medicaid regulations. Because the staff was neither properly licensed nor supervised, the petitioners claimed the facility had made material misrepresentations that defrauded the government, thereby violating the FCA.

After the United States government declined to intervene in the matter, the United States District Court for the District of Massachusetts dismissed the complaint based on a finding that the applicable regulations violated by the facility were not express conditions of payment. The district court's decision was then reversed by the First Circuit, which found that the regulations at issue imposed compliance with those regulations as a condition of payment and that by submitting a claim for payment, the health facility falsely implied certification with those regulations. The Supreme Court granted certiorari in order to review the viability of the implied false certification theory of liability.The Court's decision resolves a wide circuit split.

The FCA imposes liability on those who collect payment from the government based on fraud. Under the theory of implied false certification, "when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement . . . the defendant has made a misrepresentation that renders

the claim 'false or fraudulent' under [31 U.S.C.] § 3729(a)(1)(A)." Opinion at 1. This theory was explicitly rejected by the Seventh Circuit, which required express or affirmative falsehoods. Other courts have required that the violated regulations, statutes, or contracts be express conditions of payment.

The Court's decision

First, the Court accepted the implied certification theory of liability in certain circumstances. The Court found that in submitting claims for payment, the mental health clinic had used payment and other codes that corresponded to specific counseling services as well as National Provider Identification numbers corresponding to specific job titles. The Court found these representations to be "clearly misleading in context." Id. at 10-11. Because of these representations as well as the defendant's failure to disclose noncompliance with applicable regulations, the Court held that the implied certification theory can be a basis for FCA liability where the claim submitted for payment "does not merely request payment but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half- truths." Id. at 11. The Court declined to decide whether "all claims for payment implicitly represent that the billing party is legally entitled to payment" when no representations in the submission for payment are made. Id. at 9.

Second, the Court found that a condition of payment need not be expressly stated as such in the statute, regulation, or contract. Despite the defendant's argument that a condition of payment must be expressly stated in order to provide fair notice and prevent open-ended liability, the Court held that these concerns can be "effectively addressed through strict enforcement of the Act's materiality and scienter requirements." Id. at 13-14.

The Court then clarified how the FCA's materiality requirement should be enforced. In defining materiality, the Court looked not only to the FCA's statutory definition of materiality, but also drew from common law tort and contract definitions. Id. at 14-15. The Court stated that the materiality standard is "demanding" and that the FCA is "not 'an all-purpose antifraud statute' . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations." Id. at 15. The Court stated that "the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive" to the decision to pay. Id. at 16.

Furthermore, proof of materiality can include evidence as to whether the government routinely pays claims despite knowledge of noncompliance, or if the government routinely refuses to do so. Id.

The Court also found that a defendant can have knowledge of materiality without the government expressly identifying a condition of payment as such. Especially telling is the Court's analogy to a contractor who submits a claim to the government for a guns order knowing, but not disclosing, that the guns do not shoot. The Court used this analogy as an example of a requirement that, while perhaps not explicitly a condition of payment, is so material that failure to know the requirement "would amount to 'deliberate ignorance' or 'reckless disregard' of the truth or falsity of the information even if the Government did not spell this out." Id. at 13.

At the end of its opinion, the Court emphasized that not every requirement of the myriad regulations and contractual requirements that companies and individuals are often required to follow will be material. Specifically, the Court stated that "if the Government required contractors to aver their compliance with the entire U.S. Code and Code of Federal Regulations, then under this view, failing to mention noncompliance with any of those requirements would always be material. The False Claims Act does not adopt such an extraordinarily expansive view of liability." Id. at 17.

The Court also stated, "We emphasize, however, that the [FCA] is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations." Id. at 18.

Accordingly, the Supreme Court vacated the finding of the First Circuit, and remanded for reconsideration based on the Court's new analysis.

The impact of the Court's decision

While at first glance it may be a relief to companies and individuals to hear the Court say that FCA liability will not arise for every possible instance where a company

fails to comply with contractual, statutory, or regulatory requirements, determining what is or is not a material requirement, or whether a company acted with the requisite knowledge, is sure to be argued and litigated by plaintiffs' lawyers and whistleblowers. Resolving these questions likely will require a case-specific, fact-based analysis and may lead to increased discovery from all parties as well as relevant government agencies and players. Despite the Court's efforts to say that garden-variety breach of contract cases or insignificant regulatory violations will not give rise to FCA liability, the Court has opened the door for plaintiffs' lawyers and whistleblowers to argue that every statutory, regulatory, or contractual violation is a material one.

Because the Court declined to resolve the question of whether all claims for payment implicitly represent that the billing party is legally entitled to payment, the particulars of individual claims will become focal points of FCA cases. Litigants in FCA cases resting on the implied certification theory will have to wrestle with the claims not only for purposes of satisfying Federal Rule of Civil Procedure 9(b)'s heightened pleading standard, but also for determining what the billing party did or did not represent when submitting a claim for payment. This requirement may pose a challenge for plaintiffs who do not have access to claims information, particularly in healthcare cases where FCA defendants, such as pharmaceutical or medical device manufacturers, are not the billing party. How courts will approach these cases remains uncertain, but actual claims submission will become doubly important in FCA cases where the implied certification theory of liability has been raised.

**China whistleblower protections may increase FCPA investigations and prosecutions**

*By Brian T. Kelly and Eric J. Walz*

The People's Republic of China ("PRC" or "China") has sought to crack down on government corruption for years. In 2015, for example, the PRC introduced new legislation that criminalized the giving of bribes to Chinese officials' close relatives and family members. This year, the PRC expanded the definition of "bribe" to include the giving of intangible benefits to Chinese officials.

These enhanced regulations followed years of increased scrutiny from Chinese citizens and the international community. While the new laws show progress, the PRC has not yet resolved its corruption problems. U.S. enforcement activity has demonstrated the continued need for additional progress. As of January 2016, China led all countries with 28 active Foreign Corrupt Practices Act ("FCPA") investigations—ten more than the next leading country, Brazil.

The PRC whistleblower protection regulations

In March, the PRC passed new regulations aimed at protecting Chinese whistleblowers from retaliation in the wake of government corruption allegations. Now, whistleblowers will enjoy greater confidentiality safeguards, employment security and protection of personal property for them and their families if they report government corruption. While the new safeguards may not, at first blush, appear significant to U.S.-based and publicly traded companies with Chinese operations, the regulations' collateral consequences could prove costly for companies lacking effective FCPA compliance programs.

By enacting the new regulations, the PRC has taken another step forward in holding its government officials civilly and criminally liable for accepting bribes. Whistleblowers will now move through the reporting process and even collect rewards while their identities remain confidential. Moreover, whistleblowers will not only enjoy protection from physical threats to themselves, their families, and their property, but also from threats to their employment status and other professional matters. In fact, local police details will now be responsible for guarding whistleblowers and their families' physical safety and personal property. Finally, the new regulations create stronger rewards for whistleblowers, incentivizing the outing of more corrupt Chinese officials.

The Foreign Corrupt Practices Act

The FCPA criminalizes the corrupt giving of bribes to foreign officials by U.S.-based and publicly traded companies for the purpose of getting or keeping business. In recent years, the Department of Justice

("DOJ") and Securities and Exchange Commission ("SEC") have expanded their investigation and prosecution of businesses engaging in foreign bribery, extracting more than $132 million in corporate settlements last year, down from over $1.5 billion in 2014. Moreover, a recent memorandum—released in late 2015 and colloquially dubbed the "Yates" memo—reinvigorated the DOJ's efforts to punish individuals responsible for violating the FCPA and other federal laws. In 2015, eleven individuals were sentenced to a total of 24 years in prison for violating the FCPA. Moreover, the DOJ and SEC recently added additional FCPA-focused Assistant United States Attorneys to their ranks, and the DOJ created a "Pilot Program" aimed at boosting corporate self- disclosures of FCPA violations.

On the horizon

When viewed alongside the FCPA, the new PRC regulations take on more significance for businesses operating in China. FCPA violations are more likely to be revealed once Chinese citizens feel confident that lodging corruption complaints against officials will not cause them future harm. To date, the DOJ and SEC have mostly pursued FCPA cases against companies engaged in sensitive industries such as health care, natural resources and technology. Indeed, those industries account for almost 50% of FCPA corporate settlements. Meanwhile, the utility, finance and food and beverage industries have faced less FCPA scrutiny in the past. But the DOJ and SEC of old— hamstringed by a lack of resources—were forced to focus investigations on industries vital to U.S. infrastructure and safety. Now, the DOJ and SEC have increased resources, thus giving the next Chinese whistleblower the power to trigger an industry-wide investigation.

Often referred to as "industry sweeps," at times the DOJ and SEC investigate entire industries after a common denominator signals that corruption may be rampant throughout. That common denominator may take the form of a cultural acceptance (or even encouragement) of bribery, a common third-party supplier or vendor or a common foreign official. Here, business dealings with a particular Chinese official and his or her office may be closely scrutinized after one—or several— Chinese whistleblowers allege that corruption exists.

To protect against becoming the subject of questionable dealings in China, business organizations should be mindful specifically of their Chinese business operations and set a top-down tone that bribery will not be tolerated. Now more than ever, businesses and their executives must be involved in creating, implementing and overseeing FCPA compliance programs to prevent wrongdoing, root out issues if they occur and rectify employee and vendor misconduct. Strong compliance programs allow employees to confidentially report FCPA violations to compliance teams and encourage the unbiased investigation of such complaints. Though no compliance program can guarantee that a rogue employee will not attempt to bribe an official, strong programs will nonetheless reduce the business organization's criminal and civil liability.


## W. Scott O'Connell

**Partner**
**Nixon Peabody (Boston, MA)**

**617.345.1150 | soconnell@nixonpeabody.com**
**https://www.nixonpeabody.com/en/team/oconnell-scott**


Scott O'Connell is chair of the Litigation Department and a member of the firm's Management Committee. He is a trial lawyer known for his perseverance, strategic thinking and value driven service for clients. Scott focuses in class action and aggregate litigation and corporate governance and control contests. He is currently representing financial services, life sciences, manufacturers and health care companies in high exposure disputes with associated significant reputational harm in parallel civil, criminal and regulatory proceedings.

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**Recognition**

- Selected by his peers for inclusion in The Best Lawyers in America© 2017 for Appellate Practice, Commercial Litigation, Litigation - Banking and Finance, Litigation - Health Care, Litigation - Municipal, Litigation - Securities, Mass Tort Litigation/Class Actions - Defendants, and Product Liability Litigation - Defendants in Boston, MA, and Manchester, NH; listed in Best Lawyers since 2010; Boston "Lawyer of the Year" in Litigation - Securities Law (2016), Litigation—Banking & Finance (2014), and Litigation–Securities (2013)
- 2015 Tier One national recognition in Best Lawyers in Mass Tort Litigation & Class Action defense
- Chambers USA: America's Leading Lawyers for Business (2008 to present)—Clients rate Scott O'Connell as an "expert on class actions." He is commended for his "well-thought arguments," his ability to "think on his feet" and his strong command of technical legal points.
- "New England Super Lawyer" in Securities Litigation and/or Class Action-Mass Torts (2007 to present)
- Rising Star in Benchmark Litigation (MA and NH) (2008 to present)—A peer observes, "Scott has unbelievable energy, he bobs and weaves in and out of everything. When he presents, clients say 'I would like him for my attorney.' He has a very businesslike approach."
- AV peer rating from Martindale-Hubbell (2004 to present)

**Education**

- Cornell Law School, J.D., 1991, (Editor, Law Review)
- St. Lawrence University, B.A., 1987, cum laude
- Harvard Business School, 2008, "Leading Professional Service Firms"

# The Role Of Emotion In Litigation

**Josh Lanning**
**Moore & Van Allen (Charlotte, NC)**
**704.331.3647 | joshualanning@mvalaw.com**

## A LAWYER'S APPROACH TO NEGOTIATION

- A lawyer's "go to" tools for negotiation are reason and logic.
- We idealize "rational" decisions and devalue "irrational" decisions or those made based on emotion.
- We look for what is "right" and reject what is "wrong" and we assume that "right" describes our client and "wrong" describes our adversary.
- No lawyer ever says: "We need to approach this problem with more emotion."

## THE RATIONAL ARCHETYPE

- Spock – Vulcans suppressed emotions in search of "a complete mastery of logic."


- Sherlock Holmes – "Data! Data! Data! . . . I can't make bricks without clay."

- Plato's Chariot Driver

## SHOULD SPOCK REPRESENT CLIENTS?

- Neuroscientist Antonio Damasio calls this the "high reason view" by which he means "rational processing must be unencumbered by passion."

- Despite persistence of the rational ideal – study after study shows:
  - All people (save sociopaths) experience emotion 100% of the time
  - Emotions are inseparable from and *essential to* good decision-making

- The Lesson: Even in the pursuit of the most reasoned approach, we cannot escape emotion, nor should we try.

## RATIONAL SCIENTIFIC STUDIES (IRONICALLY) HIGHLIGHT CRITICAL ROLE OF EMOTIONS IN DECISION-MAKING

- Damasio's most famous patient "Elliot" lost the ability to feel emotion following brain surgery. In the absence of the ability to be happy, anxious, or sad Elliot:
  - Became paralyzed by every decision in life.
  - Could not manage time or prioritize tasks.
  - Lost his job because he could no longer complete projects.
  - Invested in a shady business scheme that resulted in bankruptcy.
  - Divorced, re-married and divorced again.

## DAMASIO'S SOMATIC MARKER HYPOTHESIS

- Over life of a human – the brain "marks" input to the rational pre-frontal cortex from positive or negative emotions.
- Ultimately, these markers facilitate rapid decision-making by associating an anticipated outcome with an emotional response.
- Put simply, decisions are evaluated by anticipating how we expect to feel.
- In this respect, emotions are a feedback loop providing information on whether you will be happy with a particular choice.

## EMOTION = REASON

- Feelings lay the groundwork for reason. We know this because brain-damaged patients with no emotions cannot make decisions.
- Theme throughout literature on this topic - all decision-making turns on preferences, which are most often driven by what we value. Reason cannot tell us what to value.
- "It is only once we have a propensity or aversion towards something that we can use reason to direct our action, and this requires passions." --Katharina Paxman.

# EMOTIONS AND NEGOTIATION

- Three Premises:
  - We negotiate all the time. Virtually everything we do as lawyers boils down to convincing someone to make a decision.
  - We, and our clients, and our adversaries experience emotions 100% of the time and these are essential to decision-making.
  - To be effective persuaders, we must have a framework for addressing the importance of emotion.
- "The problem with negotiations is that no matter how often the deal is presented rationally, it is understanding irrationality that will help you gain what you want. Negotiating and arguing are dictated more by emotion than common sense." Fisher and Shapiro.

# AWARENESS IS KEY – YOU CANNOT MASTER THEM ALL

## MAKING MATTERS WORSE: EMOTIONS IMPACT NEGOTIATIONS IN CONTRADICTORY WAYS

- Happiness can facilitate rapport and information sharing, leading to a better deal for both sides.
- Happiness can lead to concessions that are unnecessary under the circumstances.
- Anger can stall conversation, prevent information sharing, reinforce an unwillingness to adapt viewpoint.
- Anger can signal confidence and convince the adversary that concessions will not be forthcoming.

## FISHER AND SHAPIRO CORE CONCERNS

## ADDRESSING CORE CONCERNS APPROPRIATELY

- Fairness: Do the players feel that they have been treated fairly.
- Honesty: Have you communicated authentically and does the adversary feel they are being deceived.
- Understanding: Does your adversary feel you have heard and understand their position, even if you do not agree with it.

## BENEFITS OF ADDRESSING CORE CONCERNS

| Core Concern: | My Core Concerns are Met When: | The Resulting Emotions Can Make Me Feel: | When this Happens, I Am Prone: |
|---|---|---|---|
| Appreciation | I am appreciated | Enthusiastic<br>Caring | To cooperate |
| Affiliation | I am treated as a colleague | Compassionate<br>Content | To work together |
| Autonomy | My freedom to decide is acknowledged | Comforted<br>Pleased<br>Hopeful | To be creative |
| Status | My high status is recognized where deserved | Proud<br>Accomplished<br>Courageous | To be trustworthy |
| Role | My role is fulfilling; it includes activities that convince me that I can make a difference | Calm<br>Relieved<br>Relaxed<br>Happy | |

# RISKS OF IGNORING CORE CONCERNS

| Core Concern: | My Core Concerns are Unmet Whenever: | The Resulting Emotions Can Make Me Feel: | When This Happens, I Am Prone: |
|---|---|---|---|
| Appreciation | I am unappreciated | Angry<br>Impatient | To react negatively, contrary to my interests |
| Affiliation | I am treated as an adversary | Indignant<br>Disgusted<br>Resentful | To go it alone |
| Autonomy | My autonomy is impinged | Guilty and Ashamed<br>Remorseful | To think rigidly |
| Status | My status is put down | Embarrassed<br>Sad | To act deceptively and be seen as untrustworthy |
| Role | My role is trivialized and restricted | Envious and Jealous<br>Anxious | |


## Joshua D. Lanning

**Member**
**Moore & Van Allen (Charlotte, NC)**

**704.331.3647 | joshualanning@mvalaw.com**
**http://www.mvalaw.com/professionals-309.html**


Josh Lanning brings considerable litigation experience to his cases with a wide-ranging background in complex commercial disputes and substantial tort claims.

Josh has represented plaintiffs and defendants in state and federal courts throughout North Carolina as well as in a number of other jurisdictions, having litigated significant disputes on behalf of his clients in Connecticut, Massachusetts, New York, New Jersey, Florida, Maine, Georgia, Utah, Nebraska, Texas, and Louisiana. In addition, Josh has managed multiple internal investigations for clients including Fortune 500 companies and local government bodies.

In the courtroom, Josh has tried numerous cases to court decision or jury verdict and has successfully argued state and federal appeals in areas ranging from constitutional law to securities entitlements. Josh focuses his practice on commercial litigation including matters involving complex contractual disputes; fraud and other business torts; Civil RICO; unfair commercial practices; securities fraud; intellectual property; and fiduciary duties. His clients are a diverse set of people and businesses ranging from individuals and families to large national banking institutions.

In addition, Josh has made pro bono matters an important part of his litigation practice. His experience includes representing prisoners in need of adequate medical care; advocating for special needs children requesting special education services under the federal Individuals with Disabilities Education Act; helping battered spouses obtain protective orders; representing families facing eviction; and assisting in obtaining debt relief for low-income families who were victims of a nationwide fraud ring.

**Practice Areas**
- Employment & ERISA Litigation
- Financial Services Litigation
- International Dispute Resolution, Regulatory Defense and Investigations
- Litigation
- Mediation and Arbitration Services
- Securities Litigation
- White Collar, Regulatory Defense, and Investigations

**Of Note**
- Served as a Henry Luce Foundation scholar in Kuala Lumpur, Malaysia assisting the Malaysian Bar Foundation in implementing its new Domestic Violence Act and in developing its new section on international mediation and arbitration.
- Served as a member of the North Carolina Law review.
- Order of the Coif.
- Named to the Access to Justice Pro Bono Partners 2013 Pro Bono Honor Roll by Legal Services of Southern Piedmont, Legal Aid of North Carolina–Charlotte, and Council for Children's Rights
- Selected for inclusion to the North Carolina Super Lawyers list in 2017 for Business Litigation
- AV peer rating from Martindale-Hubbell (2004 to present)

**Education**
- B.A., University of North Carolina, 1995 (Distinction, Highest Honors)
- J.D., University of North Carolina, 2000; Order of the Coif; North Carolina Law Review, Staff

# Panel:
# Crisis Response - Deftly Handling Your Company's Emeregency

**Moderator: Jessie Zeigler**
**Bass Berry & Sims (Nashville, TN)**
**615.742.6289 | jzeigler@bassberry.com**

## CRISIS RESPONSE - DEFTLY HANDLING YOUR COMPANY'S EMERGENCY

Moderator:
***Jessie Zeigler*** *- Bass Berry & Sims (Nashville, TN)*

**Becky Burris**, Vice President of Health, Safety and Sustainability - Verso Paper

**Eric Sharon**, Chief Litigation Counsel – Whirlpool

**Ryan McManis** - Vice President and Assistant General Counsel - Level 3 Communications

**Mike Williams** - Wheeler Trigg O'Donnell (Denver, CO)

# Agenda

- The Incidents
- Public Relations
- Collecting and Preserving Evidence
- Retaining Experts
- Identifying Potentially Responsible Parties
- Pre-Litigation Evidence Testing
- Crisis Response Plan


# The Explosion

# Groundwater Contamination


# The Fire

# First Response

- Place insurers on notice
- Prepare the PR response


*"I suggest everyone roll up in a tight little ball until the danger is past."*

# Preservation of Evidence

- Avoid spoliation of evidence
- Collect, preserve evidence, record chain of custody
  - Do not clean
  - Do not modify
  - Do not do anything destructive

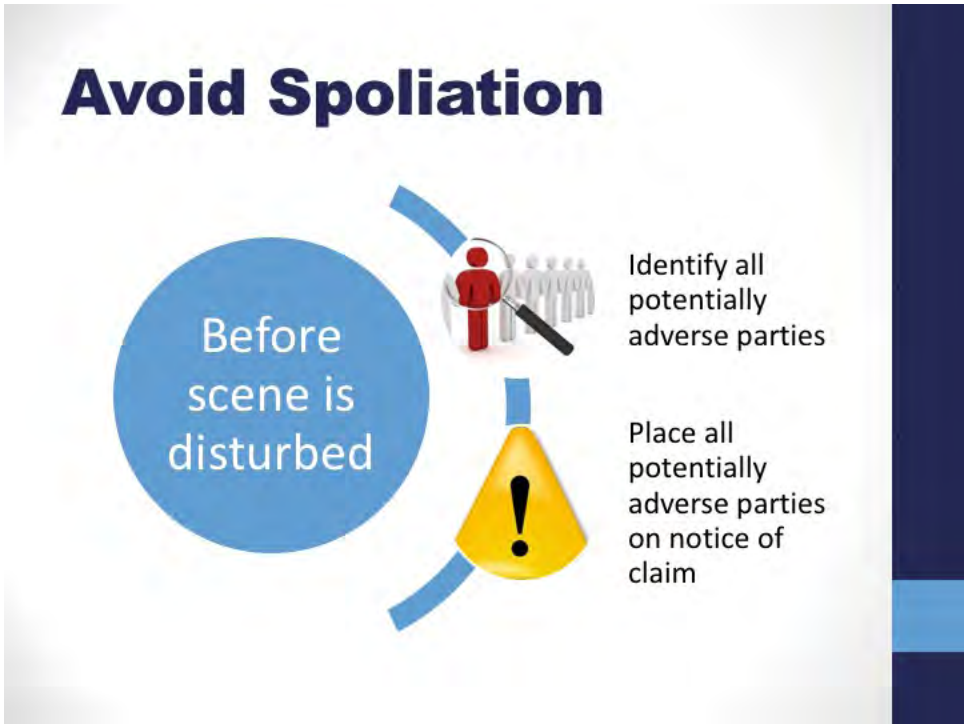
## Avoid Spoliation

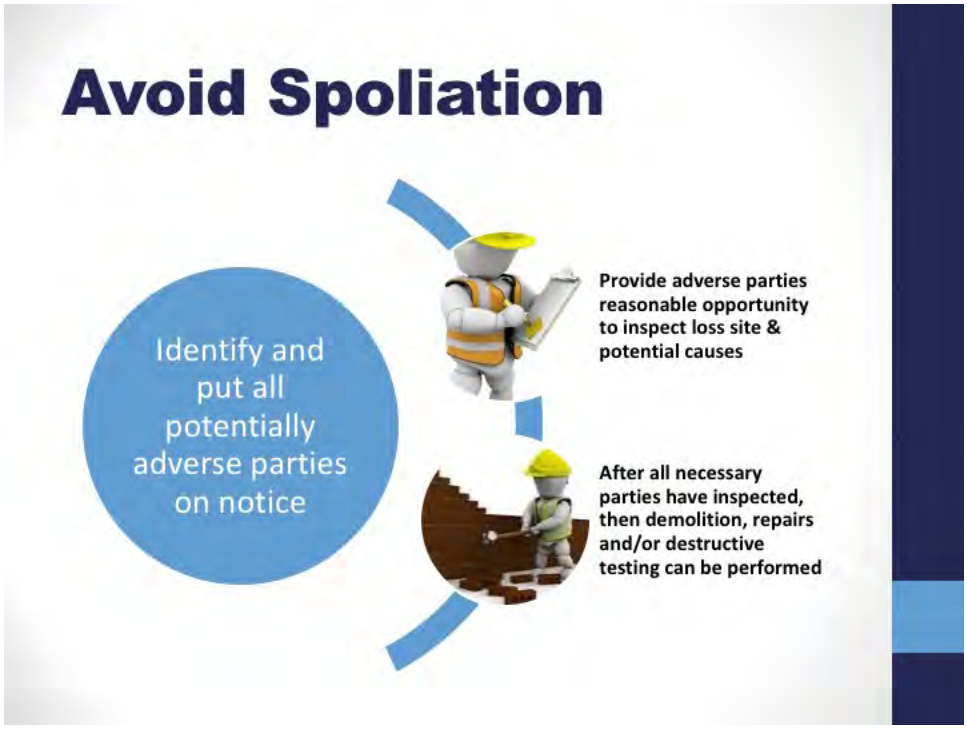
- Retain subrogation counsel as soon as possible
- Retain and supervise qualified experts who understand spoliation

## Avoid Spoliation

If debris removal is necessary, before adverse parties can be identified and placed on notice

- Take extensive photographs and/or video *before* scene is altered and as debris removal proceeds
- Preserve evidence of all potential causes of the loss located at or near origin (even those ruled out, since some other party may later allege it was the cause)


Avoid Spoliation
Before scene is disturbed
Identify all potentially adverse parties
Place all potentially adverse parties on notice of claim


Avoid Spoliation
Identify and put all potentially adverse parties on notice
Provide adverse parties reasonable opportunity to inspect loss site & potential causes
After all necessary parties have inspected, then demolition, repairs and/or destructive testing can be performed

# Retaining Experts

- Identify the correct experts
- Get them to the scene
  - Considerations of preserving confidentiality


"I know nothing about the subject, but I'm happy to give you my expert opinion."

## Retaining Experts

- Consulting v. Testifying experts
- Protecting their expert privilege


## Identifying Potentially Responsible Parties

- All equipment, devices, potential causes
- All manufacturers/sellers/installers of products potentially involved
- Place on notice

## Pre-Litigation Evidence Testing

- Reasons to test early
- For investigating authority
- Due diligence for the injured
- Public relations
- Length of time evidence is held may cause invalidation of tests

## Pre-Litigation Evidence Testing

- Develop Testing Protocol
- Notify other Interested Parties of Testing Protocol
  - Interested Parties may include PRPs, injured persons/their counsel and investigating authorities

## Pre-Litigation Evidence Testing

- Notifying other Interested Parties of Testing Protocol may include:
- Potential dates of testing
- Invite to attend
- Invite comment on Protocol
- Notify of any comments incorporated and those not incorporated and why
- Loading and transferring of evidence
- Storage of evidence

## Best Practices During the Testing

- Pictures
- Videotaping – sound off v. sound on
- Logging
- Chain of custody
- Lack of Commentary by your expert(s)

## After the Testing

- Provide data, photos and videotapes to other PRPs
- Determine whether you want a report


**Introduction**

With amendments to Federal Rule of Civil Procedure 26 over the years and a proliferation of Motions to Strike/ Exclude Expert Testimony under the Court's responsibility as a gatekeeper, keeping apprised of recent rulings on these issues is key to effectively using experts in defending mass tort claims. This article explores Rule 26, including how courts have handled discovery disputes involving experts.

**Amendments to Federal Rule of Civil Procedure 26 Pertaining to Experts**

At the end of 2010, Federal Rule of Civil Procedure 26 was amended to protect draft expert materials and some attorney-expert communications from discovery. *See* Fed. R. Civ. P. 26(b)(4)(B)-(C). Rule 26(b)(4) works in conjunction with Rule 26(a)(2) to govern discovery and disclosure from experts, respectively. With respect to Rule 26(b)(4), the amendments inserted two new sections, (B) and (C):

> (4) *Trial Preparation: Experts.*
>
> (B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
>
> (C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
>
> > (I) relate to compensation for the expert's study or testimony;
> >
> > (II) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> >
> > (III) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Rule 26(a)(2)(B) provides that an expert report must contain the "facts or data considered by the witness in forming [the opinion to be expressed]," while the old Rule was more expansive and required the report to contain "the data or other information considered by the witness in forming [the opinions to be expressed]." *See Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 263 (D. Mass. 2010) (explaining the changes to Rule 26(a)(2)(B)(ii)) (alterations in original); *see also Sara Lee, Corp. v. Kraft Foods, Inc.*, 273 F.R.D. 416,

419 (N.D. Ill. 2011) (same). Section 26(b)(4)(C) applies work-product protections to communications between the party's attorney and a "testifying expert." *Sara Lee*, 273 F.R.D. at 419. The *Sara Lee* Court did, however, highlight an exception under Rule 26 (b)(3)(A)(ii), which allows discovery if "the party seeking discovery 'has substantial need for the materials to prepare and cannot, without undue hardship, obtain their substantial equivalent by other means.'" *Id.* (quoting Fed. R. Civ. P. 26(b)(3)(A)(ii)).

**Purposes of Rule 26 As Currently Drafted**

Under the previous iteration of Rule 26, interpretation by courts was inconsistent. *See Chevron*, 754 F. Supp. 2d at 264 (noting that the First Circuit never addressed these inconsistencies). The majority applied a "bright-line rule" under which matters considered by an expert in formulating an opinion, including attorney work product, were automatically discoverable. *Id.* at 264 n.71 (citing *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 257 F.R.D. 607, 612 (E.D. Cal. 2009) (collecting cases on majority interpretation)). On the other hand, a minority found that disclosure of core work product to a testifying expert did not affect the protection accorded to such information. *Id.* (citing *Yuba River*, at 613). The majority interpretation created "undesirable effects" under the old Rule. *Id.* (citing 2010 Advisory Committee Notes to Fed. R. Civ. P. 26); *see also Sara Lee*, 273 F.R.D. at 419 (finding that the majority's "broad expert discovery carried with it several unfortunate consequences"). Such effects included increased discovery costs and impeded effective communication between attorneys and their experts, apparently inducing some parties to retain two separate sets of experts—one for consultation and another to testify. *Sara Lee*, 273 F.R.D. at 419 (citing 2010 Advisory Committee Notes to Fed. R. Civ. P. 26).

As the Court in *Sara Lee* explained, the advisory committee intended its change "to 'limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.'" *Id.* (quoting same). According to a Magistrate Judge in the District Court of Colorado, the Advisory Committee made clear "that the amendments are meant to alleviate the perceived uncertainty and rising costs associated with attorneys' limited interactions with their retained experts as a result of court opinions allowing discovery of an expert's draft reports and of all communications with counsel." *Republic of Ecuador v. Bjorkman*, No. 11-cv-01470-WYD-MEH, 2012 BL 1828, at *6 (D. Colo. Jan. 4, 2012) (citing 2010 Advisory Committee Notes). Specifically, amended Rule 26(b)(4)(B) is "aimed at protecting an expert's drafts, which may contain the attorney's work product, and Rule 26 (b)(4)(C) provides specific protection for attorney-expert communications. *Id.* at *7.

**Scope of "Facts or Data"**

Since Rule 26(a)(2)(B)(ii) allows disclosure of only "facts or data" and Rule 26(b)(4)(C)(ii) creates an exception for "facts or data" communicated by an attorney, an issue remains as to the scope of the phrase, "facts or data," in this context. Courts have typically relied on the Advisory Committee Notes in explaining that 'facts or data' "should still be 'interpreted broadly' to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to facts or data **'***considered'* by the expert in forming the opinions to be expressed, not only those *relied* upon by the expert." *Chevron*, 754 F. Supp. 2d at 264 (quoting 2010 Advisory Committee Notes to Fed. Civ. P. 26) (emphasis added). Specific to Rule 26(b)(4), this "should not 'impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions.'" *Id.* (quoting same). In *Sara Lee*, the Court found that the "requested materials contain neither 'facts or data' nor 'assumptions that the party's attorney provided,' so that they are not discoverable even under the 'testifying expert' rubric." *Sara Lee*, 273 F.R.D. at 420. After an *in camera* review of the requested materials, the *Sara Lee* Court concluded that the expert was not a testifying witness where he "merely advised Defendants on how they might conduct a pilot survey. . . ." *Id.*

Another federal Court, in *Skycam, Inc. v. Bennett*, refused to order the production of an attorney's notes made in connection with interviews of witnesses and preparation of expert reports. No. 09-CV-294-GKF-FHM, 2011 U.S. Dist. LEXIS 68725, at *3 (N.D. Ok. June 27, 2011). Here, the defendants sought production of these notes hoping to argue that the experts had not substantially participated in preparing their expert reports. *Id.* at *4 n.1. The Court however quickly disposed of the argument by stating: "under *Fed. R. Civ. P. 26(b)(4)*, as amended (and applied retroactively to this issue), plaintiffs' attorney's notes are not discoverable." *Id.*

Attorneys' notes, however, should not be confused with the notes of a party to the litigation. *See Fialkowski v. Perry*, 2012 U.S. Dist. LEXIS 91165 (E.D. Pa. 2012) (holding that a 39-page document prepared by the Plaintiff that contained the Plaintiff's thoughts and assessment of the documents and the claims in the case, which was provided to the Plaintiff's expert, must be produced).

**In re: Asbestos Products Liability Litigation**

The Eastern District Court of Pennsylvania considered the work-product privilege for expert physicians in a products liability context. No. MDL 875, 2011 U.S. Dist. LEXIS 143009, at *18 (E.D. Penn. Dec. 13, 2011). The specific issue

involved the production of "transmittal letters" that plaintiffs had provided three doctors. *Id.* These letters "may have furnished certain information about exposure, medical and smoking history to the doctors and may have been utilized by them in the formation of any letters or reports provided to counsel to support a claim." *Id.* Objecting to production, the plaintiffs argued that the "transmittal letters" were work product and subject to the protection set out in Fed. R. Civ. P. 26(b)(3)(A). *Id.* In response, the defendants pointed out that Rule 26(b)(3)(A) explicitly provides that it is "subject to" Rule 26(b)(4), a provision "which must be analyzed in that the transmittal letters provide certain information to the expert physicians." *Id.* at *19. In light of these arguments and Rule 26(b)(4)(C), the Court decided that the question is "whether information provided constitutes 'facts or data' or 'assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.'" *Id.* at *20.

In addition to their contention that the letters are protected as communications between a party's attorney and expert witnesses, the plaintiffs argued that the letters constituted "drafts of expert reports," which are explicitly protected under amended Rule 26. *Id.* at *20-21. In support of this argument, evidence showed that the plaintiffs provided the doctors information in the form of draft correspondence, prepared as letters on the doctors' letterheads that would then come back to the plaintiffs' counsel. *Id.* at *20. In these letters, there would be certain spaces left blank (or partly filled out by the plaintiffs' counsel) indicating exposure history, medical history, and certain anticipated conclusions or medical opinions. *Id.* Before considering whether the letters contained discoverable material, the Court rejected the draft report argument by referring to Rule 26(b)(4)(C), which provides: "Rule 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report . . . regardless of the form of the communications, *except*. . . ." *Id.* at *21 (emphasis in original). Thus, the Court decided draft reports were among the communications subject to "the exceptions that pertain to the identification of 'facts or data' or 'assumptions' that are at issue here." *Id.*

The Court therefore held "the information and format that [the plaintiff] provided to its diagnosing doctors regarding individuals' exposure, medical and smoking histories [falls] squarely within the definition of 'facts or data' considered by the expert, which the amendments will not protect under Rule 26(b)(3)(A) or (B)." *Id.* at *21-22. Like other courts, the Pennsylvania District Court next quoted the Advisory Committee Notes for support: "the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, *from whatever source*, that contains factual ingredients." *Id.* at *22 (emphasis in original) (quoting 2010Advisory Committee Notes on Fed. R. Civ. P. 26, Subdivision (a)(2)(B)).

In conclusion, the Court held that "defendants are entitled to any documents (in their original format) [the plaintiff] provided the doctors that the doctors 'considered,' including draft letters, as they are 'communications' that identify 'facts or data' and 'assumptions.'" *Id.* Significantly, the Court explained further that "this material is discoverable regardless of whether it is presently in the possession of any of the doctors, [the plaintiff], or anyone under their control." *Id.*

**Draft Reports**

Rule 26(b)(4) provides now that experts' draft reports are no longer discoverable. *See Henriksen*, 2011 U.S. Dist. LEXIS 46227, at *6. After deciding that draft reports were covered by the exceptions, the District Court in *Asbestos Products Liability Litigation* provided more general guidance in footnotes. 2011 U.S. Dist. LEXIS 143009 at *22-25 n.10 & 11. The Court initially acknowledged that "the Amendment has been recently codified, [so] it remains to be determined how courts will interpret its provisions." *Id.* at *23 n.10. The Court then quoted a commentator who noted that "an 'unanswered question is whether counsel will be able to use Rule 26(b)(4)(B) to trump Rule 26(b)(4)(C)(ii-iii)—can counsel protect from discovery facts or data considered by or assumptions relied upon by a retained expert by providing some in a draft report.'" *Id.* (quoting George Lieberman, *Experts and the Discovery/Disclosure of Protected Communication*, 78 Defense Counsel Journal 220, 227 (Apr. 2011)). Predictably, the Court explicitly endorsed the commentator's view that "[c]ourts would not seem to be receptive to such an obvious loophole, and caution dictates against embarking upon such a course without the support of new case law in support of such a practice,'" *Id.* (quoting same).

The Court also addressed whether a doctor's handwritten notes would fall under the draft report provision of Rule 26(b)(4)(B), and stated that such notes "were not 'draft reports,' but rather reflect [the doctor's] own interpretations of the . . . results he was retained to analyze for [the plaintiffs]." *Id.* at *23 n.11. Because they are not draft reports, "they should be considered 'the expert's testing of material involved in litigation, and notes of any such testing,' which are not 'exempted from discovery' by Rule 26." *Id.* at *24 n.11 (quoting 2010 Advisory Committee Notes on Fed. R. Civ. P. 26, Subdivision (b)(4)).

In *In Re Republic of Ecuador,* 280 F.R.D. 506 (N.D. Cal. 2012), the Court noted that draft worksheets prepared by assistants of an expert for use in his expert report are privileged, but draft worksheets prepared by an employee of the party for the same use are not privileged. The Court further noted that the work product protection does not

extend to the expert's development of his opinions to be presented outside of draft reports, such as for a presentation or notes, draft letters, etc.

**Reporting vs. Non-Reporting Expert Witnesses**

Further issues stem from attorney communications with expert witnesses who will testify but are not required to file an expert report. As the Eastern District Court of California has pointed out, the new rule is "silent as to communications between a party's attorney and non-reporting experts." *United States v. Sierra Pacific Indus.*, No. VIV S-09-2445 KJM EFB, 2011 U.S. Dist. LEXIS 60372, at *8 (E.D. Cal. May 26, 2011). However, the Court provided the following language from the 2010 Advisory Committee Notes:

> The protection is limited to communications between an expert witness required to provide a report under *Rule 26(a)(2)(B)* and the attorney for the party on whose behalf the witness will be testifying, including any 'preliminary' expert opinions. . . . The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under *Rule 26(a)(2)(C)*. The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrines.

*Id.* at *18-19 (quoting 2010 Advisory Committee Note to Fed. R. Civ. P. 26). Consequently, the issue arises as to whether a party has waived the attorney-client privilege when it discloses testifying, but non-reporting, expert witnesses. One example where the distinction between reporting and non-reporting experts has been significant is testimony by employee opinion witnesses. Other potential examples include "former employees, in-house counsel, independent contractors, treating physicians, and accident investigators." *Id.* at *31-32.

In *Graco, Inc. v. PMC Global, Inc.*, the New Jersey District Court considered the issue where the plaintiff's employee opinion witnesses who had not yet been named as testifying witnesses and did not regularly give expert testimony, but had submitted affidavits containing expert opinions. No. 08-1304 (FLW), 2011 U.S. Dist. LEXIS 14717, at *38 (D.N.J Feb. 14, 2011). The defendant had noticed the depositions of two of the plaintiff's employees and served requests for documents to be produced at the deposition, including all documents considered or relied upon in drafting the affidavits, all drafts of the affidavits, and all communications with those individuals concerning their affidavits. *Id.* at *4. Objecting to the requests, the plaintiff asserted that the employee declarants "should be treated as non-experts and maintain[ed] that the material requested is protected by the attorney-client privilege or work-product privilege." *Id.* After acknowledging "a significant divergence between the 1993 version (and related case law) and the 2010 version of *Rule 26*," the Court considered the 2010 Advisory Committee Notes "persuasive regarding intent related to relevant provisions of *Rule 26*." *Id.* at *38-39. Based on the plaintiff's "affirmative reliance on the facts and opinions set forth in [the witnesses'] respective affidavits," the Court found that the employee opinion witnesses "should be considered 'testifying witnesses.'" for Rule 26 analysis. *Id.* at *39 (citations omitted). Accordingly, the *Graco* Court decided the following with respect to the employee opinion witnesses:

> (1) [Defendant] is not entitled to a written report . . . pursuant to current, and amended, *Rule 26(a)(2)* and the 2010 Advisory Committee Note;
>
> (2) [Defendant] is entitled to a disclosure stating the subject matter and a summary of the facts and opinions proffered . . . pursuant to amended *Rule 26(a)(2)(C)* and the 2010 Advisory Committee Note and supplements thereto pursuant to amended *Rule 26(a)(2)(E)*;
>
> (3) [Defendant] is not entitled to any drafts, regardless of form, of expert reports, affidavits, or disclosures pursuant to amended *Rule 26(b)(4)(B)* and the 2010 Advisory Committee Note;
>
> (4) [Defendant] is entitled to all relevant discovery regarding the facts/data considered, reviewed or relied upon for the development, foundations, or basis of their affidavits/declarations . . . pursuant to amended *Rules 26(b)(4)(B)* and *(C)* and the 2010 Advisory Committee Note;
>
> (5) Communications between [the plaintiff's] counsel and the Employee Opinion Witnesses are protected by the attorney-client privilege [citation omitted];
>
> (6) [Defendant] is not entitled to documents and tangible things prepared in anticipation of litigation or for trial without showing it has a substantial need for the materials to prepare its case and, cannot, without undue hardship, obtain their substantial equivalent by other means pursuant to amended *Rule 26(b)(3)(A)* and the 2010 Advisory Committee Note;

*Id.* at *39-42.

Conversely, the California District Court in *Sierra Pacific* found that "*Graco* (which is not controlling here) provides little assistance to address the issue presented in this motion." *Sierra Pacific*, 2011 U.S. Dist. LEXIS 60372 at *31. Similar to *Graco*, the defendants in *Sierra Pacific* moved to compel

the United States to produce testimony and documents relating to communication between two of the United States' designated expert witnesses and attorneys for the United States and another plaintiff. *Id*. at *6. These witnesses were employees of the United States and the other plaintiff who had investigated a large fire at issue, for which they had prepared an Origin and Cause Report. *Id.* at *6-7. The United States cited *Graco* to argue that its attorney's communications with employee witnesses were protected. *Id.* at *29. The *Sierra Pacific* Court was not persuaded by the decision in *Graco* in part because "the analytical basis for that result is not explained. *Graco* discussed at length the text of the 2010 amended *Rule 26* and the advisory committee notes, but it engaged in little analysis in support of its conclusion." *Id.* at *30.

During its analysis, the *Sierra Pacific* Court provided general guidance regarding non-reporting expert witnesses: "[s]ome of these non-reporting witnesses should not be treated differently than reporting expert witnesses. For example, there is no immediately apparent policy reason to treat an employee expert whose duties regularly involve giving expert testimony any differently than an employee expert whose duties involve only intermittently giving expert testimony." *Id.* at *32. On the other hand, "some non-reporting witnesses, such as treating physicians and accident investigators, should be treated differently than reporting witnesses with respect to the discoverability of their communications with counsel." *Id.* (citing Minutes, Civil Rules Advisory Committee Meeting (April 20-21, 2009) p.14) ("The Committee did not want to protect communications by one party's lawyer with treating physicians, accident investigators, and the like. An employee expert, moreover, may be an important fact witness."). In conclusion, the Court stated "at least in some cases, discovery should be permitted into such witnesses' communications with attorneys, in order to prevent, or at any rate expose, attorney-caused bias." *Id.* at *33.

In its case, however, the *Sierra Pacific* Court decided that "counsel's communications with [its employee experts] should not be protected." *Id.* The Court reasoned that the experts were "hybrid fact and expert witnesses" and "have percipient knowledge of the facts at issue in this litigation. . . . If their communications with counsel were protected, any potential biases in their testimony regarding the causes of the fire would be shielded from the fact-finder." *Id.* While the Court "decline[d] to hold that designating an individual as a non-reporting witness waives otherwise applicable privileges in all cases, . . . in this particular factual scenario, the United States waived its privilege and work-product protection by disclosing [the employees] as expert witnesses." *Id.* at *33-34. The United States also made an argument that the decision would force it to protect its communications by retaining the witnesses for a nominal fee, thus transforming them into reporting experts, but the Court refused to rule on the permissibility or effect of such an action "given the history of this discovery dispute." *Id.* at *34-35.

In *In Re The Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012), the Court held that the "distinguishing characteristic between expert opinions that require a report and those that do not is whether the opinion is based on information the expert witness acquired through percipient observations or whether, as on the case of retained experts, the opinion is based on information provided by others…" Thus, the Republic of Ecuador was incorrect in claiming that an expert's documents were not subject to a work product privilege when they were prepared for related litigation.

**Witnesses Who Wear "Two Hats"**

Rule 26's additional distinction between testifying experts and non-testifying experts creates another issue when "courts must determine which standard applies to an expert who wears 'two hats' by serving as both a non-testifying consultant and a testifying expert." *Sara Lee*, 273 F.R.D. at 419. Indeed, "for non-testifying consultants, the Rules provide an even higher barrier to discovering attorney-expert communications." *Id.* Typically, "a party may not 'discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness.'" *Id.* (quoting Fed. R. Civ. P. 26(b)(4)(D)). When addressing experts who wear "two hats" under old Rule 26, most courts had held "that a single expert may serve in both roles but that the broader discovery for testifying experts applies to everything except 'materials generated or considered *uniquely* in the expert's role as consultant.'" *Id.* at 419-20 (quoting *In re Commercial Money Ctr., Inc., Equip. Leasing Litig.*, 248 F.R.D. 532, 538 (N.D. Ohio 2008) (emphasis in original)).

In *Sara Lee*, "two of the nation's largest hot dog manufacturers" had accused each other of false and deceptive advertising. *Id.* at 417. Before the Court was a motion to compel certain information regarding an expert of the defense who was retained to testify about one of the plaintiff's advertisements and "to consult, but not testify, about another." *Id.* The Illinois District Court applied the stronger protections applicable to non-testifying witnesses to the particular communications at issue by concluding "that the requested materials relate *solely* to [the expert's] role as consultant, even taking into account the preference for disclosure when dealing with an expert who wears two hats." *Id.* at 420 (emphasis added). In coming to this conclusion, the Court emphasized that the expert had not expressed any opinion regarding the second advertisement, "and he will not offer any testimony with respect to it at trial." *Id.* The Court explained that "[n]one of the communications contain facts, data, or assumptions that [the expert] could have considered

in assembling his expert report, and thus Defendants had no duty to disclose the communications and Plaintiff no right to discover them." *Id.* (citing Fed. Rule Civ. P. 26(a)(2)(B) and 26(b)(4)(C)). Significantly, the Court commented that such "expert-attorney communications arguably may have been discoverable under the pre-amendment *Rule 26*, but no more." *Id.*

In a slightly different scenario, the plaintiffs in *Nat. Western Life Ins.* sought discovery of e-mail communications between the defendant's testifying expert and its non-testifying expert, as well as any drafts of the expert report that were sent between the two. 2011 U.S. Dist. LEXIS 21967 at *4. Here, the plaintiff argued that the non-testifying expert was "more than a mere consultant to [the testifying expert] and that, in fact, he actually co-authored the [Expert] Report." *Id.* at *3. The Court disagreed and held that "under the current version of *Rule 26(a)(2)(B)*, [the defendant] was only required to produce 'facts or data' relied upon by [the testifying expert] in forming his opinion." *Id.* at *6. The Court then concluded that the defendant had complied with Rule 26 by producing the testifying expert's Expert Report and all e-mails between the two experts containing facts or data. *Id.*

**Rule 35 Exams**

Fed. R. Civ. P. 35(a) provides that, for good cause shown, a court "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Two defendants in *Terrell v. Harder Mechanical Contractors, Inc.* argued that under the expanded protection of amended Rule 26(b)(4)(C) they should not be required to share an expert with a third defendant whose interests conflicted with their own. No. C-10-01080 CW (DMR), 2011 U.S. Dist. LEXIS 44861, at *7 (N.D. Cal. Apr. 19, 2011). In a sexual harassment and discrimination case, the third defendant had requested a separate Rule 35. *Id.* The defendants argued that "they must be able to freely communicate with their expert in order to assist them in defending against both Plaintiff's and [their co-defendant's] claims." *Id.* Apparently, "sharing an expert would render it impossible for the expert 'to confidentially, competently, or ethically advise' the three Defendants, given that they are 'in direct conflict with each other.'" *Id.* at *8.

The California District Court found the defendants' conflict-of-interest argument unpersuasive, explaining that the mental exam had "little if any bearing on" the conflict between defendants, that issue being which defendant would be liable if the plaintiff proved harassment or discrimination. *Id.* at *10. Acknowledging the "recently expanded protection of communications between counsel and testifying experts," the Court found that "such protection does not support the conclusion that every defendant in a multi-defendant case is automatically entitled to a separate mental exam." *Id.* at *11. Rather, the Court considered the defendants' proposed result to be "both untenable and inconsistent with the principle of proportionality in discovery that is also found in *Rule 26*." *Id.* at *12 (citing Fed. R. Civ. P. 26(b)(2)(C)(i)). The Court however did recognize the defendant's right to develop its own expert testimony about the plaintiff's emotional distress and ordered the other defendants to provide a copy of the audiotape recording of their expert's exam to the third defendant within five days. *Id.* Furthermore, the Court denied the Rule 35 request *without prejudice*, explaining that the defendant retains the right to move for an additional exam if the defendant's own expert can make a particularized showing after reviewing the audiotapes that the defendant would be prejudiced if it is not able to conduct its own exam. *Id.* at *13-14.

**Conclusion**

Working with experts is crucial both in litigation, and in responding to the initial stages of a crisis. The current iteration of Rule 26 provides protections for draft reports and for opinions of consulting experts that historically were not available Additional protections are also likely available for fact witnesses who may have expertise, but are not testifying experts.


## Jessalyn H. Zeigler
**Member**
**Bass Berry & Sims (Nashville, TN)**

**615.742.6289 | jzeigler@bassberry.com**
**http://www.bassberry.com/professionals/z/zeigler-jessalyn-h**


Whether representing a Fortune 500 company or one of the largest municipalities in Tennessee, Jessie Zeigler has returned successful results for 100 percent of the cases she has handled for clients in a wide range of litigation matters. Her counsel has saved clients millions in losses across various industries – including automotive, food and beverage, healthcare, consumer products, pulp and paper, general manufacturing, chemical, pharmaceutical/life sciences, and medical device – as they have faced claims related to crisis management, environmental, natural gas hedging, health & safety, products liability, healthcare liability, or contracts. Jessie represents clients in claims related to deceptive business practices under the Tennessee Consumer Protection Act (TCPA) and the False Claims Act (FCA). She also has more than 23 years of experience in representing clients in environmental, health and safety matters.

Jessie is chair of the firm's Products Liability & Torts Practice Group.

**Related Services**
- Products Liability & Torts
- Litigation & Dispute Resolution
- Environmental
- Healthcare Disputes
- International

**Representative Experience**
- Dismissal of Multiple Plaintiff Products Liability Class Action - Represented a manufacturer in complete dismissal of a multiple plaintiff products liability class action lawsuit
- Successful Result in Case Involving Gas Hedging Charges - Represented the Town of Smyrna, Tennessee in a lawsuit against the Municipal Gas Authority of Georgia (MGAG) alleging unauthorized natural gas hedging charges imposed by MGAG. The case was resolved very favorably for the Town.
- Dismissal of Patent Infringement Case Against Pharmaceutical Company - Representation of a pharmaceutical company in a patent infringement case related to the sale and marketing of a cancer treatment drug

**Accolades**
- Best Lawyers in America® — Environmental Law; Litigation: Environmental; Natural Resources Law (2007-2017)
- Chambers USA — Environment, Recognized Practitioner (2016)
- Nashville Business Journal — "Women of Influence, Trailblazer Category" (2015)
- Nashville Bar Association — President's Award (2014)
- Mid-South Super Lawyers (2009-2016)
- Top 50 Women Mid-South Super Lawyers (2011-2012, 2016)
- Phi Beta Kappa

**Education**
- Vanderbilt Law School - J.D., 1993; Order of the Coif
- Syracuse University - B.A., B.S., 1990; summa cum laude

# Do You Believe In Miracles?
# The Road To Pre-Suit Resolution Of High Exposure Claims

**Lyndon Sommer**
**Sandberg Phoenix & von Gontard (St. Louis, MO)**
**314.446.4264 | lsommer@sandbergphoenix.com**

It's not for everyone.

When is pre-suit settlement possible?

# Reality

# Exchanging Information

# Expert Reports

# Pangea Group v. Accounting Firm

# Stock v. Accounting Firm


## Lyndon Sommer
**Shareholder**
**Sandberg Phoenix & von Gontard (St. Louis, MO)**

**314.446.4264 | lsommer@sandbergphoenix.com**
**http://www.sandbergphoenix.com/attorneys-lyndon-sommer/**


Lyndon Sommer, Registered CPA (Ill.) M.Acct., J.D., is a shareholder of Sandberg Phoenix & von Gontard and member of the firm's Business Litigation and Products Liability Practice Groups. He focuses his work in the areas of commercial litigation and product liability and toxic tort litigation, frequently handling cases involving asbestos and benzene.

Lyndon specializes in professional negligence cases involving certified public accountants, who he has successfully defended at trial and on appeal. He is experienced in defending accountants in federal court and is very familiar with federal procedure and expert requirements. Throughout his career, he has handled more than 100 professional negligence cases. He has also defended attorneys and financial advisers in litigation and arbitration.

Lyndon is also experienced in representing shareholders of closely held companies involved in shareholder disputes, and has spent a substantial amount of time representing shareholders in trial courts and arguing several appeals arising out of shareholder litigation. These appeals have been argued in both state and federal courts.

Having tried cases in federal and state courts in Missouri and Illinois, Lyndon has received jury verdicts on behalf of both plaintiffs and defendants. He has also argued multiple cases before the United States Courts of Appeal for the Seventh and Eighth Circuits, as well as the Illinois Appellate Court and Missouri Court of Appeals.

**Industries**
- Accounting
- Architects and Engineers
- Brokers / Dealers / Financial Advisors
- Construction and Development
- Entrepreneurs, Closely Held & Family Owned Business
- Lawyers and Law Firms
- Manufacturing / Distribution
- Restaurants
- Trucking
- Wholesale, Retail and Services

**Professional Activities**
- Admitted to practice law in Missouri and Illinois, Lyndon is also a Registered Certified Public Accountant in Illinois.
- He is member of the Professional Liability Underwriting Society, the Missouri Society of CPAs and the American Association of Attorneys/Certified Public Accountants.
- Lyndon also actively serves as a member of the Missouri Bar, the Bar Association of Metropolitan St. Louis, the Lawyers Association, the St. Clair County Bar Association and the East St. Louis Bar Association.
- For his outstanding work in the area of Product Liability Litigation – Defendants, Lyndon has been included in the 2017 Edition of Best Lawyers in America.

**Education**
- Attending Southern Illinois University School of Law, Lyndon earned his Juris Doctor in 1992 and served as the Editor in Chief of the Southern Illinois University Law Journal.
- Lyndon earned a master's degree in Accountancy in 1989 and a B.S. in Accounting, in 1987 from Southern Illinois University, Carbondale.

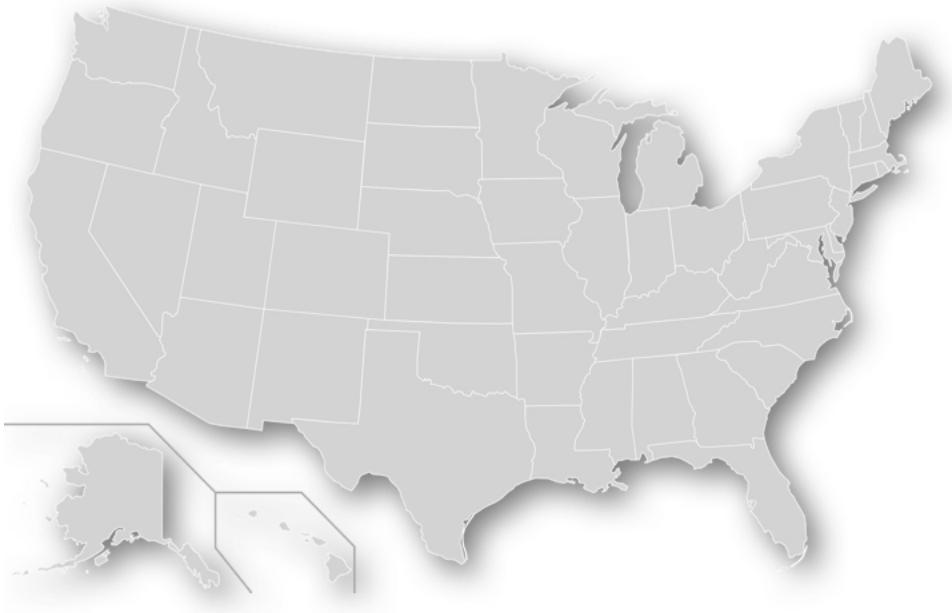
# The Sweet Spot - Finding The Right Balance Between Grooming Future Trial Lawyers And Addressing Client Needs

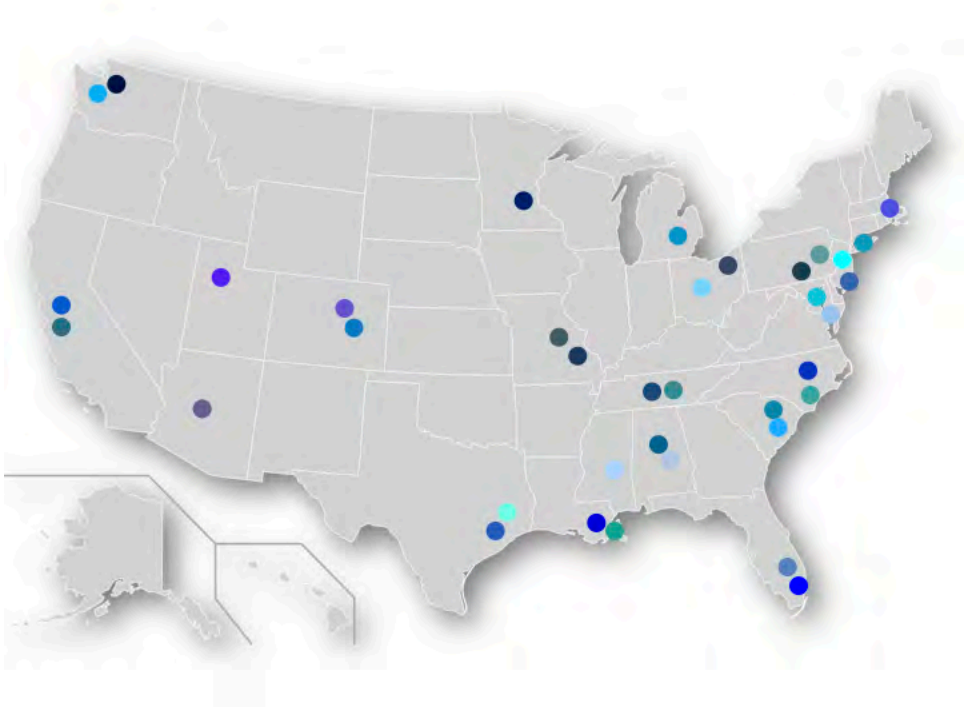
**Mike Bell**
**Lightfoot Franklin & White (Birmingham, AL)**
**205.581.0721 | mbell@lightfootlaw.com**

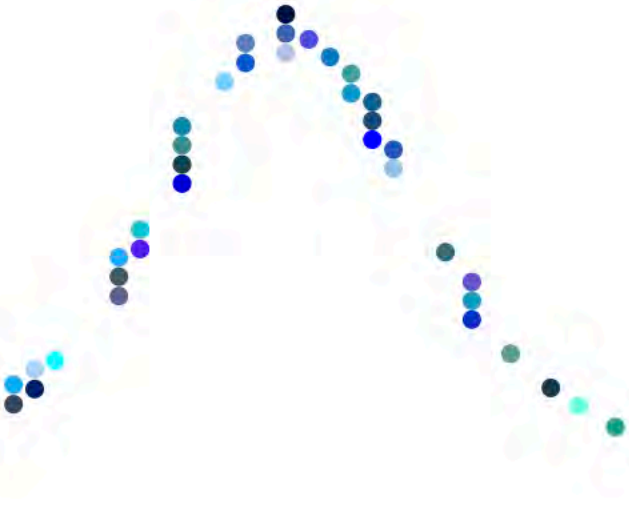
# The Sweet Spot

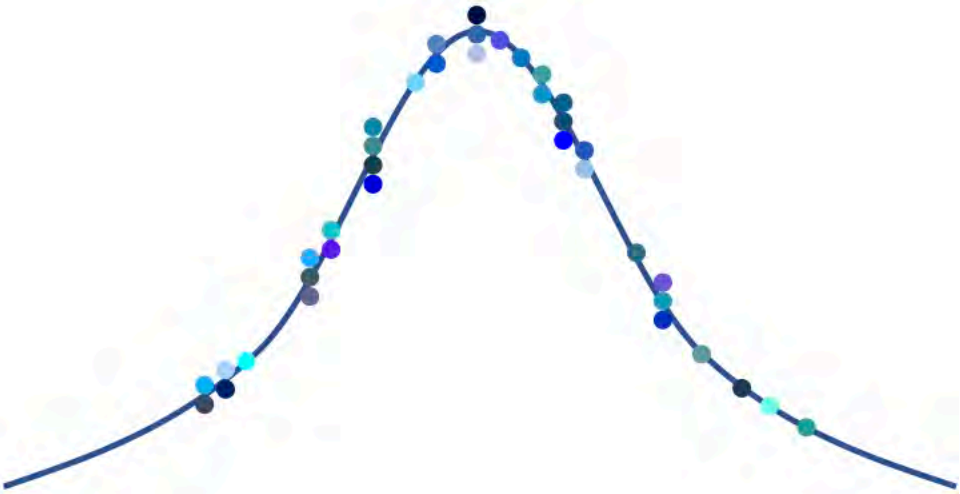
Mike Bell

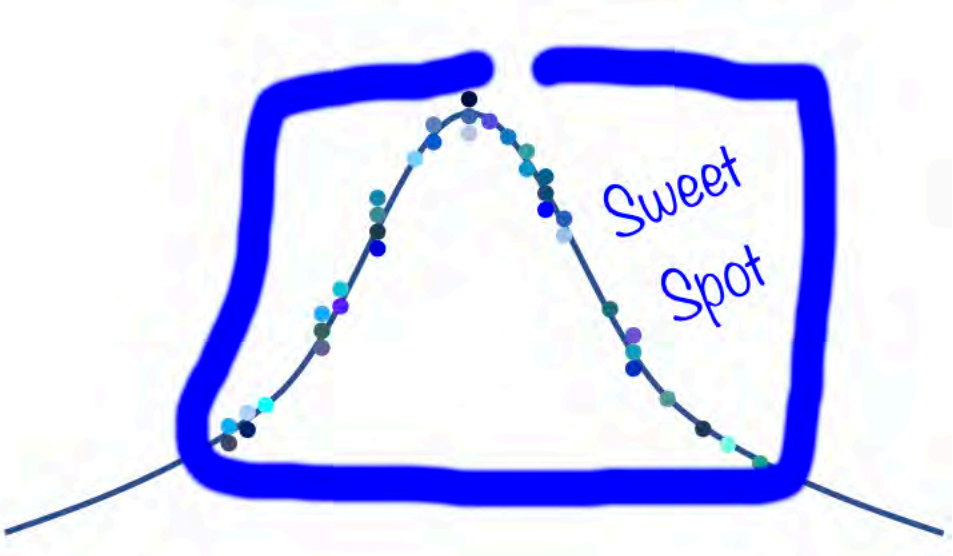
lightfootlaw.com







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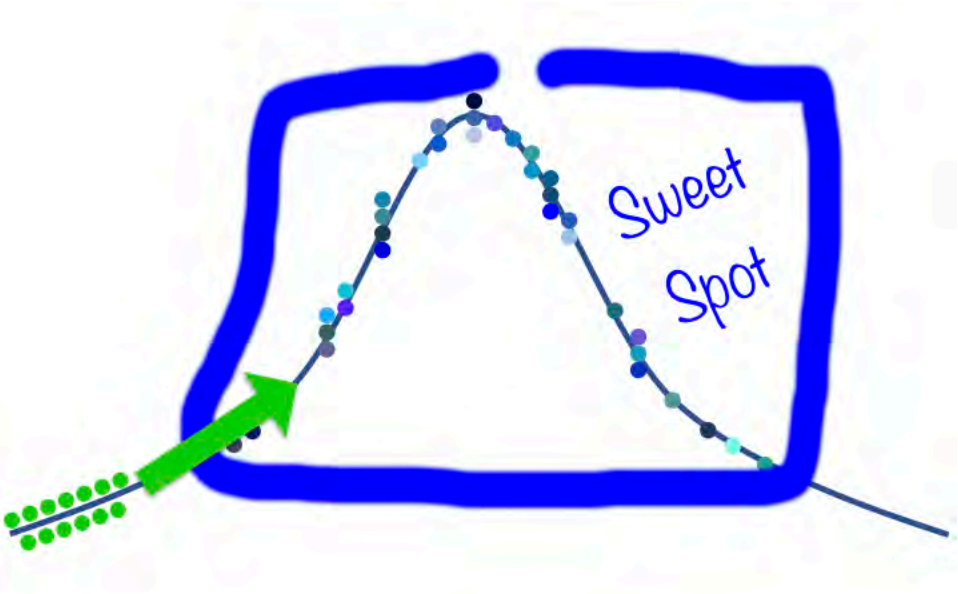
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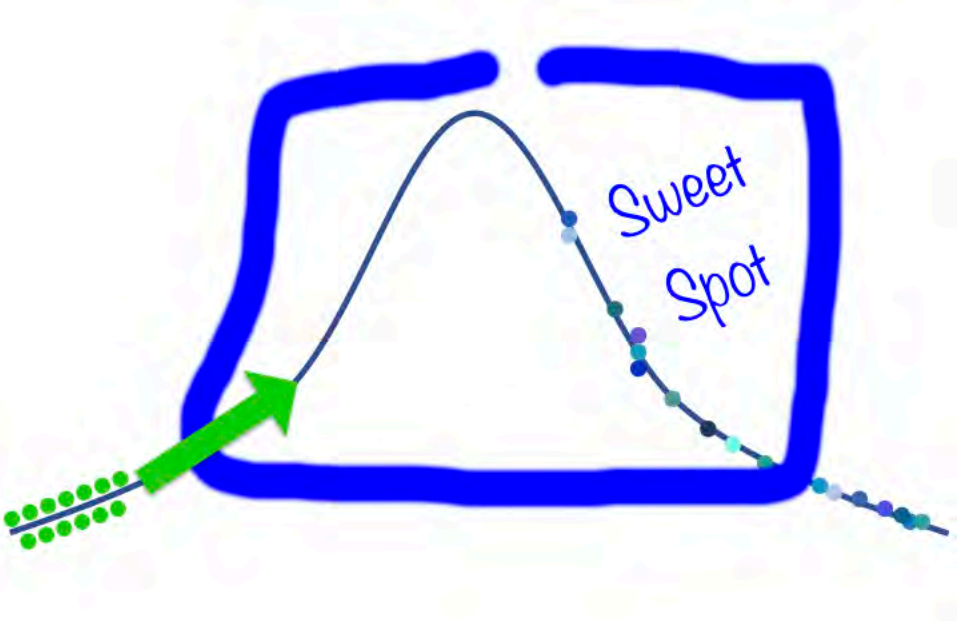
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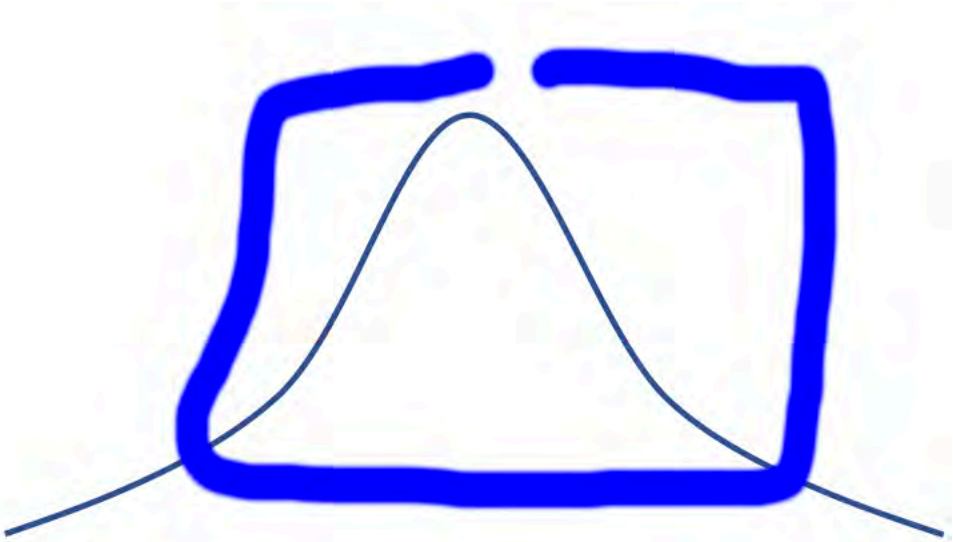

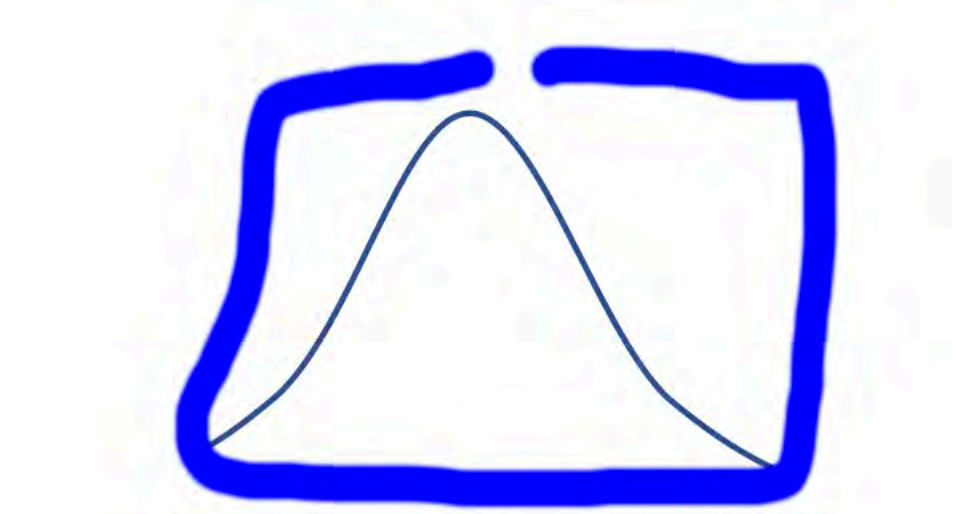

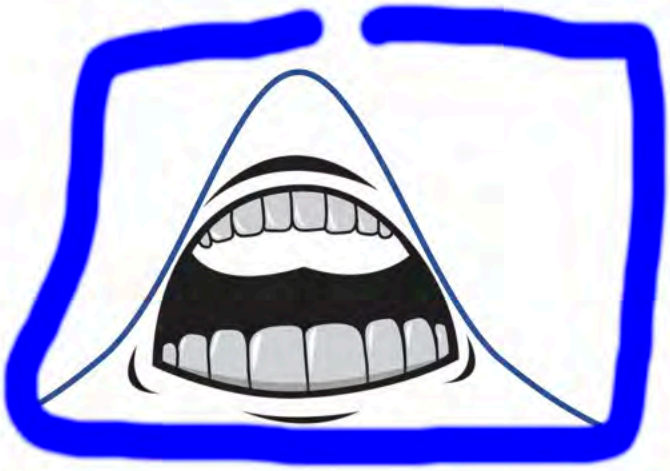

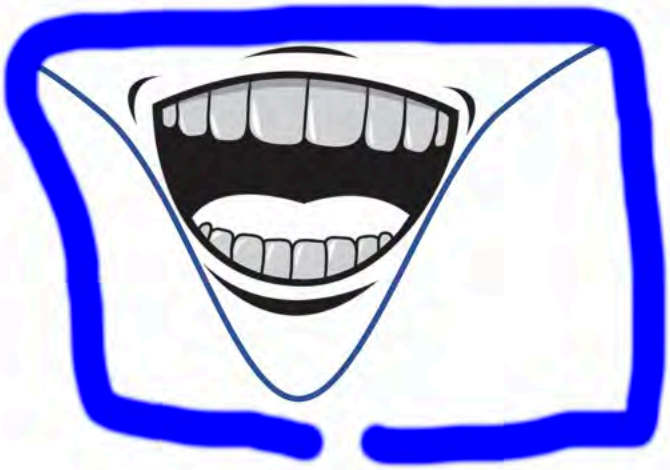

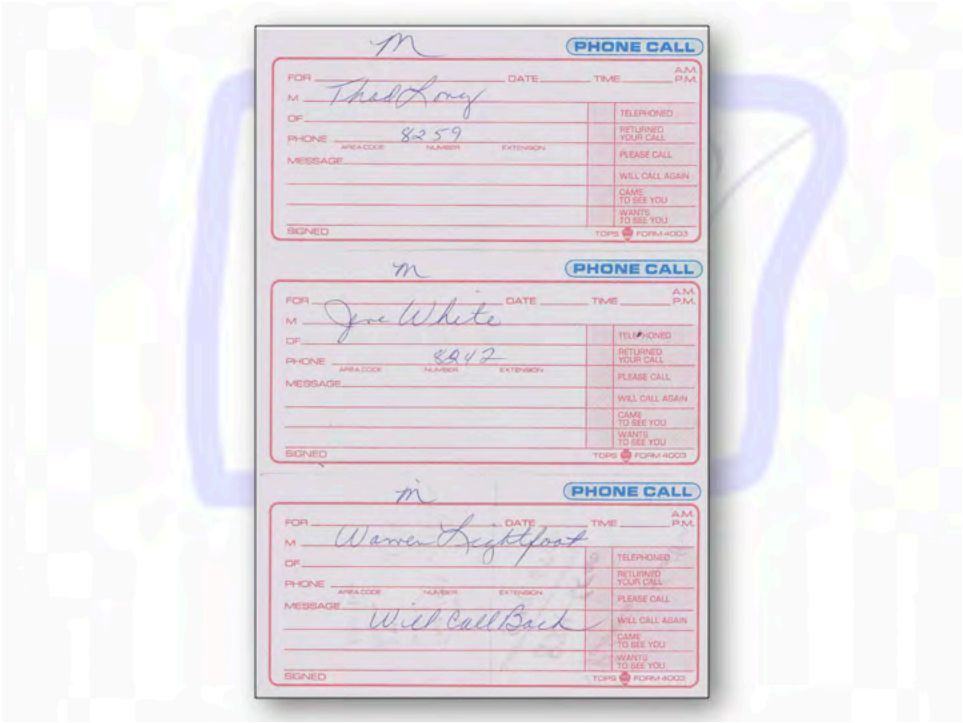
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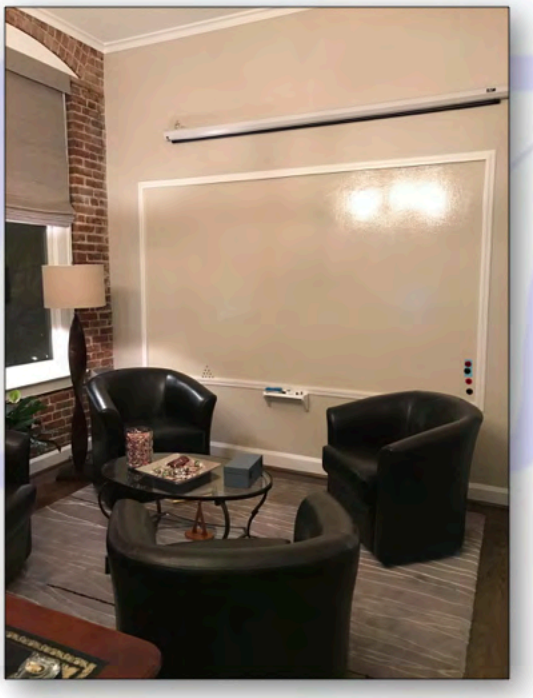

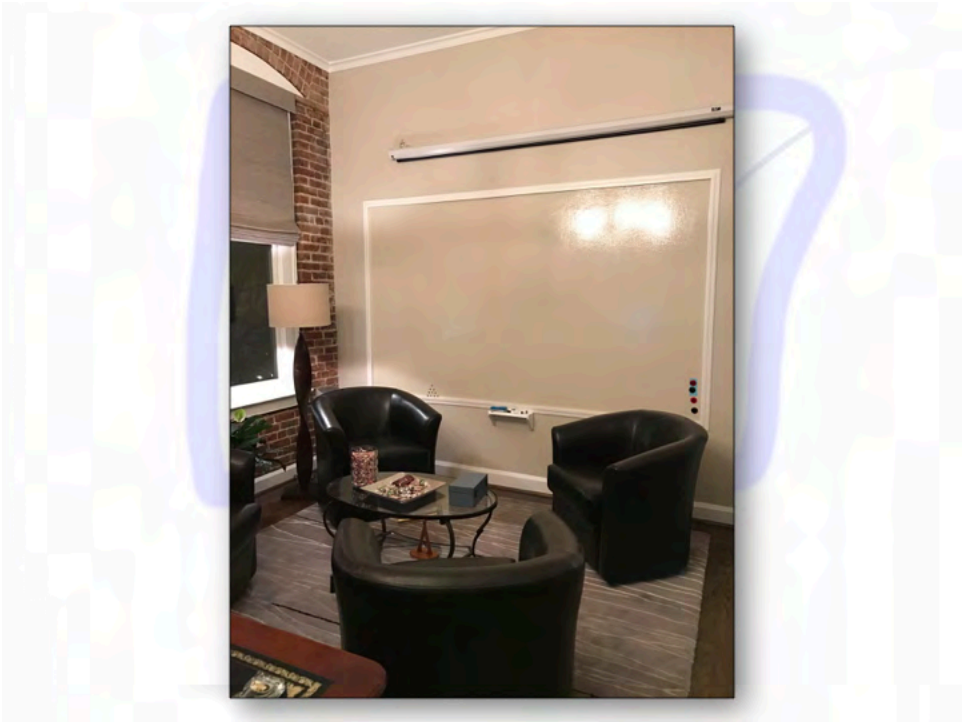

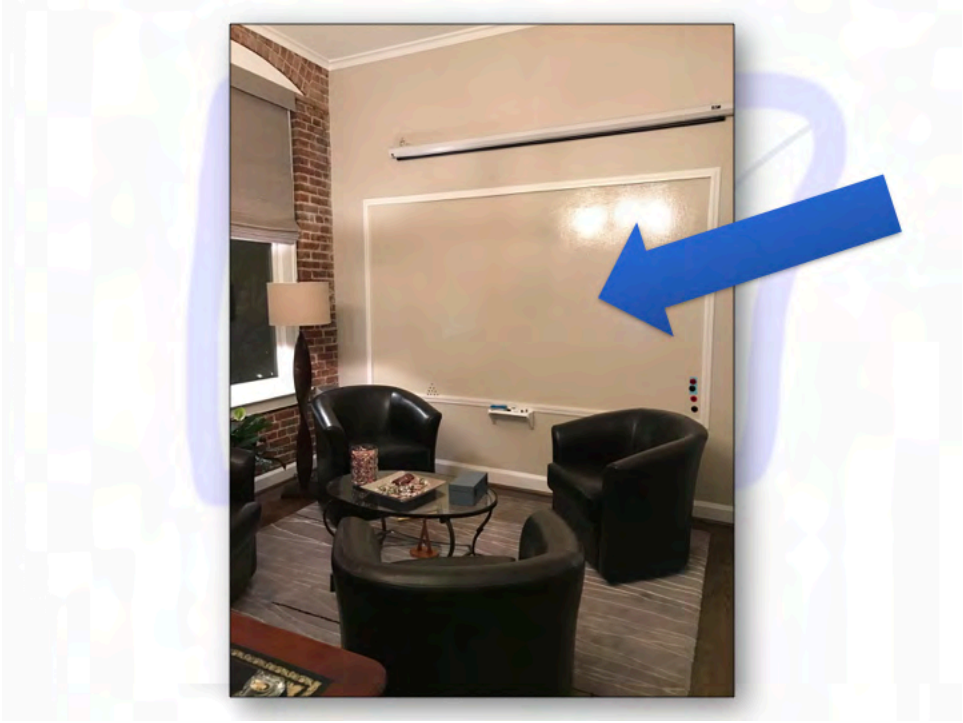


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Voice Memos
Dictate
Evernote
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GoodNotes
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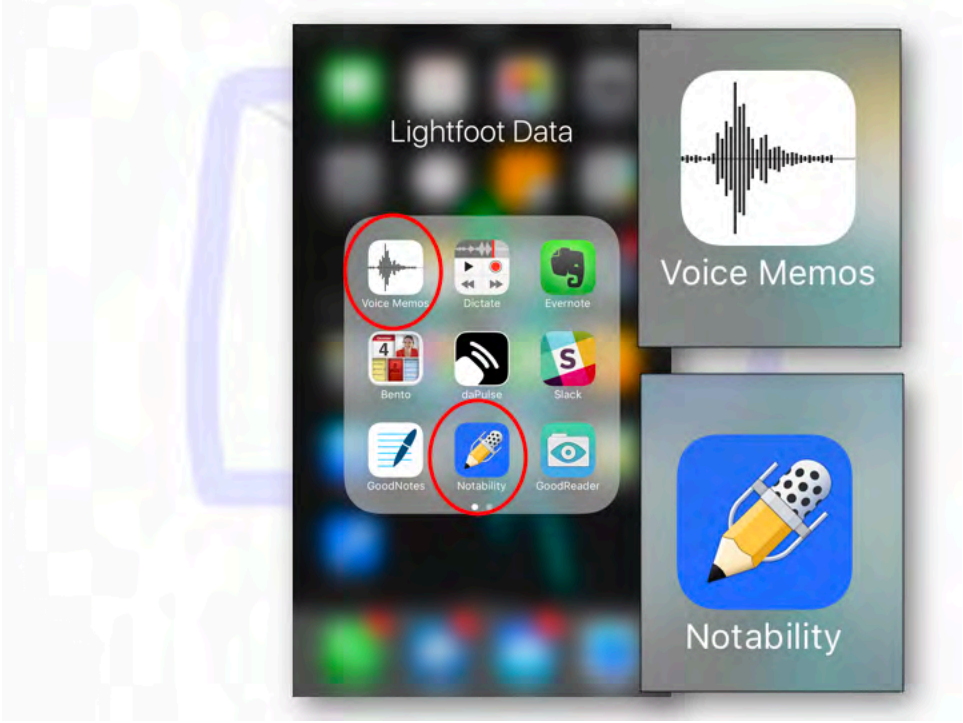
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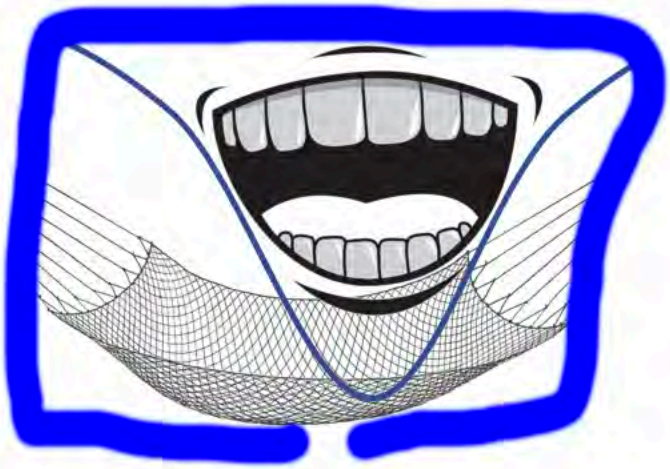
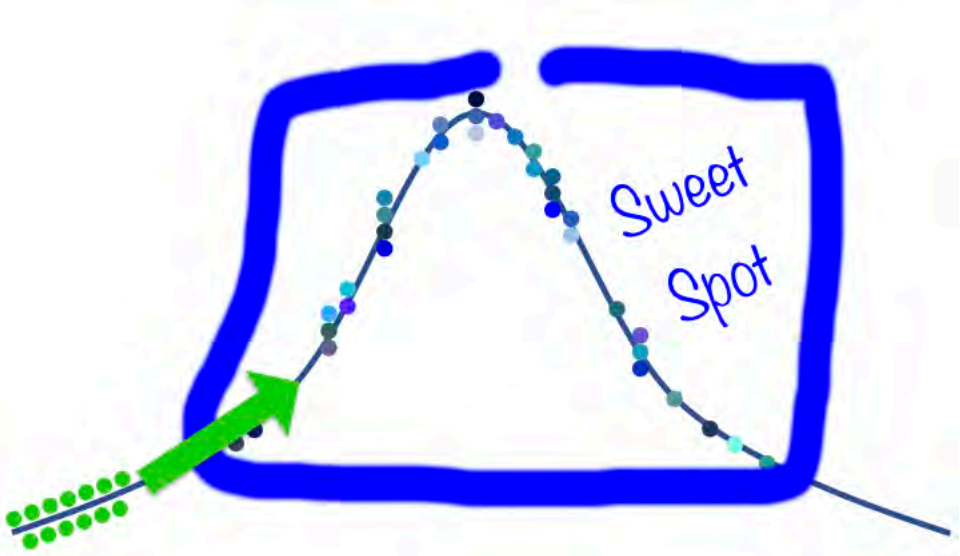





mbell@lightfootlaw.com

**Michael L. Bell**
**Partner**
**Lightfoot Franklin & White (Birmingham, AL)**

**205.581.0721 | mbell@lightfootlaw.com**
**http://www.lightfootlaw.com/attorney/michael-l-bell/**

If you have a litigation problem, we handle it. No one likes to be involved in the litigation process. It's stressful. It's high risk. However, it's what we do. More specifically, it's what I do and enjoy doing. So, if you have a lawsuit problem—I'm on it and together we will tailor make a Lightfoot team that will bring the expertise and skill set that the particular problem needs to achieve the ultimate goal (whether that goal is winning at trial or achieving a reasonable resolution short of trial).

I've been doing trial work for over 25 years. Probably the most important thing I can promise a client is a Lightfoot team that is passionate, creative and resourceful– we will fight to make sure our client's side of the story is heard and understood. I've tried lots of cases with all levels of exposure. There are no outcome guarantees in the lawsuit world. That said, our clients always truly believe that they got their day in court and that their message was effectively delivered. Look, most problems we deal with in litigation don't have a so-called silver bullet solution, but our clients can rest comfortably knowing that our Lightfoot team will work hard to discover the litigation message, develop that message and then deliver it effectively. And we will solve whatever known, unknown and unknowable litigation problems we encounter along the way.

By the way, if you're interested, I have been lucky enough to be inducted as a Fellow of the American College of Trial Lawyers, receive designations from the Alabama editions of Best Lawyers in America and Super Lawyers, AV Peer Review Rating in Martindale, Editor in Chief of the Law Review and other honors during College and Law School. More importantly, I am a proud father and husband..

**Practice Areas**
- Pharmaceuticals & Medical Devices
- Consumer Fraud and Bad Faith
- Appellate
- Business Litigation
- Plaintiff's Litigation
- Class Actions
- Product Liability
- Software and Technology Litigation
- Healthcare

**Education**
- B.A., Birmingham-Southern College, 1985 cum laude
- J.D., Cumberland School of Law - Samford University, 1988 cum laude

# The International Trade Commission: Game Changing IP Results In An Underutilized Area

Jennifer Fitzgerald
Freeborn & Peters (Chicago, IL)
312.360.6585 | jfitzgerald@freeborn.com

Freeborn *Your Future Is Our Purpose*
FREEBORN & PETERS LLP

## Inside the International Trade Commission

Jennifer L. Fitzgerald

## About the ITC

- International Trade Commission under §337 of the Tariff Act
  - Can exclude foreign imports
  - Foreign discovery
  - Patent expertise
  - Only 40 cases a year on average

## Who is the defendant?

- US or foreign entity that is manufacturing outside of the US and importing offending goods into the US
- Without importation the ITC has no jurisdiction

## Multiple Defendants

- While the America Invents Act removed the ability to sue multiple defendants in one action, the ITC actually encourages a multi-respondent action
- If there are multiple importers of infringing goods, you can stop them all at once.

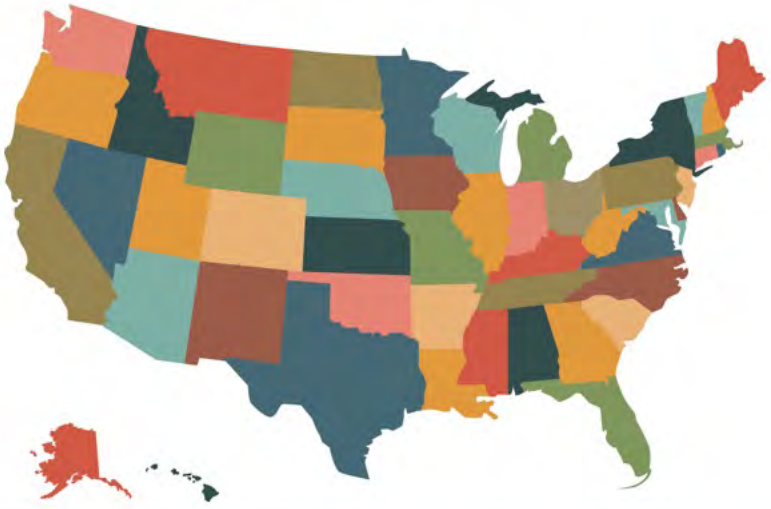
## In Rem not In Personam

- Jurisdiction is not at issue. Even if a district court does not have personal jurisdiction over a defendant, the ITC has jurisdiction over the importation of products

## In Rem not In Personam

- Exclusion orders would bar importation, which increases likelihood that foreign respondents will respond to the investigation if they want to continue to do business in the US


## Do I have a domestic industry?



## Technical Prong

- Do I practice my own patent
  - Preparation of claim charts on my own product
- Does a licensee practice my patent
  - Claim chart on the licensed product


## Economic Prong

- Do I have significant domestic investment in the US
  - Patent licensing
  - Labor
  - Factories
  - Research and Development

## Economic Prong

- Just because you are a US company, do not presume to meet. You must establish, which may require an expert


## How Urgent is the matter?

- ITC- average time to trial is 10 months; cases finalized in 16-18 months
- DCT- cases are just getting started
- Delays/extensions are very unusual in ITC
- Motion practice does not delay cases
- IPRs unlikely to delay cases

## Impact of Timing

- While overall costs are comparable, time over which they are incurred are shorter
- Higher percentage of cases go to trial (hence all costs are incurred)


## Discovery

- The discovery powers are very broad
- "Inspired" by the Federal Rules of Evidence
- Motions to quash are unlikely to succeed
- Can be taken from any and all named respondents, including foreign
- Failure to comply will include sanctions

## OUII Staff Attorney

- Office of Unfair Import Investigations (OUII) may assign an independent trial attorney
- Cases essential brought on behalf of the government
- Provides an independent voice to ALJ
- Participates in discovery, depositions, trial, brief all issues and can provide insight into the ALJ

## Remedies

- No monetary damages
- Exclusion orders
  - Limited
  - General

## Limited Exclusion Order

- Apply only to respondents in current investigation
- However, the exclusion is generally very broad and can include future redesigns.
  - Respondent may seek an advisory opinion or modification proceeding to clear redesigns

## Limited Exclusion Order

- Exclusion order may include downstream products that incorporate excluded products even if manufactured by a third party

## General Exclusion Order

- Exclusion order not limited to the respondents at issue. Instead it applies to all infringing articles of the type at issue regardless of the source
- Used when complainant show that there is a pattern of violation and/or where there is difficulty in identifying the source of the infringing products

## US Customs

- Exclusion orders are issued to U.S. Customs and Border Protection who are charged with barring the importation of infringing goods.
- Working with customs and educating them is imperative to a successful remedy

## Cease and Desist

- Another available remedy
- Is generally ordered when there is proof that a significant inventory of infringing product has been imported
- Can include: destruction of infringing goods, prohibitions on repairs
- Failure to comply with cease and desist can result in civil penalties

## Ebay Factors

- The Ebay factors requiring a showing of irreparable harm or the inadequacy of damages do not apply in the ITC and need not be shown before an exclusion order or cease and desist order are issued

## Public Interest

- However, before the ITC can issue a remedy, it must consider whether or not an exclusion would be consistent with the public interest.

## Collection of Damages

- Monetary damages are not available in ITC
- Most parties file concurrently district court case which is generally stayed
- When stay lifted, ITC record transfers to District Court (including all discovery)
- ITC carries "persuasive value" in district court

## Confidentiality


- Taken very seriously
- Individual lawyers sign on, not firms
- Can be very frustrating to in-house counsel
- Experts are vetted by opponent prior to access
- HOWEVER, settlement documents are publicly filed and only minor redactions are permitted

## Final Thoughts

- Use counsel that has been there before, perhaps supported by your go-to firm
- Get your discovery in order before you file
  - Draft requests
  - Preparation of your documents for production
- Element of surprise is on your side, take advantage

The International Trade Commission, though seldom used, can provide unique and expansive remedies for companies looking to protect their IP from infringing importers. Venturing into the ITC can be an intimidating process, but dramatic results can be achieved quickly and efficiently. Trial lawyer Jennifer Fitzgerald will provide some background and a list of questions to ask yourself before you file suit.

The International Trade Commission ("ITC") is a little used, and not very well known, forum for resolving many intellectual property disputes in an expeditious and efficient manner. Much of the ITC's value is provided by its unique discovery procedures and, critically, its ability to provide remedies that can include an immediate stop to importation into the United States of infringing goods. Thus, it may be the ideal forum for dealing with foreign-producing, importing, infringers.

The ITC is empowered under Section 337 of the Tariff Act of 1930 (19 U.S.C. §1337). It is authorized to issue remedies to prevent unfair practices in the importation of goods into the United States. While monetary damages are not available, exclusion orders can be issued, including orders that potentially cover products made by non-parties. Furthermore, the ITC has broad discovery powers, and the docket moves very quickly – with trial almost always within a year of filing.

The International Trade Commission institutes approximately 40 patent cases per year. With the highest number of cases filed in 2011 (69 -- primarily driven by smartphone technology suits). It provides a forum for intellectual property disputes and cases are administered and decided by Administrative Law Judges (ALJ) who are knowledgeable and do not take kindly to requests for extension or gamesmanship in the discovery proves.

While historically, most Section 337 cases have related to patent or trademark infringement allegations, other forms of unfair competition can, and have, also been brought before the ITC, including: copyright infringement, misappropriation of trade secrets, passing off, and false advertising.

In order to evaluate the ITC as a potential forum for your next IP dispute, there are several areas where the differences between the district courts are significant. Reviewing some of these differences will aid in deciding whether the ITC is right for any particular matter.

**1. Is the defendant importing and do I meet the domestic industry requirement?**

In order to bring an action in the ITC any complainant (the equivalent of a plaintiff) must establish both that the Respondent's (the equivalent of a defendant) products at issue are imported into the United States and that the complainant maintains a domestic industry related to that same product. The ITC is authorized solely to issue remedies related to unfair practices in the importation of goods. Without importation, the ITC has no jurisdiction. Thus, complainants must first carry the burden of establishing the importation. The complainant also bears the burden of satisfying the domestic industry requirement, which has two prongs – a. the technical prong which requires the complainant to show that it (or its licensee) practices at least one valid claim of the each patent and b. the economic prong, which requires the complainant to show that it has made significant domestic investment in the United States. This can be met by showing patent licensing, labor, factories, and/or research and development in the United States. Since there is no bright line rule about what satisfies the economic prong, many complainants opt to hire an expert to demonstrate the economic impact within the United States, but this also creates an opportunity for respondents to drive up costs and proceed with onerous discovery effort to investigate thoroughly the complainants operations, research and development, and manufacturing

**2. Timing – How fast do I want this case to move?**

To be sure, one of the key differentiators between federal district courts and the ITC is timing. The average time to trial is about 10 months, with 6-8 months of fact and expert discovery. Most cases before the ITC are concluded within 16-18 months, including both the initial and final determination by the ITC which will be issued many months after trial. Of course, most court cases extend for periods of years. In some jurisdictions, trial in 3 years is considered expeditious, and that does not take into account how long it takes to reach a final resolution.

While most plaintiffs want their cases heard quickly, there are some potential negative consequences to the speedy resolution. First, a higher percentage of cases at the ITC go to trial. Second, the cost of an ITC trial can be high, although, as compared to a district court patent infringement case that goes to trial, the costs are likely lower in the long run. However, once an ITC case is filed, there is no delaying the process. So, whereas a $2.5 million legal expenditure may spill over three years in the district court, that same amount may be spent in a single year while litigating in the ITC.

Furthermore, where there is a chance that a prospective defendant is anticipated to seek post-issuance review of the validity of a patent through the inter partes review process (IPR), it is important to know that the ITC rarely stays a case for an IPR. That is not the case with district court and is somewhat based on the fact that the ITC matter is likely to progress faster than the IPR. In comparison, an IPR is not likely to be reviewed and instituted for approximately 6

months, by then the ITC case will be nearly ready for trial and the ITC will not be inclined to stay the matter pending a determination that may still be months away.

**3. Who are the Defendants?**

One true advantage to the ITC, especially in wake of the America Invents Act, is the ability to sue multiple unrelated respondents in a single action. The AIA all but prohibited multiple-defendant matters. But the ITC has no such restrictions. In fact, as an investigation based on a class of products, the ITC is generally encouraged to include multiple importers of those products into a single investigation.

A further significant advantage in the ITC is the fact that the ITC has *in rem* (not *in personam*) jurisdiction over products imported into the United States by the respondents. This means that the ITC can have jurisdiction in a matter, even when the respondents themselves are not subject to a district court's jurisdiction.

Additionally, the ITC has power to issue exclusion orders against respondents named in an investigation and who do not appear. Because of the draconian effect of such a failure to respond, any respondent that wishes to continue to do business in the US must fully participate in the investigation or risk no longer being able to import into the US.

**4. What kind of discovery will I need?**

The discovery powers of the ITC are comprehensive. The ITC has subpoena power and can compel non-parties to appear before it with very little notice and with little to no ability for a recipient to attempt to quash the subpoena.

Further, complainants can obtain discovery from any and all named respondents. The ability to directly get discovery, on a very short time table, especially from a foreign respondent, is a true advantage in using the ITC. Respondents' ability to hide information or delay responses in discovery is greatly reduced.

**5. How complex is my case?**

As previously noted, the ITC handles, on average, more patent trials each year than any other tribunal. The ITC is uniquely positioned to handle complex cases. Many, but not all cases are assigned an attorney from the ITC's Office of Unfair Import Investigations ("OUII"). The OUII attorney participates in the investigation as an independent trial attorney. They file briefs and provide insight into all aspects of the case including importation, domestic industry, claim construction, infringement, validity, and discovery disputes. They provide a potentially independent voice to the ALJ that is intended to represent the interests of the United States as opposed to the interests of the parties. Further, they are very knowledgeable about the rules and procedures of the office, which helps both parties keep up with the rigors of an ITC case.

**6. What remedies are available?**

Within the district court, available remedies include monetary damages and, potentially, injunctive relief. Enforcement of a district court injunction, however, may require subsequent court contempt proceeding. Likewise, an unpaid monetary damage may be incredibly difficult to collect from a foreign entity.

However, at the ITC, there are no monetary damages available. Instead, the primary remedy is the issuance of an exclusion order to prohibit the importation of infringing goods. Exclusion orders can either be in the form of a limited or a general exclusion.

Limited exclusion orders only apply to the parties that appeared before the Commission. However the scope of the exclusion against those parties is broad. Exclusion orders rarely list specific products by name/product number. Instead, they more broadly apply to all varieties of the infringing product, including future redesigns. The burden shifts to the respondent to prove noninfringement of its products, and of its redesigns. In order to receive such clearance to import, the respondent may need to seek an advisory opinion or a modification proceeding to alter the exclusion order. That process may also implicate extensive dealing with U.S. Customs officials. Exclusion orders are not limited to products themselves, and can extend to downstream products that incorporate the product at issue, even when the downstream product manufacturer is not before the Commission.

A general exclusion order is not limited to the parties to the ITC proceeding. Instead, it excludes all infringing articles of the type at issue, regardless of the source. In order to secure a general exclusion order, the claimant must also demonstrate that the issuance of a general exclusion order is necessary to avoid circumvention of a limited exclusion order or that there is a pattern of violation of the statute and difficulty in identifying the source of the infringing products. Exclusion orders are issued to the U.S. Custom and Border Protection ("Customs"), and charge Customs with barring the excluded goods from entering the US. The scope of the exclusion order can be very broad. It may include products that were not at issue before the ITC, product redesigns (requiring the respondent to prove the redesign does not infringe).

The ITC can also issue a cease and desist order either in addition to or instead of an exclusion order. Cease and

desist orders are usually implemented when significant inventory of infringing product has already been imported into the US. The ITC has broad powers to issue cease and desist orders including, among other things: required destruction of infringing good, prohibitions on repairs, and/or a stop on additional importation among others. Failure to comply with a cease and desist orders can result in an enforcement action before the Commission, which would then have the ability to assess civil penalties.

Finally, the ITC does not apply the Ebay factors in determining whether to issue an exclusion order. Therefore, there is no requirement that a patentee establish either irreparable harm or the inadequacy of damages (of course monetary damages are not evaluated or awarded by the ITC).

Also of potential significance is the fact that before the ITC can issue a remedy, it must consider whether an exclusion order would be consistent with the public interest. While most cases do not rise to this level, it may be more significant in areas of medical devices.

**7. How can I recover my damages?**

Most ITC cases are concurrently filed with a district court action. The district court actions are generally stayed in light of the ITC matter (and must be stayed if a respondent timely requests). However, once the stay is lifted, the district court case can proceed. Significantly, the parties have the ability to rely on ITC discovery for the district court cases – including any discovery from a foreign manufacturer who is not a party to the district court case. When the stay is lifted, the record from the ITC transfers to the district court. Therefore, the parties can rely on the same evidence in the district court that was relied upon in the ITC, regardless of whether the parties are identical or not. However, take note that in patent cases, a successful complainant in the ITC is not guaranteed victory in the district court. Respondents/defendants may still raise invalidity challenges in the district court litigation. On this point, the Federal Circuit has commented that the Commission's determination has "persuasive value."

**8. Will my documents and settlement agreement be maintained as confidential?**

Each of the ALJ's seems to have his or her own nuanced protective order (PO). The PO generally provides two tiers of confidentiality. The ALJ's are very clear that not every document in the possession of the parties is entitled to the highest (attorney's eyes only) designation. That said, the ITC takes confidentiality very seriously. Each attorney must individually sign onto the protective order; there is not a general sign-on for a named attorney's firm. Further, before potential experts can be shown any confidential documents, the name and background information on that potential expert must be disclosed to the other party, with a chance for that party to object to the use of the expert. During a hearing, when confidential documents are to be used, the ALJ will clear the courtroom, and close the blinds. The excused individuals are to sit in a room that has white noise pumped in. However, should the parties settle a matter before the ITC, it is expected that only a lightly redacted form of the settlement agreement will be publicly filed with the ITC.

**9. What are your best tips?**

If you are planning to file suit in the ITC, make sure that your attorney has been there before. The ITC has very unique characteristics and the unsuspecting attorney is likely to learn the ropes the hard way. Additionally, before you file, get your discovery in order. Draft your discovery requests, and have your documents ready to be searched and produced – if not already prepared for production. The deadlines in the ITC are no joke. Missing deadlines can be catastrophic and extensions are rarely given. Complainants have a true opportunity getting their house in order before filing the complaint. It should not be wasted.

**Jennifer L. Fitzgerald**
**Partner**
**Freeborn & Peters (Chicago, IL)**

**312.360.6585 | jfitzgerald@freeborn.com**
**https://www.freeborn.com/attorney/jennifer-l-fitzgerald**

Jennifer Fitzgerald is a Partner in the Litigation Practice Group and has extensive business litigation experience in matters involving intellectual property, securities, antitrust and general commercial litigation throughout the United States. Her legal experience includes trial and appellate work on behalf of both plaintiffs and defendants in a wide range of complex litigation matters.

As a registered patent attorney, Jennifer has the ability to discuss inventions at their most scientific level but she also is skilled in the art of explaining technical issues to lay persons. She has advised clients and litigated patents throughout the U.S. on topics as varied as golf clubs, windshield wipers, diet modification software, visual skills enhancement, package design, medical products, acoustic echo cancellation technology, RFID technology and wireless communications.

She assists clients with prosecution and protection of trademarks and copyrights worldwide. She has organized raids against counterfeiters in China, actively assisted a client in the “reclamation” of trademarks in Europe and recovered U.S. domain names from cybersquatters. She maintains contacts with a worldwide set of foreign counsel to serve the international needs of her clients.

Initially stemming from her intellectual property and litigation backgrounds, Jennifer regularly advises clients in the area of product recalls. Having represented clients before the Consumer Products Safety Commission, National Highway Transportation Safety Administration and the U.S. Coast Guard, she is skilled in the assessment and management of a product recall, recognizing the sensitivity in protecting a brand and consumers alike. She also assists clients in evaluating internal practices and procedures related to recall preparedness. In these advisory roles, Jennifer and clients work together to minimize the impact of a recall on the company as a whole.

In her securities practice, Jennifer served on a team that won the only “fraud on the market” securities class action case in which, after trial, a jury found the company not guilty, despite evidence that directors were selling shares prior to a disappointing earnings announcement. She also has represented broker dealers in both class action suits and regulatory body investigations. In the antitrust context, she has participated in actions before the International Trade Commission and the Department of Justice. In addition she represented a client in a U.S. antitrust action, alleging tying, predatory pricing, monopolization and attempted monopolization in the international arena. As a result of both her broad legal experience and her personality, Jennifer also serves as outside general counsel to several companies. In this context, she provides general advice and counseling services, and facilitates problem identification and resolution.

**Practice Areas**
- Litigation
- Intellectual Property Litigation
- Restrictive Covenants and Trade Secrets
- Antitrust
- Purchasing and Supply Chain Management

**Education**
- J.D., Loyola University Chicago School of Law,; Case reporter for the Consumer Law Reporter and participated in the London Advocacy Program in 1994-1995
- B.S., University of Southern California

# Strategies For Successfully Defending "No Injury" Consumer Protection Class Actions

**Steve Benenson**
**Porzio Bromberg & Newman (Morristown, NJ)**
**973.889.4339 | spbenenson@pbnlaw.com**

PORZIO
BROMBERG&NEWMAN P.C.

**Strategies for Successfully Defending "No-Injury" Consumer Protection Class Actions**

*Presented by:*
**Steven P. Benenson, Esq.**
spbenenson@pbnlaw.com
973.889.4339

## New Jersey's Truth-in-Consumer Contract Warranty and Notice Act, N.J.S.A. §56:12-14, *et seq.*

- Applies to a "consumer or prospective consumer"
- Who is offered or enters a "written consumer contract"
- "[W]hich includes any provision that violates any clearly established legal right of a consumer" under state or federal law.
- "[A]t the time the offer is made or the consumer contract is signed. . . ." Section 15.

## TCCWNA Definitions

- Act applies to any "seller, lessor, creditor, lender or bailee"
- Defines a "consumer" as "any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes." Section 15.

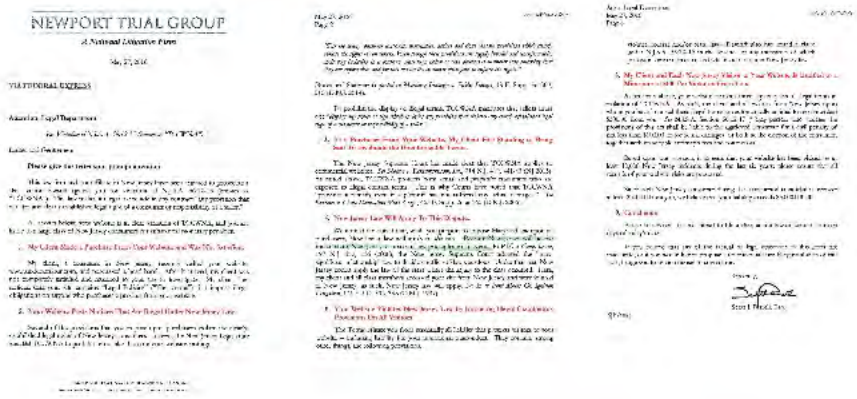
## Savings Clause Provision

- "No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable ***in some jurisdictions*** without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey[.]" Section 16 (emphasis added).

## Penalties

- A person who violates TCCWNA "shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs." Section 17.

## How TCCWNA Claims Arise


NEWPORT TRIAL GROUP

A National Litigation Firm

VIA FEDERAL EXPRESS

## Companies Confronting TCCWNA Claims

- Apparel, electronics and RX eyewear manufacturers
- Social media websites
- Software developers
- Self-storage REITs
- Rental car companies
- Restaurant chains
- Automobile dealers

## Clearly Established Rights

- What statute, regulation or common law is claimed to be violated?
- Is the law evolving, unsettled or ambiguous?
- Clauses typically implicated:
  - Exculpatory, limitation of liability and indemnification
  - Invalidity or severability
  - Fees
  - Insurance requirements
  - Disclosure of consumer rights
  - Waiver of jury trial
  - Time limitations for asserting claims or defenses
  - Waiver of right to attorney's fees/litigation cost sharing

## Consumer/Primary Use

- Is plaintiff's use of the good or service "primarily for personal, family or household purposes"?
- Is the "prospective consumer" in Section 15 "aggrieved" under Section 17 in the absence of viewing the contract or actual harm?
- Applicability to website Terms of Use
  - Free subscription services
  - Limited content licenses
  - Personal identification information

## Choice-of-law and Forum Selection Clauses

- Selection of any State's law other than New Jersey takes TCCWNA out of play.
- New Jersey enforces choice-of-law provisions in consumer contracts.
- Ambiguous clauses are analyzed under law of chosen state.
- Forum selection clauses are presumptively valid, and overridden only for "extraordinary" public interest reasons.
- Private interest factors such as plaintiff's preferred forum or inconvenience are irrelevant.

## Class Certification Defenses - Overbreadth

- "All persons who used defendants' service in the State of New Jersey [during a particular time frame]"
- Inclusion of corporate, company and business customers in class definition
- Statistical analysis of customer base
- Rebutting "the majority of customers" argument

## Class Certification Defenses - Ascertainability

- To prove ascertainability under Rule 23(b)(3), there must be: (1) objective criteria for defining the class and (2) a reliable and administratively feasible mechanism for determining whether class members fall within it.
- Defining the customer base
  - Customer types and particular industries or businesses served.
- Limitations of company records
  - Individuals entering agreements on behalf of a business or for a business purpose.
  - Insufficiency of customer lists, and customer category and marketing information.
  - Use of proxy indicators.
  - Due process concerns.

## Class Certification Defenses - Predominance

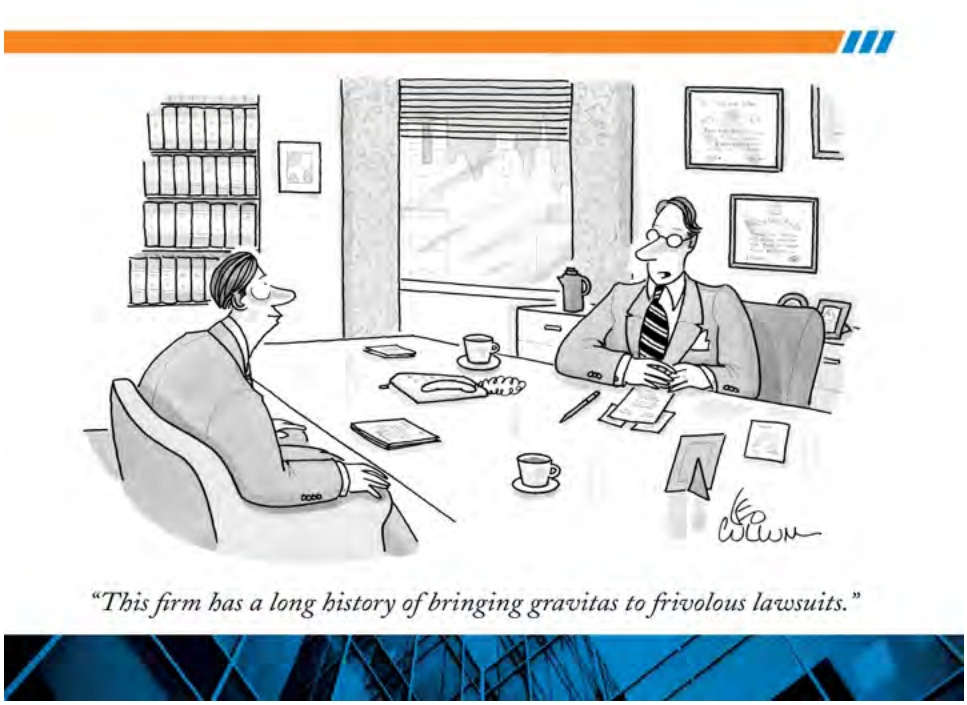
- Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members."
- Individualized review of customer agreements, forms and company records, or fact finding hearings to interrogate customers on their intended primary use of the good or service, defeats predominance.
- Creates enormous manageability problems for the court.
- Again, implicates due process.

## Class Certification Defenses – Typicality

- Rule 23(a)(3)'s typicality requirement is designed to ensure plaintiff's claims and the surrounding factual circumstances are representative of the class.
- Plaintiff cannot be subject to a defense inapplicable to the class and a major focus of the litigation.
- Examples
  - Plaintiff has substantial experience with similar agreements and legal terms.
  - Plaintiff's subjective intent regarding differs from class.
  - Privity concerns.

## Class Certification Defenses - Superiority

- Rule 23(b)(3) requires the court to consider difficulties managing the class.
- Certification is inappropriate in statutory penalty cases where there would be astronomical class-wide damages awarded for no-injury claims and access to small claims courts is available to obtain relief.
- TCCWNA's fee shifting ameliorates risk claims are too small to be prosecuted.




## Introduction

In the past several years, plaintiffs' firms have threatened or brought class actions against different companies under New Jersey's Truth-in-Consumer Contract Warranty and Notice Act, N.J.S.A. §56:12-14, *et seq.* ("TCCWNA"). This seldom invoked nearly four decade-old consumer protection law applies to a "consumer or prospective consumer" who is offered or enters a "written consumer contract"[1] "which includes any provision that violates any clearly established legal right of a consumer" under state or federal law "at the time the offer is made or the consumer contract is signed. . . ." N.J.S.A. §56:12-15. The Act applies to any "seller, lessor, creditor, lender or bailee" and defines a "consumer" as "any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes." *Id.* TCCWNA separately provides that "No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable ***in some jurisdictions*** without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey[.]" §56:12-16 (emphasis added). A company that violates TCCWNA "shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs." N.J.S.A. §56:12-17.

The sparse legislative history of TCCWNA reflects a concern that including legally invalid or unenforceable provisions in consumer contracts may deceive consumers into not pursuing their rights. *See* Sponsor's Statement to Assembly Bill No. 1660 (May 1, 1980). *See also Shelton v. Restaurant.com,* 214 NJ 419, 431 (2013); *Walters v. Dream Cars Nat., LLC*, No. BER-L-9571-14, 2016 WL 890783, at *6 (N.J. Super. L. Mar. 7, 2016)("[T]he Legislature intended that TCCWNA only target those vendors that engage in a *deceptive* practice and sought only to punish those vendors that in fact deceived the consumer, causing harm to the consumer."). However, the "TCCWNA does not establish consumer rights or seller responsibilities. Rather, the statute bolsters rights and responsibilities established by other laws." *Watkins v. DineEquity, Inc.*, 591 Fed.Appx. 132, 134–35 (3d Cir. 2014).

The statute lends itself well to the class action vehicle because if a violation is established, a common issue of law applicable to the entire class is often inescapable and penal damages are imposed automatically ***without*** evidence of actual injury. *Johnson v. Wynn's Extended Care, Inc.*, 2012 U.S. Dist. LEXIS 166527 (D.N.J. Nov. 20, 2012) ("[A] plaintiff asserting a claim under TCCWNA need not have suffered any actual damages.").[2] Plaintiffs often combine TCCWNA

1 TCCWNA also applies to a "warranty, notice or sign," and has been construed to extend to advertisements. See Smerling v. Harrah's Entertainment, Inc., 389 N.J. Super. 181, 193 (App. Div. 2006)(print advertisements); DeHart v. U.S. Bank, N.A. ND, 811 F.Supp.2d 1038, 1051 (D.N.J. 2011) (loan reinstatement and payoff letters) and Shah, 2009 U.S. Dist. LEXIS 90562, 3 (direct mail credit card solicitations).

2 Because cases originally filed in federal district court under 28 U.S.C. §1332(d) in which the plaintiff does not suffer a "concrete and particularized injury" may be dismissed on Article III standing grounds, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), plaintiffs frequently allege monetary or other harm when asserting TCCWNA claims.

claims with those arising under the New Jersey's Consumer Fraud Act, N.J.S.A. §56:8-1 *et seq.* ("CFA"), which imposes treble damages. TCCWNA class actions are challenging to defend and present high risk damage exposure.

Based on our recent experience representing various manufacturers, a social media website, a self-storage REIT and an HVAC supplier, we explore several issues critical to successfully defending these claims. These include: evaluating dispositive motions in light of the Act's "clearly established right" and "consumer" requirements, analyzing the impact of choice-of-law and forum selecting clauses, and opposing class certification on the grounds of ascertainability, predominance, typicality and superiority.

**Motions to Dismiss**

**1. "Clearly Established Rights"**

To mount an attack on the pleadings, an in-depth analysis must be performed of the parties' agreement and the underlying state or federal law claimed to have been violated. These laws may be based in statute, regulation or common law, and may be unfamiliar to the company and defense counsel. This study entails determining whether the allegedly violated right is "clearly established" within the meaning of the statute. Where the law is evolving, unsettled or ambiguous, this presents a first line of defense to be invoked on a motion to dismiss.

In *McGarvey v. Penske Automotive Group, Inc*., No. 08-5610-JBS-AMD, 2011 WL 1325210, at *1 (D.N.J. Mar. 31, 2011), *aff'd*, 486 F. App'x 276 (2012), the Court rejected the plaintiffs' argument that where the source of a consumer right is a statute, then it is "clearly established" for purposes of TCCWNA – even when the statute is facially ambiguous:

> Such an interpretation would essentially read out "clearly established" from the statute entirely, so that its meaning would be unchanged if it were written "violates any legal right of a consumer . . . as established by State or Federal law at the time the offer is made." * * * The distinction between violating a legal right and violating a clearly established legal right must lie [in how] apparent the existence of the right is to the parties. An ambiguous statute no more clearly establishes a legal right than does a single thread of disputed precedent.

Id. at *4 (emphasis added); see also id. (noting that to give "clearly established" any meaning at all "requires that the right in question must have a more established basis than its mere post hoc recognition of a right" in court).[3] The same logic would apply to a common law right that is not clearly established by unequivocal precedent. "[T]he New Jersey legislature intended to impose [TCCWNA] liability only upon those vendors whose violation of a consumer statute was so clear that no reasonable vendor could fail to know that its conduct was prohibited . . . ." Id. (emphasis added).

Determining whether an provision violates a "clearly established right" is not always straightforward. For instance, a clause time-barring a consumer's assertion of a defense after 12 months from the "act, omission, or inaction" giving rise to it has been deemed to run afoul the Federal Rules of Civil Procedure and New Jersey Court Rules. Martinez Santiago v. Public Storage, 38 F. Supp. 3d 500, 510 (D.N.J. 2014). A run-of-the-mill exculpatory clause may raise the "question of whether the standard duty of care owed to business invitees may be waived in consumer contracts." Id.at 514. An indemnification clause that does not clearly disclaim its applicability to the seller, lessor, creditor, lender or bailee's gross negligence, recklessness or intentional misconduct is likely unenforceable on public policy grounds. Id. at 515-17. And the standard "invalidity" provision, which fails to specify which contractual provisions may be void or unenforceable under New Jersey law, may violate section 17 of the Act. Id. at 511.

Conversely, a claim that requiring a consumer to initial certain provisions of the agreement violates TCCWNA because it deceives class members into "thinking such illegal provisions were valid" and persuades consumers "not even to try to enforce their rights" is without legal support. Id. at 515. A waiver of jury trials "on behalf of any of Customer's agents, guests or invitees" is enforceable because "there is no clearly established right that is violated by the waiver of a jury trial on behalf of third parties." Castro v. Sovran, 114 F. Supp. 3d 204, 217 (D.N.J. 2015). A claim that a company violated the New Jersey Insurance Producers Licensing Act ("IPLA") by the unlicensed sale of insurance policies does not violate TCWNNA because there is no private cause of action under IPLA. Id. at 217-18. A limitation of liability clause in a property storage agreement whose title, but not text, is bolded as required by the Self-Storage Act, N.J.S.A. § 2A:44-193(a), offers no-basis for a TCCWNA claim. Id. 211-12. An invalidity or savings clause in a contract that only applies to one state does not implicate section 17 of the Act. Id. at 2012-13. And failing to disclose a patient's pupillary distance measurement, which is not considered part of the refractory prescription that must be supplied upon demand, did not violate the state Ophthalmic Dispenser Regulation N.J.A.C. §§ 13:33-5.1, 7.1(a), 7.1(f), and 7.2 and hence TCCWNA. Friest v. Luxoticca Group, S.p.A., 2:16-cv-03327, 2016 WL 7668453 *8 (D.N.J. Dec. 16, 2016).

3 In affirming, the Third Circuit likewise emphasized that TCCWNA must be interpreted to require a violation of not just any legal right, but a "clearly established" legal right to avoid rendering this term meaningless and superfluous. McGarvey, 486 F. App'x at 282 n. 8.

**2. The Consumer/Primary Use Requirements**

As a preliminary matter, TCCWNA only applies to "consumers." See Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429 (2013) (noting the TCCWNA is not applicable "unless plaintiffs are consumers" as defined by N.J.S.A. § 56:12-15). See also Watkins v. DineEquity, Inc., No. 11-7182, 2012 WL 3776350, at *3 (D.N.J. Aug. 29, 2012); DeHart v. U.S. Bank, N.A., ND, 811 F. Supp. 2d 1038, 1052 (D.N.J. 2001); Baker v. Inter Nat'l Bank, No. 08-5668, 2012 WL 174956 (D.N.J. Jan. 19, 2012) (dismissing TCCWNA claim as plaintiff was not a "consumer"). Determining whether the named plaintiff's use of the defendants' "money, property or service" is "primarily for personal, family or household purposes" implicates both whether he is a "consumer" under the Act and, as well discuss below, predominance issues for class certification purposes. The Shelton Court determined that the phrase "primarily for personal, family or household purposes" modifies the term "property," and that the Legislature intended to describe the "use to which the property is put" rather than the "nature of the property." Id. at 434-35. If the primary use is for business purposes, the plaintiff does not qualify as a "consumer" under TCCWNA.

Where the complaint does not specifically allege that the plaintiff was presented with or viewed the allegedly offensive language in a contract or website, or merely claims that he was a "prospective consumer" without more, he is arguably not "aggrieved"[4] under the Act, and the claim should be dismissed. *Cameron v. Monkey Joe's Big Nut Co.*, 2008 N.J. Super. Unpub. LEXIS 3061 (Law Div. Aug. 4, 2008) ("The Act does not define the term 'aggrieved,' but logically it would refer to one suffering the effect of a violation of the Act."). Shah v. American Express Co., No. 09–00622, 2009 WL 3234594, *3-4 (D.N.J. Sept. 30, 2009) ("The plain language of TCCWNA only grants a remedy to aggrieved consumers and not to aggrieved 'prospective consumers.'"); id. (although "TCCWNA creates a violation where a [seller] in the course of its business offers a consumer or prospective consumer any notice which violates any federal or state law provisions," "liability under TCCWNA only attaches for the [seller] when there are actual 'aggrieved' consumers."); Hecht v. The Hertz Corp., 2:16-cv-01485, 2016 WL 6139911 *4 (D.N.J. Oct. 20, 2016)(plaintiff "[did] not allege that he even viewed (let alone relied to his detriment) either of these sections of Hertz's website.").[5]

If the defendant is a free communications platform such as a social media website that does not sell a good or service, plaintiff is not a "consumer" under section 15 of the Act. That the on-line Terms of Use ("TOU")(the "contract" under TCCWNA) requires a subscriber to provide a limited intellectual property license to use his posted content, arguably does not constitute "consideration" or a "sale" of property under the Act. Tasini v. AOL, 851 F. Supp. 2d 734, 743 (S.D.N.Y. 2012) ("Those who produce content for others to consume cannot be said to be 'purchasers or goods and services.'")(cit. and alterations omitted). The same can be said of personal identification information. Claridge v. RockYou, Inc., 785 F. Supp. 2d 855, 864 (N.D. Cal. 2011) (rejecting claim that plaintiff "purchase[d] or lease[d] an online service by providing personal identification information, that it had an "'ascertainable value'" and the "generalized notion that the phrase 'purchase' or 'lease' contemplates any less than tangible form of payment").

**3.Choice-of-Law and Forum Selection Clauses**

Where the contract or TOU contains a choice-of-law provision for a state other than New Jersey, a motion to dismiss should be made on this basis to take the TCCWNA claim out of play. New Jersey "clearly recognize[s] the validity and enforceability of choice-of-law provisions in contracts." Schunkewitz v. Prudential Sec. Inc., 99 Fed. App'x 353, 355 (3d Cir. 2004) (New Jersey law) (citation and internal quotation marks omitted). A court must dismiss a plaintiff's state-law claims when a choice-of-law provision renders that state's law inapplicable. See, e.g., Campmor, Inc. v. Brulant, LLC, Civ. No. 09–5465, 2010 WL 1381000, at *2-4 (D.N.J. Apr. 1, 2010) (enforcing Ohio choice-of-law clause and dismissing claims not recognized by Ohio courts); Spitz v. Medco Health Solutions, Inc., No., 2:10–cv–01159, 2010 WL 4615233, at *3 (D.N.J. Nov. 3, 2010) (dismissing California-law claims because the parties' dispute was governed by New Jersey law); see also Receivables Purchasing Co. v. Eng'g and Prof'l Servs., Inc., Civ No. 09-1339, 2010 WL 56042, at *3 (D.N.J. Jan. 5, 2010) (dismissing Arkansas-law claims where the parties agreed that New Jersey law would govern). Whether the choice-of-law provision is ambiguous is a question of contract interpretation for the court ordinarily determined under the law of the jurisdiction specified in the agreement. See, e.g., Drucker's, Inc. v. Pioneer Elecs. (USA), Inc., No. 93–1931, 1993 WL 431162, at *6 (D.N.J. Oct. 20, 1993).

Where a forum selection provision is present, strong consideration should be given to transferring venue under 28 U.S.C. 1404(a) in conjunction with a motion to dismiss. This is especially true where the forum selection and choice-of-law clauses incorporate the same state (typically where the defendant has its principal place of business). The courts in the chosen forum are presumably more familiar with the controlling law, and the venue may prove both unfamiliar and inconvenient to plaintiff's counsel.

4 The term "aggrieved" is not defined in Section 17 of the Act. See Barrows v. Chase Manhattan Mortg. Corp., 465 F. Supp. 2d 347, 362 (D.N.J. 2006) (undefined TCCWNA terms should be given their ordinary meaning); see also N.J.S.A. § 1:1-1.

5 A related concept is that the omission of certain information otherwise required by state law, such as the total price of merchandise, does not violate TCCWNA because it only applies to illegal provisions included in covered writings. Friest, 2016 WL 7668453 *10.

Forum selection clauses are presumptively valid. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-595 (1991). Only "exceptional" or "extraordinary" "public interest" circumstances can override a contractual forum-selection clause. A plaintiff's preferred choice of forum, or any other private interest factors, like burden or inconvenience, are not considered. Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 581-82 (2013) ("When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation."). Even public-interest factors "will rarely defeat a transfer motion," and in "all but the most unusual cases … the 'interest of justice' is served by holding parties to their bargain." Id. at 583. Such clauses present an exception to the general rule in federal courts that the substantive choice-of-law rule of the transferor court ordinarily controls after a transfer of venue. Atl. Marine, 134 S. Ct. at 583 (rejecting "rule that the law of the court in which the plaintiff inappropriately filed suit should follow the case to the forum contractually selected by the parties.")

**Class Certification Defenses**

**1. Overbroad Class Definitions**

TCCWNA class definitions that would apply to non-consumers, such as "All persons who used defendants' service in the State of New Jersey [during a particular time frame]" are susceptible to attack on the grounds of overbreadth. A class is not ascertainable if it "is overbroad and could include a substantial number of people who have no claim under the theory advanced by the named plaintiff." Vigus v. S. Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 235 (S.D. Ill. 2011); see also Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 137-38 (3d Cir. 2000); Franco v. Conn. Gen. Life Ins. Co., 289 F.R.D. 121, 141 (D.N.J. 2013). To the extent the defendant can demonstrate from its records or expert analysis that its customers include a meaningful percentage of corporations, companies and businesses – which are neither ascertainable nor "consumers" under TCCWNA – the class is overbroad and should not be certified. See Mann v. TD Bank, N.A., No. 09-1062, 2010 WL 4226526, at *12 (D.N.J. Oct. 20, 2010); Franco, 289 F.R.D. at 143; Bright v. Asset Acceptance, LLC, 292 F.R.D. 190, 198 (D.N.J. 2013). Plaintiffs will likely argue that if the majority of customers in the industry or company defendant are consumers, then the statutory prerequisite is satisfied.[6] The problem with this argument is that it reads the "consumer" definition out of the statute[7], and would impermissible extend the Act's protections to businesses merely by the fortuity of having been included in the class.

**2. Ascertainability**

If the company's records do not readily lend themselves to a determination of the customer's primary use of the "money, property or service" that is the subject of the parties' agreement, the class arguably cannot be ascertained. In order to prove ascertainability under Fed. R. Civ. Pro. 23(b)(3), plaintiff must show that (1) the class is defined with reference to objective criteria and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015)("if class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate."); Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013). "[A] plaintiff may not merely propose a method of ascertaining a class without any evidentiary support that the method will be successful" or merely provide assurances to the district court it will later meet Rule 23's requirements. Id. at 306-307, 311.

This argument should be supported with competent affidavits describing the types of customers that use the company's goods or services, including particular industries or businesses, the reasons why agreements may be entered into by an individual on behalf of a business or for a business purpose, and why the company's customer lists alone cannot determine the primary use of the property or service.[8] The company should also be prepared to respond to plaintiff's arguments that certain "indicia of use" contained in customer files are reliable and objective proxy indicators. This may require demonstrating that information initially provided by customers or recorded by employees in the agreement, ancillary forms or databases is not reliable or accurate for this purpose.

Although the company's management software may capture customer category information, it may be used for an entirely different reason (such as marketing), may have pre-populated fields, and not be the subject of training and consistent use by employees. Depending on the company's business, customer use information may be captured, but not verified, because it is not practicable to do so. "[W]here nothing in company databases shows or could show whether individuals

6 In the unpublished opinion Korrow v. Aarons, Inc., No. 10–63172013, WL 5811496 (D.N.J. July 31, 2013), the district court cited Shelton for the proposition that individualized inquiries are unnecessary to determine whether the putative class members are "consumers" under TCCWNA "as long as the products or services bargained for are 'primarily for personal, family, or household purposes.'" Relying on defendant's testimony that corporations made up only a small percentage of its customers, the court found that rent-to-own furniture contracts were primarily for a consumer use under TCCWNA. The Korrow court further stated that Shelton determined that "use" defines "property" under TCCWNA, not whether the user was a "consumer." Id. at *11. However, Shelton made no such narrow ruling.

7 A court should assume that the Legislature used no "unnecessary or meaningless language" and "should try to give effect to every word of a statute . . . rather than construe a statute to render part of it superfluous." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 587 (2013) (citations and internal quotations omitted).

8 For example, in the self-storage industry, it is not uncommon for tenants who work in the customer service, sales, pharmaceutical and medical supply, construction and landscaping, legal, entertainment, delivery and import, realty, and mechanical industries to sign leases in their own names. This occurs for myriad reasons, including that the tenant does not own the business or have authorization to rent in its name; cannot provide tax identification or other company information; must maintain legal records that the company cannot store etc.

should be included in the proposed class, the class definition fails." Marcus, 687 F.3d at 593-94 (citing Clavell v. Midland Funding LLC, No. 10-3593, 2011 WL 2462046, at *4 (E.D. Pa. June 21, 2011) ("even if Midland could run a search that identified all of the debtors against whom cases had been filed . . . this would not capture the proposed class") and Deitz v. Comcast Corp., No. 06-06352, 2007 WL 2015440, at *8 (N.D. Cal. July 11, 2007) (defendant's records did not differentiate between subscribers that owned cable ready TV boxes or other devices); see also Carrera, 727 F.3d at 303; Mladenov v. Wegmans Food Mkts., Inc., 124 F.Supp. 3d 360, 371 (D.N.J. 2015).

To the extent it can be demonstrated that the court would need to engage in individualized factual inquiries regarding each customer's intentions, ascertaining the class is not practical. See Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981); Corder v. Ford Motor Co., 283 F.R.D. 337, 342 (W.D. Ky. 2012).

The ascertainability prong also raises significant due process concerns. Where there is no method to identify "consumers" on a class-wide basis that would permit defendant to exercise its due process rights to challenge the claim, certification should be denied. Carrera, 727 F.3d at 307; Western Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) ("to deny [defendant] the right to present a full defense on the issues [with respect to individual class members] would violate due process."); In re OnStar Contract Litig., 278 F.R.D. 352, 381 (D. Mich. 2011) .

In sum, if plaintiff cannot present a plan demonstrating a reliable and administratively feasible mechanism to determine on a class-wide basis each user's primary purpose for the good or service, the motion for class certification should be denied. See Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 356 (3d Cir. 2013).

**3. Predominance**

Related to Rule 23(a)'s ascertainability prong is Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." A plaintiff must "demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members." Marcus, 687 F.3d at 600 (quoting Hydrogen Peroxide, 552 F.3d at 311, as amended (Jan. 16, 2009)). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Id.

Again, if individualized review of customer agreements, forms and company records, or fact finding hearings or mini-trials would be required to interrogate customers regarding their intended use of the good or service, the predominance requirement is not met. See Johnston v. HBO Film Mgmt., 265 F. 3d 178, 194 (3d Cir. 2001)(affirming denial of class certification because need for countless mini-trials to determine "the applicability of any defenses" "would present severe manageability problems for the court"); Laney v. Am. Standard Cos., No. 07-3991, 2010 WL 3810637, at *14-15 (D.N.J. Sept. 23, 2010). Once again, due process concerns are implicated. Carrera, 727 F.3d at 307.

Courts that have considered TCCWNA claims and claims arising from statutes that apply to goods or services "primarily for personal" use, have denied class certification because individualized investigation is required to establish statutory liability. See, e.g., Dugan v. TGI Fridays, Inc., 135 A.3d 1003 (App. Div. 2016), petition for leave to appeal granted, 226 N.J. 543 (2016)(menu beverage pricing); Corder v. Ford Motor Co., 283 F.R.D. 337, 343 (W.D. Ky. 2012) ("[Defendant], of course, has every right to demand a full litigation of that element of the cause of action, and for each putative class member no less."); Corder v. Ford Motor Co., 297 F.R.D. 572, 575 (W.D. Ky. 2014) ("[The need to determine the primary purpose for each customer's purchase requires an individualized inquiry that threatens to overwhelm any trial"). See also In re OnStar Litig., 278 F.R.D. at 380 (denying class certification because "[m]otor vehicles can be purchased for commercial use, personal use, or both."); Johnson v. Harley-Davidson Motor Co. Group, LLC, 285 F.R.D 573, 583 (E.D. Cal. 2012); Arabian v. Sony Elec., Inc., No. 05-1744, 2007 WL 627977, at *14 (S.D. Cal. 2007) (denying class certification because "this legal requirement will require an individual examination of the purpose for which each laptop was acquired")

If plaintiff cannot demonstrate how he will establish on a class basis that the class members are "individuals" who rented storage "primarily" for personal purposes without individualized inquiries, he fails to satisfy Rule 23(b)(3)'s predominance requirement.[9]

**4. Typicality**

Another avenue of attack is to argue that the representative plaintiff is not typical of the absent class members as required by Rule 23(a)(3). This requirement "ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." Wal-Mart Stores v. Dukes, 131 S.Ct. 2541, 2550 (2011). The typicality requirement is designed to "screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact [may be] present."

9 For the same reasons, the commonality requirement of Rule 23 would not be satisfied. In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004) ("the Rule 23(b)(3) predominance requirement, which is far more demanding, incorporates the Rule 23(a) commonality requirement.").

Marcus, 687 F.3d at 598-99 (3d Cir. 2012) (cit. omitted). See also Lerch v. Citizens First Bancorp, Inc., 144 F.R.D. 247, 251 (D.N.J. 1992). The court therefore must consider "the attributes of the plaintiff, the class as a whole, and the similarity between the plaintiff and the class." Marcus, 687 F.2d at 599. This "comparative analysis" addresses the concerns that "the claims of the class representative must be generally the same as those of the class in terms of . . .the factual circumstances underlying that theory" and "the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation. . . .".Marcus, 687 F.3d at 598-99. A defense unique to a named plaintiff renders that plaintiff atypical and inadequate to represent a class. Beck v. Maximus, Inc., 457 F.3d 291, 297 (3d Cir. 2006).

It may be possible to argue that the circumstances surrounding the named plaintiff's transaction render him vulnerable to the argument he is atypical. Discovery should focus on demonstrating that the named plaintiff would be subject to different defenses than the absent class members. If an overbroad class definition potentially includes business customers, a purely "consumer" plaintiff cannot represent them. If the plaintiff has substantial experience with similar agreements or TOU's such that his knowledge of legal rights or the impact of certain clauses would differ from that of absent class members, he may not be typical. See Marcus, 687 F.3d at 599-600 (acknowledging "typicality problem" if named plaintiff knew of potential issues because "he would be unable to represent fairly the interests of class members who did not have such knowledge."). Typicality concerns also arise where the plaintiff joins interrelated entities, but is not in privity with the actual seller, lessor, or lender that provided goods or services to class members.

**5. Superiority**

Last, certification may be inappropriate if the plaintiff cannot satisfy the superiority prong of Rule 23(b)(3), which requires the court to consider the "difficulties likely to be encountered in the management of a class action." See Fed. R. Civ. P. 23(b)(3)(D); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 615-16 (1997). Manageability "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974); Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 149 (3d Cir. 2008). Many courts have questioned the propriety of and denied certification to classes of statutory penalty claims under state and federal statutes where there would be astronomical class-wide damages awarded for no-injury claims and access to small claims courts is available to obtain relief. This is especially true if the plaintiff's cause of action provides for fee shifting, such as under the TCCWNA, which ameliorates the risk that claims will be too small to warrant individual suits. N.J.S.A. 56:12-17. See, e.g., Smith v. Chrysler Fin. Co., No. 00-cv-6003, 2004 WL 3201002, at *5 (D.N.J. Dec. 30, 2004).

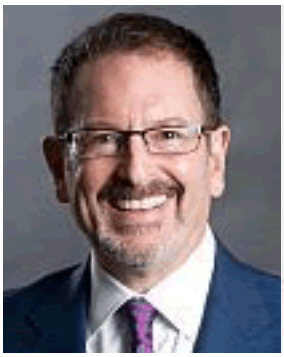
With TCCWNA claims, where attorneys' fees are available and there is no requirement to demonstrate actual damages, class certification could expose a defendant to the risk of paying the equivalent of millions of dollars in a civil fine to class members who do not even allege that they suffered any injury. New Jersey courts have found class certification inappropriate in claims involving statutory penalties. See Local Baking Prod., Inc. v. Kosher Bagel Munch, Inc., 421 N.J. Super. 268, 280, 281 (App. Div. 2011); Levine v. 9 Net Ave., Inc., No. A-1107-00, 2001 WL 34013297 (App. Div. June 7, 2001). Courts in other jurisdictions applying similar statutes imposing automatic penalties have repeatedly held that they are not amenable to class treatment. See, e.g., Rowden v. Pac. Parking Sys., 282 F.R.D. 581, 586 (C.D. Cal. 2012); Forman v. Data Tansfer, 164 F.R.D. 400, 405 (E.D. Pa. 1995) (TCPA class action "would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements"); Watkins v. Simmons & Clark, 618 F.2d 398, 399-400 (6th Cir. 1980) ("clear purpose of the [Truth-in-Lending Act] statutorily mandated minimum recovery was to encourage lawsuits by individual consumers . . . ."); Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1377-78 (11th Cir. 1984).

Absent any actual harm suffered by plaintiffs, class treatment is never superior to an individual action. The far superior alternative is individual proceedings in state small claims court to obtain statutory penalty damages, attorney's fees and costs. Kosher Bagel, 421 N.J. Super. at 276 (describing this as "a far superior method of vindication . . . than any certification or class action."). See also Klay v. Humana, Inc., 382 F.3d 1241, 1271 (11th Cir. 2004) ("[W] here the 'defendants potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff,' . . . individual suits, rather than a single class action, are the superior method of adjudication . . . ." (citation and quotation marks omitted)), abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008).

**Conclusion**

No injury TCCWNA class actions can be limited in scope or defeated entirely by the proper marshalling of dispositive motion and class certification strategies. The defense must thoroughly analyze the underlying state or federal law claimed to have been violated by the parties' agreement, attempt to dismiss claims where the law not "clearly established" or ambiguous, offensively invoke choice-of-law and forum selection clauses, and if required, focus discovery on class certification defenses centered on the class definition, ascertainability of the class, predominance, typicality and superiority issues. As a risk prevention measure, companies

should review their customer agreements and ensure that they do not invite TCCWNA claims.




## Steven P. Benenson

**Principal**
**Porzio Bromberg & Newman (Morristown, NJ)**

**973.889.4339 | spbenenson@pbnlaw.com**
**http://www.pbnlaw.com/attorneys/benenson-steven/**


For over 30 years, Steven Benenson has represented public and private companies as national, regional and local counsel in high stakes and complex business, commercial and product liability litigations and class actions in trial and appellate courts across the country.

Steve has substantial experience prosecuting and defending claims in varying industries arising out of mergers, acquisitions and divestitures (including indemnification disputes); manufacturing, supply and distribution agreements; directors & officers' liability (including corporate veil-piercing suits); insurance coverage; legal and accounting malpractice; consumer protection laws; fraud; conspiracy; and enterprise liability. He has successfully briefed and argued appeals in the United States Courts of Appeal and state appellate courts regarding the recognition of novel causes of action; jurisdiction, consolidation and venue; preemption; class certification; expert witness disqualification; and statutory fee awards. Steve also counsels companies on crisis response, risk management and liability prevention relating to defective and counterfeit products, warnings and recall campaigns.

Steve is a "top notch litigator," whose "ability to quickly understand complex factual situations or unfamiliar technical issues is unmatched [and]... translates into his ability to effectively convey his client's position to any tribunal." "The forcefulness of his advocacy comes from expertise and experience rather than bully tactics" wrote BestLawyers.com. Steve's methodical investigation, strategic analysis and creativity help simplify and effectively resolve complex, challenging and disruptive cases.

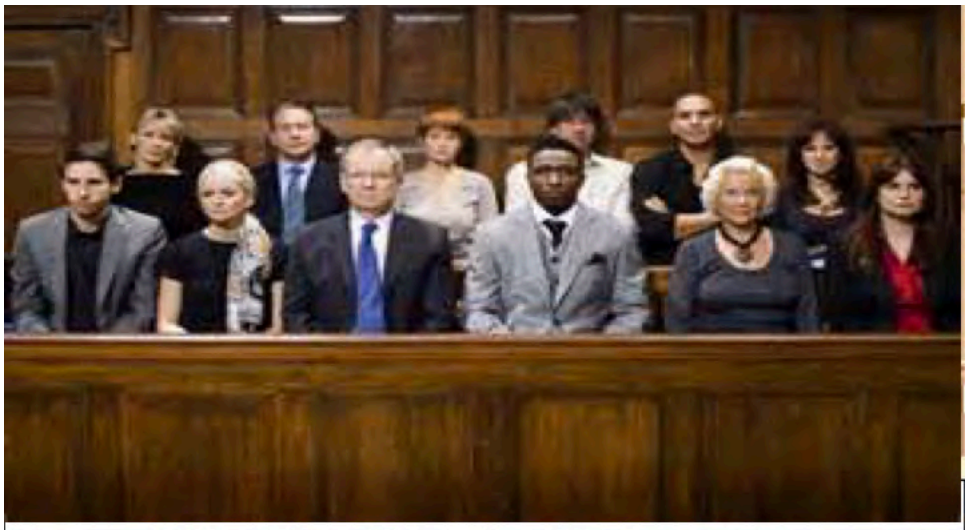
**Practice**
- Class Actions
- Life Sciences Litigation
- Litigation
- Product Liability
- Toxic and Environmental Tort

**Honors and Awards**
- Recognized in Best Lawyers in America, Commercial Litigation, Mass Tort Litigation/Class Actions - Defendants, 2012 - 2017
- Recognized on the New Jersey Super Lawyers List, Business Litigation, Class Actions/Mass Torts and Products Liability, 2005 – 2007, 2010 - 2017
- Recognized in The International Who's Who of Commercial Litigators, 2009
- "AV" rated by Martindale-Hubbell (highest rating)
- Master Advocate, National Institute of Trial Advocacy
- Knight of the Lyondell Enterprise (client recognition for outstanding results)

**Education**
- Cornell University Law School, Ithaca, New York, J.D., 1984
- Dartmouth College, Hanover, New Hampshire, magna cum laude, high departmental distinctions, 1981; Phi Beta Kappa; William Jewett Tucker Fellow

# When To Prepare Your Opening Statement

**Sawnie McEntire**
**Parsons McEntire McCleary & Clark (Dallas, TX)**
**214.237.4303 | smcentire@pmmclaw.com**



## Opening Statement = The Challenge

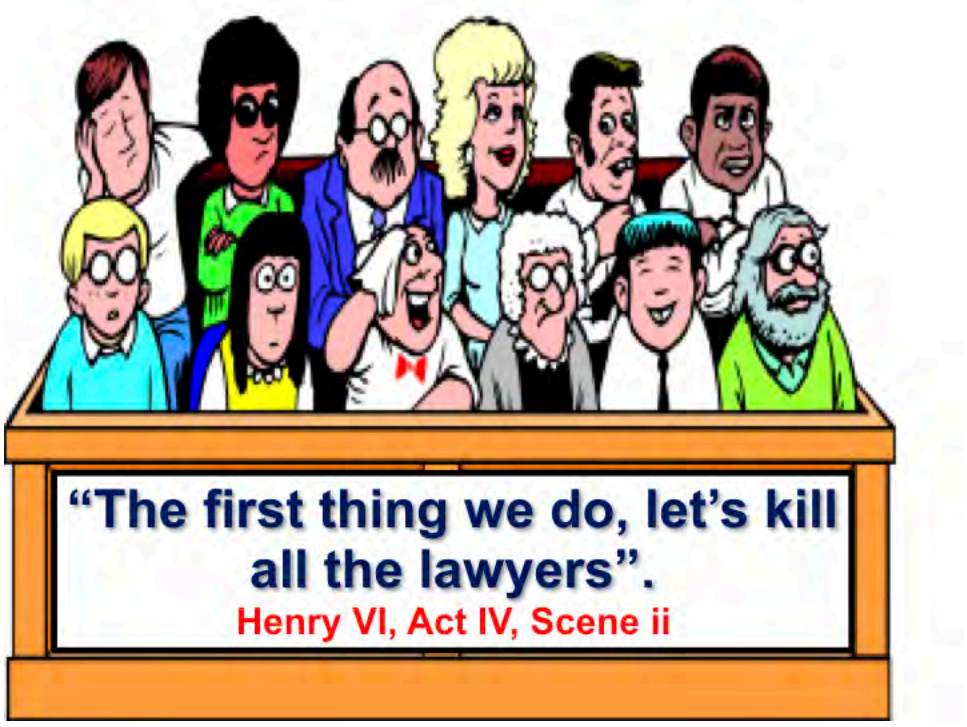
- 1of 3 occasions when lawyers talk to jurors
- Average juror attention span = 7 minutes to 10 minutes
- Last seen…last heard…*last believed*
- Most cases are won or lost in the first few days

## The Challenge

| | |
|---|---|
| Average attention span in 2015 | 8.25 seconds |
| Average attention span in 2000 | 12 seconds |
| % of teens who forget major details of close friends and relatives | 25% |
| % of people who forget their own birthdays from time to time | 7% |
| Average length watched of a single internet video | 2.7 minutes |

Statistic Brain, July 2016


"YOU WILL NEVER GET A SECOND CHANCE TO MAKE A FIRST IMPRESSION."
WILL ROGERS
ADDICTED2SUCCESS.COM

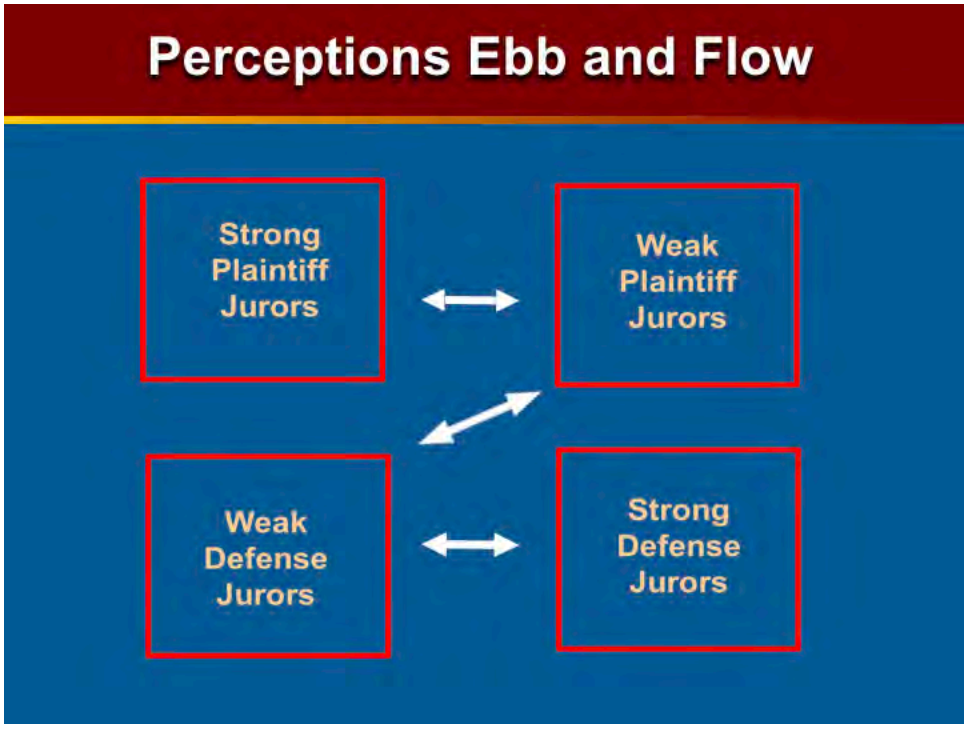

"The first thing we do, let's kill all the lawyers".
Henry VI, Act IV, Scene ii

## Ingredients of First Impressions

- Thank the Jury
- Communicate fairness
- Communicate courtesy
- Don't exaggerate
- Don't waste time
- Don't lecture, but talk with the Jury
- Present appealing client / personify client
- Tell an interesting story
- Move about courtroom (if allowed)
- Make eye contact
- Strategic pauses

## Other Rules of Engagement

- Know the Jury
  - Identify decision makers / potential forepersons
  - Focus on decision makers
- Trial Themes
  - Cogent trial themes
  - Simplify trial themes
  - Repeat trial themes
- Other Ways to Capture Attention
  - Use demonstratives / models / pictures
  - Use technology
  - Use short videos (if permitted)
- Don't Over Promise / Don't Exaggerate

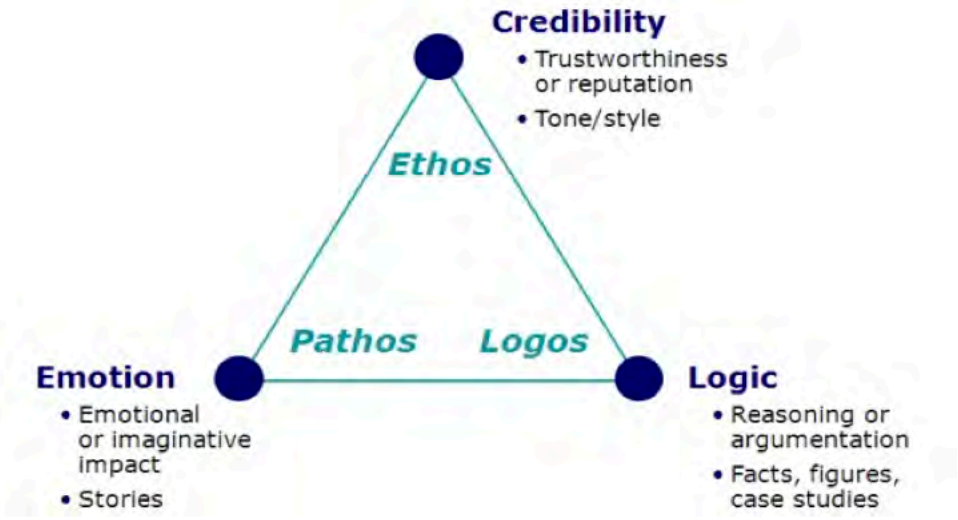

Perceptions Ebb and Flow
Strong Plaintiff Jurors
Weak Plaintiff Jurors
Weak Defense Jurors
Strong Defense Jurors


Opening Statement = Opportunity
Provide a road map
Provide simple, credible themes
Highlight favorable evidence
Neutralize unfavorable evidence
Make a connection
Pathos
Logos
Ethos

## Trial Themes = Building Blocks

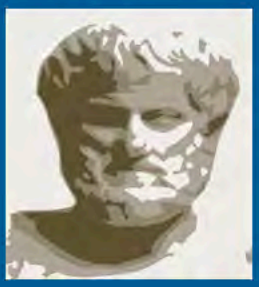
- Simple, logical, quickly understood explanations
- Repeat, repeat and repeat
- Simplify, simplify and simplify
- Build upon the 3 Cornerstones

## Aristotle's 3 Cornerstones of Victory



## Ethos = Credibility = Trust

"Character may almost be called the most effective means of persuasion".



## Ethos = Credibility = Trust

Client

Storyline

Opposing Party (Reverse)

**Objectives**

- Ethical
- Moral
- Principled
- Social Conscience
- Good Citizen
- Credible
- Trustworthy

## Logos = Reason

"The use of reason is more distinctive of a human being than the use of his limbs".

## Logos

The Road Map

The Story

The Explanation

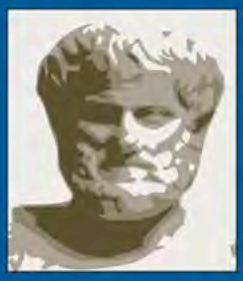
The "Bad" Evidence

**Objective**

- Simple explanations
- Factually supported explanations
- Reasoned explanations
- Internally consistent explanations
- Keep the jury interested

## Pathos = Emotional Reaction

"Thus, every action must be due to one or other of seven causes: chance, nature, compulsion, habit, reasoning, anger or appetite".

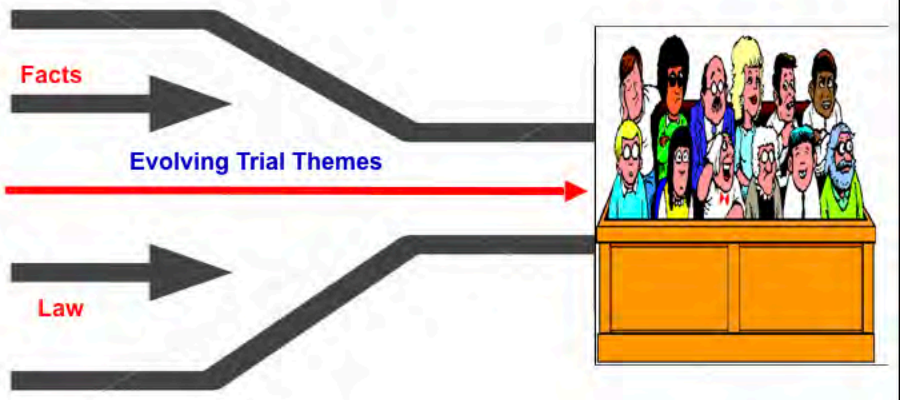


## Early Planning Is Critical

"Planning is bringing the future into the present so that you can do something about it now".

Alan Likein

## Early Planning




## 1st Steps – Develop a Trial Plan

- Identify key legal principles early
- Identify favorable facts early
- Mold the law and the facts early
- Develop themes
- Identify negative facts early and plan to neutralize
- Develop key timeline

## Next Steps

- Develop discovery plan to advance themes
- Narrow fact issues in *every* deposition
- Develop favorable testimony in *every* deposition
- Neutralize negative facts in *every* deposition
- *Every* deposition is a trial deposition

## Final Steps

- Simplify themes
- Test themes
- Use demonstratives to enhance messages and themes
- Use selected evidence to drive home message


## Understandable Trial Themes

**ETHOS AND PATHOS**

Suit to vacate security interests in client's assets that stunted client's ability to borrow money and grow

**LOGOS**

Suit defending real estate broker on lost sale and diminution of property value

## Simple, Repeated Themes

**Pathos**

Suit involving control of a power plant by an F.O.E. [Friend of Enron]

**Ethos and Pathos**

Suit to maintain a residential airport adjacent to homes


=

## Simple Explanations

**LOGOS**

Suit defending vehicle rollover case with fatal ejection of passenger



Address the "BAD"
LOGOS
Suit defending pharmaceutical company in acute reaction
THE DAILY NEWS
THE WORLDS FAVORITE NEWSPAPER
The ABC Drug Kills


## Sawnie McEntire

**Director and Shareholder**
**Parsons McEntire McCleary & Clark (Dallas, TX)**

**214.237.4303 | smcentire@pmmclaw.com**
**http://pmmclaw.com/attorneys/sawnie-mcentire**


Sawnie McEntire has over 35 years of experience handling complex civil matters in federal and state courts throughout Texas and across the United States. Sawnie has tried dozens of difficult cases to jury verdict on a variety of subject matters, such as commercial, products liability, pharmaceutical, and real estate claims. Sawnie has served as national, state-wide, and regional counsel for many of his clients, has received many national and local accolades for his advocacy accomplishments, and has authored several publications on advocacy skills.

**Admission to Practice**
- Texas, 1980
- U.S. District Courts for the Northern, Southern, Eastern, and Western Districts of Texas
- U.S. Courts of Appeals for the Fifth and Ninth Circuits

**Memberships and Affiliations**
- State Bar of Texas
- Texas General Counsel Forum (Dallas Chapter) - Director
- American, Dallas and Houston Bar Associations
- Texas and Dallas Bar Foundations
- Federation of Defense and Corporate Counsel
- Environmental Law Institute Associates Program
- Dartmouth Lawyers Association - Life Member

**Education**
- Southern Methodist University Dedman School of Law; J.D., 1980
- Dartmouth College; B.A., magna cum laude, 1976

# The Price Is Not Right: Class Action Risks Of Comparative Price Advertising

**Brandon Wisoff**
**Farella Braun + Martel (San Francisco, CA)**
**415.954.4449 | bwisoff@fbm.com**

## Is Everything Perpetually On Sale?


## Deceptive Pricing

- Pricing claims that create the illusion of a bargain where none exists
- Most common types of discount claims
  - Claimed discounts off one's own former or regular prices
  - Claimed discounts off prices that others are offering to sell the same or similar products
  - Claimed discounts off a list price or MSRP

## FTC Guides

- 16 C.F.R. § 233 "Guides Against Deceptive Pricing"
- Not new
- First developed in late 1950's
- Current version dates back to 1967

## Former Price Comparisons 16 C.F.R § 233.1

- Discusses reductions from the advertiser's own former price for an article.
- "A former price is not necessarily fictitious merely because no sales at the advertised price were made. " *Id*. § 233.1 (b)

## Former Price Comparisons (cont.)

- FTC Will Scrutinize Whether:
  - the product was openly and actively offered for sale at the referenced former or regular price
  - for a reasonably substantial period of time
  - in the recent, regular course of business
  - honestly and in good faith, and not to establish an inflated price on which to base a supposed discount

## Retail Price and Comparable Value Comparisons 16 C.F.R. § 233.2

- Retail Price Comparison: claiming prices that are lower than those being charged by others for the *same* merchandise.
- Comparable Value Comparison: claiming reductions from prices being charged either by the advertiser or by others for *merchandise of like grade and quality.*

## Retail Price Comparisons

- Advertiser should "be reasonably certain" that the higher advertised price:
  - does not *appreciably exceed* the price
  - at which *substantial sales* of the article
  - are being made *in the area*. *Id*. § 233.2(a).

## Comparable Value Comparisons

- Advertiser should "be reasonably certain" that the price advertised for comparable merchandise
  - does not exceed the price being offered by representative retail outlets in the area
  - and that the comparable merchandise is in fact of essentially similar quality obtainable in the area

## Discounts From List Price or MSRP 16 C.F.R. § 233.3

- Such comparisons will not be deemed fictitious if:
  - substantial (not isolated or insignificant) sales
  - are made at that price
  - in the advertiser's trade area

## Discounts From List Price or MSRP (cont.)

- There is a "clear and serious danger" of the consumer being misled if the list price
  - is significantly in excess
  - of the highest price
  - at which substantial sales
  - are made in the trade area

## State Pricing Regulations

- Most states have "Baby" or "Little" FTC Acts broad enough to prevent deceptive pricing
- Many have provisions specific to pricing
- Some are more restrictive than the FTC Guides
- These laws can vary significantly from state to state

## FTC Deceptive Pricing Enforcement

- Prime FTC Focus in 1950's and 1960's
  - Accounting for up to 30% of the Commission's Advertising Related Actions
- Almost Non-Existent After Late 1970's

## Possible Reasons for FTC Shift

- Increase in state enforcement and unwillingness to use Commission resources to duplicate those efforts
- Consumers' ability to check, and unlikelihood of relying on, seriously exaggerated claims
- Big one: economic policy concerns over stifling price competition

## Views of Former FTC Chairs

- Timothy Muris has noted the "risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that the government should seek to encourage . . . ."
  - T. Muris, *Economics and Consumer Protection*, 60 Antitrust L.J. 103, 113 (1991)

## Views of Former FTC Chairs (cont.)

- Robert Pitofksy has argued:"it is time for the FTC to formally abandon its Pricing Guides and for the states, perhaps through the leadership of the National Association of Attorneys General, to repeal their deceptive pricing statutes and regulations."
  - R. Pitofsky, R. Shaheen and A. Mudge, *Pricing Laws Are No Bargain for Consumers*, 18-SUM Antitrust at 64 (2004).

## Not Likely to Happen

- Avalanche of recent deceptive pricing claims
- Truth In Advertising.org has recently been tracking 61 federal class actions alone involving alleged fictitious pricing
- Forty-nine of those cases had been filed in 2015-16 alone
  - C. Salls, *Group Tracking 61 Federal Class Actions Over Alleged Fictitious Pricing*, Legal Newsline, July 12, 2016

## Some Recent Headlines

- "Some Online Bargains May Only Look Like One"
  - N.Y. Times, Apr. 13, 2016
- "More Retailers Accused of Misleading Consumers with Fake Price Schemes"
  - Money, Jan. 7, 2016
- "Los Angeles Sues Four National Retailers Over Sale Prices"
  - Wall St. J., Dec. 9, 2016

## Some Possible Explanations

- Increased regulatory publicity
  - Overstock.com ordered in 2016 to pay $6,828,000 in civil penalties and subjected to injunctive relief (CA District Attorneys action – now on appeal)
  - Walgreens agreed in 2016 to pay $500,000 in penalties, fees and costs and institute compliance measures (NY Attorney General investigation)

## Some Possible Explanations (cont.)

- Call to Action
  - 2014 letter to FTC from Senators Sheldon Whitehouse (D-RI), Richard Blumenthal (D-CT), Ed Markey (D-MA) and Rep. Anna G. Eshoo (D-CA)
  - Complaining about outlet stores claiming discounts for products never sold elsewhere

## Some Possible Explanations (cont.)

- Legal Developments
  - *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011) (under CA law economic injury occurs where consumer is misled into purchasing a product even if the product has an objective value equivalent to the purchase price)
  - *Hinojos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir. 2013) (applying *Kwikset* holding to a deceptive pricing case)

## Some Possible Explanations (cont.)

- Large Settlements
  - Justice Stores: $50.8 million
  - Michael Kors: $4.875 million settlement fund and $975,000 in fees
  - Burlington Coat Factory: $27.75 million in merchandise certificates and $927,500 in attorneys' fees (pending)

## Some Possible Explanations (cont.)

- Increase in false price ads due to competitive pricing pressures in internet economy
  - Increased ability of consumers to shop price
  - Whenever a retailer exaggerates pricing claims, others may likely feel compelled to follow or be left behind in the race to claiming the "lowest" price

## Litigation Landscape

- Uncertain – mixed results on basic issues
- Appellate authority not well developed
- Significant risk with courts sometimes certifying contested class actions

## Mitigating the Risks # 1

- Understand applicable law
  - FTC guides are important starting place
  - But state laws are often more detailed

## Mitigating the Risks # 2

- Develop substantively and procedurally sound pricing policy
  - Volume and variety of prices surveyed
  - Selection of prices to be used for comparison
  - Training of pricing personnel
  - Internal audit and updating

## Mitigating the Risks # 3

- Document pricing research and preserve records for likely limitations period
  - Assist memory
  - Establish credibility
  - Demonstrate seriousness

## Mitigating the Risks # 4

- Pay careful attention to context and ordinary meaning of terms used in pricing claims: e.g.,
  - "Compare to MSRP" will be more meaningful than simply "Compare At" if the reference is to MSRP
  - If the comparison reference price is at the higher end of the spectrum of observed prices, consider adding descriptive language to the comparison, such as "up to__ elsewhere"

## Mitigating the Risks # 5

- Utilize best possible disclosure of meaning of terms used in pricing claims
  - Online easier, but pay attention to FTC.com guides concerning conspicuousness
  - Retail POS more difficult
    - Consider Signage: *e.g.*, "For more information on our 'Compare At' Prices, Please Consult A Sales Associate or visit www.___.com"
    - Give Sales Associates Scripts with Approved Answers to FAQ

## Mitigating the Risks # 6

- Consider adding Class-Waiver arbitration provision to online terms and conditions of service
  - individual arbitration of any disputes arising out of or relating in any way to purchases
  - waiver of any right to a trial in court or by jury
  - waiver of any right to proceed in arbitration or elsewhere in a class or other representative capacity

## Mitigating the Risks # 7

- Possible written price guaranty or other money back policy for customers dissatisfied with pricing claims
  - Not legally dispositive
  - But courts may be less likely to certify a class in the face of such a simple, convenient, expeditious and complete form of relief

Introduction

"Was that retail 'bargain' you received really a bargain?" That is the question being asked by a recent spate of lawsuits filed against prominent retailers. Most of these actions have been brought as private party class actions, but price discount claims have also attracted renewed regulatory attention in recent years. The facts and circumstances of these cases have varied. Some actions have challenged as false a retailer's assertion that a product is "on sale" or has been "discounted" from the retailer's former or regular price. Others have challenged a retailer's supposedly favorable price comparisons to prices of a competitor's same products or to prices of other "similar" products that are not actually of like grade and quality. Still others have challenged a retailer's supposed "discount" from a list price or MSRP at which the product has never sold. Despite these differences, the gravamen of the claim in each instance is typically the same: the retailer is allegedly misleading consumers into believing they are receiving a bargain when they are in fact paying the price at which the product normally sells.

While the majority of these cases have been brought in California (with the benefit of California's liberal consumer protection laws), cases are appearing nationwide and the publicity surrounding them suggests their numbers will only grow. That is especially true given the proliferation of internet price searching tools and the resulting pressure that retailers feel to compete on price and to respond to "bargains" being offered by their competitors. The risk to retailer clients is substantial: some of these claims have resulted in multimillion dollar settlements and/or regulatory fines. Even where cases are terminated early, defense costs can be significant.

In this article, I first summarize the historical background and legal bases of these "false discounting" claims. I review how the FTC, which had developed deceptive pricing guides and then vigorously pursued such claims in the 1960's, had – most likely for policy reasons – all but abandoned enforcement actions related to pricing by the 1980's. I also mention generally various state law deceptive pricing provisions, most of which derive from the FTC model. I next discuss the recent resurgence of these claims over the last few years, primarily via private class actions, but also by regulatory (primarily state regulatory) enforcement actions. After summarizing some of the cases and their outcomes, I conclude by suggesting a few measures that retailers can take to mitigate the risks.

**FTC Guides Against Deceptive Pricing**

The FTC developed "guides" against deceptive pricing in the late 1950's and subsequently amended them throughout the 1960's; the current guides still date back to 1967.[1] The guides do not have the force of law; they instead "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry." 16 C.F.R. § 1.5. However, "[f]ailure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions." Id. Under Section 5 of the FTC Act, the Commission has authority to prevent "unfair or deceptive acts or practices in or affecting commerce" which are broadly declared as being "unlawful." 15 U.S.C. § 45. As discussed more fully herein, while there is no private right of action under Section 5 of the FTC Act, many state statutes addressing deceptive trade practices and unfair competition contain restrictions similar to those in the FTC guides. In addition, the guides are often cited in private litigation as setting the norms that should be enforced under state consumer protection law. The guides are thus a critical starting point for analyzing the bona fides of an advertiser's pricing claims.

The guides specifically address several forms of pricing claims relevant here, including (1) "former price comparisons," i.e. claimed discounts from an advertiser's own normal price, 16 C.F.R. § 233.1, (2) "retail price" or "comparable value" comparisons, i.e., claimed discounts from what others in the locale are selling the same or similar product, id. § 233.2, and (3) claimed discounts from a list price or MSRP, id. § 233.3. The guides note, however, that "[t]he practices covered in the provisions . . . represent [only] the most frequently employed forms of bargain advertising," and warn that "there are many variations which appear from time to time and which are, in the main, controlled by the same general principles." Id. § 233.5 (emphasis added).

The FTC guides expressly address and provide commentary with examples concerning "former price comparisons," which are described as "[o]ne of the most commonly used forms of bargain advertising," i.e., the "offer of a reduction from the advertiser's own former price for an article." 16 C.F. R. § 233.1(a). While it is certainly risky to claim a discount from a former price at which substantial sales were not actually made, the guides note that "[a] former price is not necessarily fictitious merely because no sales at the advertised price were made." Id. § 233.1(b) They warn, however, that in such cases the advertiser "should be especially careful . . . that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith – and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based." Id. Each factor is important: thus, comparisons to prices that were not openly offered in the recent past for a reasonable period of time in the ordinary course of business are suspect. Id. § 233.1 (d). The guides also warn that comparisons to former prices may be scrutinized regardless of whether the advertisement

1 Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (Oct. 15. 1958); 16 C.F.R. § 233.1(a) et seq.; 32 Fed. Reg. 15534 (Nov. 8, 1967).

expressly uses such words as "Regularly," "Usually," or "Formerly" to describe the former price. Id. § 233.1 (e). They also caution against misleading discount claims concerning trivial reductions, such as advertising that an item has been "' Reduced to $9.99,' when the former price was $10." Id.

The guides also expressly address "retail price comparisons" and "comparable value comparisons." Id. §233.2. A "retail price comparison" is where an advertiser "offer[s] goods at prices [claimed to be] lower than those being charged by others for the same merchandise in the advertiser's trade area." Id. § 233.2(a) (emphasis added). A "comparable value comparison" is "[a] closely related" claim where an advertiser "offer[s] a reduction from the prices being charged either by the advertiser or by others in the advertiser's trade area for other merchandise of like grade and quality." Id. § 233.2 (c) (emphasis added). Both types of pricing claims are treated similarly. For "retail price comparisons, the advertiser should "be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area." Id. § 233.2(a). For "comparable value comparisons," the advertiser should "be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area." Id. § 233.2(c). Of course, "comparable value comparisons" carry the additional warning that the other comparable merchandise should "in fact, [be] of essentially similar quality and obtainable in the area." Id.

Finally, the guides expressly address price comparisons to a manufacturer's "list price" or "suggested retail price," i.e., MSRP.[2] The guides note that a claimed discount from MSRP can be misleading, reasoning that "only in the rare cases are all sales of an article at the manufacturer's suggested retail or list price." Id. § 233.3(c). They go on to state that "this does not mean that "all list prices are fictitious and all offers of reductions from list, therefore deceptive." Id. § 233.3(d). The guides reason that even if a list price is not the actual price for all sales, it may still be the actual price for many sales "at least in the principal retail outlets which do not conduct their business on a discount basis." Id. The guides thus conclude that an advertised discount from MSRP "will not be deemed fictitious if [the MSRP] is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area . . . ." Id. "Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price." Id. In addition to offering a few illustrative examples, the guides do recognize that one "who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles sold throughout so large a trade area." Id. § 233.3(g). However, they also warn that every advertiser must "in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area." Id. 233.3(i).

As can be readily seen, the guides talk in general undefined terms like "substantial sales," "reasonably substantial period of time," "recent past," "comparable merchandise," and "good faith." While this flexibility is perhaps needed for regulatory enforcement decisions, use of the guides for standard setting in private litigation has led to much uncertainty, and thus risk.

**Early FTC Enforcement, and Then Abandonment, of Deceptive Pricing Claims**

While the FTC's 1960's-era pricing guides still remain in effect, vigorous FTC enforcement of the guides is now rare. So called "fictitious price claims" were in fact a prime focus of the FTC during the 1950's and 1960's, accounting for as much as 30 percent of the Commission's advertising related actions.[3] But as former FTC Chairman Robert Pitofsky noted in 2004:

> By the mid-1970's, however, the FTC's enthusiasm for these cases had cooled considerably. The FTC has not brought a single fictitious price case since 1979, and the last two chairs of the FTC – one presiding during a Democratic Administration and the other during a Republican Administration – have indicated that enforcement actions in the area often do more harm than good.[4]

The reasons for the FTC's change of direction can be surmised from public comments. Pitofsky has noted that a FTC Director of Consumer Protection attributed the Commission's cessation of enforcement in this area to an increase in state enforcement and an unwillingness to use Commission resources merely to "duplicate" those efforts.[5] But the reality is more complicated. Pitofsky himself has argued that FTC enforcement of pricing claims is unnecessary because consumers are in a position to check the validity of exaggerated claims and are unlikely to believe or rely on claims that are seriously exaggerated.[6] He has

2 The guides also expressly cover advertising of additional merchandise promised to a customer on the condition that s/he buy a particular other product at a particular price. Id. § 233.4. Litigation involving these types of claims has been less frequent and is not addressed herein.

3 R. Pitofsky, R. Shaheen and A. Mudge, Pricing Laws Are No Bargain for Consumers, 18-SUM Antitrust at 62 (citing to T. Muris, Economics and Consumer Protection, 60 Antitrust L.J. 103, 112 (1991)).

4 Id.; see also R. Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661 (1977).

5 Id. at 63.

6 Id.

also argued that such enforcement may actually dampen the very vigorous price competition that ultimately benefits consumers. Because discounters are a natural target for discount pricing claims, aggressive FTC enforcement could raise the costs to sellers "of ascertaining whether particular discount claims are accurate [and thus] deter them from making such claims at all."[7] Another former FTC Chairman, Timothy Muris, has made similar arguments, noting the "risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that the government should seek to encourage . . . ."[8] In other words, cessation of aggressive FTC enforcement was likely related to economic policy concerns, namely a desire to encourage, rather than dampen, retailers' competition on price rather than just on service or reliability. Aggressive price competition is good for consumers and consumers have the ability, especially now with online price checking tools, to compare prices and evaluate the meaningfulness of claimed discounts.

These same policy concerns and conclusions do not drive the decision making of private class action plaintiff attorneys armed with the still-in-effect FTC guides and an arsenal of state consumer protection laws. Partly for this reason, Pitofsky and others argued in 2004 that "it is time for the FTC to formally abandon its Pricing Guides and for the states, perhaps through the leadership of the National Association of Attorneys General, to repeal their deceptive pricing statutes and regulations."[9] The recent explosion of pricing litigation, increased publicity around misleading pricing claims, and renewed regulatory interest all suggest that outcome is highly unlikely. Retailers, therefore, need to renew and, indeed, ramp up their attention to pricing policy and applicable law.

## State Baby FTC Act Analogs for Deceptive Pricing Claims

In evaluating pricing policies, it is also important to take account of state law variations. It is beyond the scope of the article to address applicable law in the 50 different states, but most states have consumer protection statutes modeled on the FTC Act, sometimes called "baby" or "little" FTC acts, some of which expressly incorporate FTC guidance and standards. These state law provisions are typically broad enough to attack any "deceptive" sales practice, whether related to pricing or otherwise.[10] Some states also have statutes that expressly address some types of pricing claims.[11] These state laws vary in whether they permit private rights of action under their provisions, whether class actions are allowed and the types of remedies available. Understanding unique state law is obviously important to evaluating claims in any particular state. But also in any class action asserting nationwide or multistate claims, understanding and evaluating state law differences that can create individualized issues and help defeat class certification is essential.[12]

## The Recent Resurgence of Comparative Pricing Claims

After decades of relative quiet, deceptive pricing, and related litigation, has again become headline material. A recent New York Times article headline proclaimed "Some Online Bargains May Only Look Like One," and its author opined that "[l]ist price is a largely fictitious concept, promoted by the brand or manufacturer and adopted by the retailer to compel the customer into pushing the buy button."[13] The sheer number of these headlines is a wake-up call for retailers: "More Retailers Accused of Misleading Consumers with Fake Price Schemes,"[14] "Los Angeles Sues Four National Retailers Over Sale Prices,"[15] "J.C. Penny Sued for Never Charging Full Price,"[16] "It's Discounted, but Is It a Deal? How

7 *Id*.

8 T. Muris, *Economics and Consumer Protection*, 60 Antitrust L.J. 103, 113 (1991)

9 R. Pitofsky, R. Shaheen and A. Mudge, *Pricing Laws Are No Bargain for Consumers*, 18-SUM Antitrust at 64.

10 Many of these state law provisions are based on uniform or model acts approved by the National Conference of Commissioners on Uniform State Laws, including the 1964 Uniform Unfair and Deceptive Trade Practices Act ("UDTPA"), the 1971 Uniform Consumer Sales Practices Act ("UCSPA") and the 1971 Model Unfair Trade Practices and Consumer Protection Law ("UTPCPL").

11 *See, e.g.*, Alaska Admin. Code tit. 9, § 05.030(1) (illegal to advertise a price comparison "which is based on any price other than the seller's own regular price, unless the seller discloses the nature and source of the referenced comparison price, such as 'manufacturer's list price' or 'comparable retail value.'"); Cal. Civ. Code § 1770(a)(13) (prohibiting "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions."); Cal. Bus. & Prof. Code § 17501 ("No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement."); D.C. Code Ann. § 28-3904(j) (illegal to "make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or the price in comparison to price of competitors or one's own price at a past or future time."); 815 Ill. Comp. Stat. Ann. 510/2(a)(11) (a seller violates the law if he "makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions"); 940 Mass. Code Regs. 6.05 (providing very detailed restrictions on comparative price advertising including both comparisons to former prices and to other seller's prices); Mich. Comp. Laws Ann. § 445.903, Sec. 3(1)(i) (unlawful to "make[] false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions"); Minn. Stat. Ann. § 325D.44, Subdivision 1 (11) (same); Ohio Statutes Title XIII, Commercial Transactions, Chapter 1345, Consumer Sales Practices, § 1345.02(B)(8) (unlawful to represent "[t]hat a specific price advantage exists, if it does not.); Ohio Administrative Code, Chapter 109:4-3-03 (providing detailed regulations of comparative price advertising for out of store ads); 73 Pa. Stat. Ann. § 201-2(4)(xi) (declaring as deceptive "[m]aking false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions"); Tex. Bus. & Com. Code Ann. § 17.46(b)(11) (declaring as deceptive "making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions"); Wis. Admin. Code ATCP § 124.03(1) (illegal to make price comparison "[b]ased on a price other than one at which consumer property or services were sold or offered for sale by the seller or a competitor, or will be sold or offered for sale by the seller in the future, in the regular course of business in the trade area in which the price comparison is made"); *id*. § 124.03(2) (illegal to make price comparison "[i]n which the consumer property or services differ in composition, grade or quality, style or design, model, name or brand, kind or variety, or service and performance characteristics, unless the general nature of the material differences is conspicuously disclosed in the advertisement with the price comparison"); Wis. Admin. Code ATCP §§ 124.04, 124.05 (providing detailed regulations for when price discounts can be claimed); Va. Code Ann. § 59.1-207.41 (provisions governing former price comparisons); *id*. § 59.1-207.42 (provisions governing comparing prices to competitor's prices); *id*. § 59.1-207.43 (provisions governing comparisons to market value, list price or MSRP).

12 *See, e.g., Mazza v. American Honda Motor Co*., 666 F.3d 581 (9th Cir. 2012) (vacating nationwide class certification order finding material differences in state consumer protection laws made class overbroad).

13 D. Streitfeld, *Some Online Bargains May Only Look Like One*, N.Y. Times, Apr.13, 2016, https://www.nytimes.com/2016/04/14/technology/some-online-bargains-may-only-look-like-one.html?_r=0.

14 B. Tuttle, *More Retailers Accused of Misleading Customers with Fake Price Schemes*, Money, Jan. 7, 2016 (mentioning suits against J.C. Penny, Kohl's, Macy's, Bloomingdale's and Jos. A. Bank), http://time.com/money/4171081/macys-jc-penney-lawsuit-original-prices/ .

15 *Los Angeles Sues Four National Retailers Over Sale Prices*, Wall St. J., Dec. 9, 2016 (AP) (describing four lawsuits filed against J.C. Penny, Sears, Macy's and Kohl's by the Los Angeles City Attorney's Office wherein the retailers were accused of "duping shoppers into believing they got bigger discounts than they actually did."), https://www.wsj.com/articles/los-angeles-sues-four-national-retailers-over-sale-prices-1481250632.

16 B. Tuttle, *J.C. Penny Sued for Never Charging Full Price*, Money, May 20, 2015 (claiming that: "items were given inflated original prices solely for the purpose of making the inevitable discounts seem more impressive. It's a classic sales strategy known as 'price anchoring,' and J.C. Penney is hardly the only store known to engage in the practice," and commenting "Let's hope that regardless

List Prices Lost Their Meaning,"[17] "Fake Sales Can Cost You,"[18] "The Dirty Secret of Black Friday 'Discounts': How Retailers Concoct 'Bargains' for the Holidays and Beyond,"[19] "J. Crew Sued Over Misleading Online Sales,"[20] "Justice Stores to Give Refunds to Shoppers Through Class-Action Settlement,"[21] "DSW Class Action Says Pricing Strategy Deceives Customers,"[22] "TJ Maxx Sued Over 'Compare At' Prices,"[23] "Is the Price Right? Nordstrom Facing Class Action Over 'Compare At" Pricing,"[24], "Why 40% Off Doesn't Mean What You Think It Does,"[25] "Outlet Store Bargains May Be Cheaper Quality, Lawsuit Claims,"[26] "'Fake' Sales Trick Customers at Major Stores, Study Says."[27]

And this sampling of headlines is just that; there are many more articles, reports and cases out there – and not all lawsuits receive significant media attention so the numbers are probably higher than might otherwise be estimated. According to one source, the organization Truth In Advertising.org has recently been tracking 61 federal class actions alone involving alleged fictitious pricing.[28] Forty-nine of those cases had been filed in 2015-16 alone.[29] This, of course, does not account for state court actions or regulatory proceedings. So the numbers are clearly meaningful, perhaps to some even staggering, and on the rise.

**Possible Explanations for The Renewed Interest in Pricing Claims**

While it is not clear what triggered this avalanche of renewed pricing litigation, several factors undoubtedly contributed to the trend. The early 2000s' saw some isolated activity,[30] but perhaps the first truly high-profile case in recent years was the State of California's enforcement action against Overstock.com. In November 2010, a group of California District Attorneys sued Overstock.com in California state court in Alameda County alleging violations of various California consumer protection laws.[31] They alleged that Overstock deceptively displayed a "list price" above a price at which Overstock offered an item, with a representation of the supposed "savings" (in dollar amounts and as a percentage), and then also used the terms "compare at" or "compare" instead of "list price." Id. They alleged that the list price was false because Overstock instructed its employees to choose the highest price they could find as a reference price ("list price") or that they simply made up a reference price using a multiplier on Overstock's wholesale cost. Id. In 2014, following trial, the court rejected an award of consumer restitution, but awarded $6,828,000 in civil penalties, and an injunction against the conduct it found to be false or misleading. The judgment is now on appeal, but regardless of outcome, the publicity surrounding the case, especially in California, has no doubt spurred interest by the plaintiffs' class action bar in these types of cases.

This type of high-profile regulatory publicity has not been limited to California. While coming later in the timeline, the New York Attorney General began investigating Walgreens' advertising and pricing practices in early 2014. The investigation became public when in April 2016 it entered into a settlement with the retailer over allegations, among others, that Walgreen misrepresented some deals as "Smart Buy" or "Great Buy" when the advertised price was not different than the original selling price.[32] It also alleged that Walgreen's labeled some items as "Last Chance" or "Clearance" when the items would remain on sale for many months. Id. In addition to agreeing to a compliance program, Walgreens agreed pay the state $500,000 in penalties, fees and costs. Id. This renewed interest in pricing litigation by state authorities certainly helps to explain the willingness of

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29 *Id*. (noting 25 filed in 2015 and 24 filed in 2016). The article specifically discusses a false discounting claimed filed in Los Angeles federal court against Harbor Freight Tools.

30 *Harris v. HSN LP*, 2007 WL 61068 (Cal. App. 4th Dist. Jan. 10, 2007), State Unfair Trade Practices Law (CCH) ¶ 31,353 (unpublished and non-citable decision denying class certification of false pricing claims); *Mahfood v. QVC, Inc.*, 2008 WL 5381088 (C.D. Cal. Sept. 22, 2008) (denying class certification of false pricing claims finding that individual issues predominated).

31 *People of Cal. v. Overstock.com, Inc.*, No. RG10-546833, Statement of Decision (Alameda Cnty. Super. Ct., Feb. 5, 2014).

32 *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of Walgreen Co*., Attorney General of the State of New York Bureau of Consumer Frauds & Protection, Assurance No. 16-085.

class action attorneys to invest in these types of cases.

There has also been renewed interest in, and publicity concerning, pricing claims even at the federal level. On January 30, 2014, three U.S. Senators and a Congresswoman[33] sent a letter to FTC Chairwoman Edith Ramirez, calling on the agency to look into claims that merchants may be selling lower quality items produced specifically for outlet stores without properly informing consumers about the difference between those items and the higher-quality products found in regular retail stores. The letter stated in relevant part:

> We have no objections to the evolution of the type of merchandise offered at outlets. However, we are concerned that outlet store consumers are being misled into believing they are purchasing products originally intended for sale at the regular retail store. Many outlets may also be engaged in deceptive reference pricing. It is a common practice at outlet stores to advertise a retail price alongside the outlet store price—even on made-for-outlet merchandise that does not sell at regular retail locations. Since the item was never sold in the regular retail store or at the retail price, the retail price is impossible to substantiate. We believe this practice may be a violation of the FTC's Guides Against Deceptive Pricing (16 CFR 233).[34]

Then, on Black Friday in 2014, Senator Blumenthal of Connecticut, one of the authors of the letter to the FTC, held a news conference warning holiday shoppers of deceptive price comparisons and mentioning his call to the FTC for action. At least one news report covering the press conference mentioned the California District Attorneys' case against Overtock.com and the $6.8 million in fines that the company was ordered to pay.[35]

But aside from publicity that regulatory action has generated, an important factor contributing to increased pricing litigation is the California Supreme Court's 2011 decision in Kwikset Corp. v. Superior Court.[36] That case did not involve deceptive pricing, but rather allegations that a lock manufacturer misrepresented its products as "Made in the USA," when in fact many of the lock components were manufactured abroad. The principal legal issue was whether the plaintiffs "had been injured in fact" and "lost money or property" as a result of the alleged misrepresentation, as required by the standing provisions of California's Unfair Competition Law, one of California's most prominent consumer protection statutes. The Supreme Court sided with plaintiffs, rejecting the argument that there had been no actual loss of money or property because the plaintiffs had received locksets that were not overpriced or defective. Id. at 331-32. The Court instead held that when a consumer relies on misrepresentations in purchasing a product that the individual would not have purchased but for the misrepresentation, the consumer has not received the "benefit of the bargain" even if the product is worth in market terms the price that was paid. Id. at 333-34.[37] Thus, while the decision did not address deceptive pricing, it provided at least the theoretical vehicle by which the private plaintiff's bar could claim class-wide damages in deceptive pricing cases; they could allege a false representation of price without –at least for standing purposes under California law – having to further allege (and then prove) that the products were not worth what was paid (an issue that could implicate individualized issues in any putative class action case involving multiple products).[38]

The Ninth Circuit Court of Appeals then gave a boost to pricing litigation in its 2013 Hinojos v. Kohl's[39] decision by applying the Kwikset holding in a deceptive pricing case. Plaintiffs there asserted class action claims under California's consumer protection statutes against a retailer accused of claiming its prices were discounted from the "original" or "regular" price when in fact the products typically sold at the supposed discounted price. The district court had dismissed the action for lack of standing because, unlike in Kwikset where the composition of the products (locksets) was different than represented (because they were not actually "Made in the USA"), the Kohl's plaintiffs received the exact items they wanted at the exact prices they agreed to pay. Whether or not those prices were in fact discounted did not, according to the district court, cause any economic injury to plaintiffs. The Ninth Circuit reversed finding that Kwikset controlled, thus signaling to the plaintiffs' class action bar that these kinds of actions were clearly in play, at least at the pleadings stage.

These California legal developments helped open to door to class action pricing claims which had previously been met with resistance in some jurisdictions that did not recognize actual loss based solely on the allegation of a false discount. Thus, in Kim v. Carter's, Inc., 598 F.3d 362, 363-64 (7th Cir. 2010), the Seventh Circuit dismissed false pricing claims under Illinois law, explaining: "The plaintiffs agreed to pay a certain price for Carter's clothing, which they do not allege was defective or worth less than what they actually paid. Nor have plaintiffs alleged that, but for Carter's deception they could have shopped around and obtained a better price

33 Senators Sheldon Whitehouse (D-RI), Richard Blumenthal (D-CT), Ed Markey (D-MA) and Rep. Anna G. Eshoo (D-CA).

34 Text of letter available at: https://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers

35 M. Pazniokas, *On Black Friday, Blumenthal Shops for Media*, The CT Mirror, Nov. 28, 2014.

36 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011).

37 The Supreme Court offered several analogies, reasoning for example that a Jew or Muslim does not receive the benefit of the bargain in purchasing food falsely represented as kosher or halal even if the food is otherwise fairly priced from a general market perspective. *Id*.

38 The Court was careful to note the issue of standing is distinct from the issue of restitution, so courts can still require evidence of economic harm in evaluating whether and in what amount restitution is appropriate. *Id*. at 335-37 & n. 15.

39 *Hinojos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir. 2013).

in the marketplace." Id. at 365. The court concluded that the plaintiffs "got the benefit of their bargain and suffered no actual pecuniary harm." Id. at 366; see also Mulligan v. QVC, Inc., 888 N.E.2d 1190, 1197 (Ill. App. Ct. 2008) (finding that the plaintiff suffered no actual damage from QVC's listing its actual sales prices next to substantially higher, but allegedly fictitious "retail values" where the plaintiff "agreed to purchase some jewelry items for a certain price" and could not show "that the value of what she received was less than the value of what she was promised"). Some recent cases outside California still take that approach. Thus, in Shaulis v. Nordstrom Inc., 120 F. Supp. 3d 40 (D. Mass. 2015), the court accepted plaintiff's allegation that she would not have purchased a sweater but for an alleged false discount, but still dismissed the claim under Massachusetts law. The court reasoned that "there is no amount of money damages that could be awarded to plaintiff to make her whole" because, although "[s]he paid $49.97 for a sweater on the alleged belief 'that she saved at least 77% on her purchase,'" "it appears that she paid $49.97 for a sweater that is, in fact, worth $49.97" and plaintiff "still has the sweater in her possession." Id. at 51. The court concluded that "the fact that plaintiff may have been manipulated into purchasing the sweater because she believed she was getting a bargain does not necessarily mean she suffered economic harm: she arguably got exactly what she paid for, no more and no less." Id. at 51–52. While it is not yet clear what impact California's Kwikset/Hinojos decisions will have outside California, those decisions have clearly opened the floodgates to pricing litigation in California.

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Also likely contributing to the increase in pricing litigation is the "the one thing begets another" syndrome: some recent class action pricing cases, including cases outside California, have resulted in substantial settlements. For example, in 2016, Justice Stores agreed in a federal action brought in Pennsylvania to create a $50.8 million settlement fund for the claims of class members who bought products advertised as 40% off when they in fact allegedly sold at the regular price.[40] In 2016, a court-approved settlement in New York required Michael Kors to create a $4.875 million settlement fund and pay $975,000 in fees to resolve allegations that it (1) advertised discounts in its outlet stores off supposed MSRPs that the products had never actually sold at and (2) falsely compared inferior products manufactured exclusively for its outlet stores to different products sold in its regular retail outlets.[41] Similarly, a California federal court has set a July 2017 final approval hearing to consider a proposed settlement by Burlington Coat Factory of claims that it advertised discounts from "Compare" prices that allegedly had no basis because they were made up and did not represent prices at which competitors actually sold the products.[42] Under the terms of the settlement, if approved, Burlington would provide up to $27.75 million in merchandise certificates and pay up to $927,500 in attorneys' fees.[43] These kinds of public settlements are, of course, the best advertising to get the plaintiffs' bar's further attention.

Finally, while strictly supposition, this author believes that the recent increase in false pricing claims results in part from an actual increase in deceptive pricing advertisements fostered by an internet economy. Because internet pricing tools have enabled consumers instantly to check prices across a wide spectrum of sellers, retailers are pressured to compete more and more on price. Whenever a retailer exaggerates pricing claims, others may likely feel compelled to follow or be left behind in the race to claiming the "lowest" price. Ironically, the ability of consumers to check prices, and thus exaggerated discount claims, also mitigates any claimed harm from such misrepresentations. Thus, the very factors that caused the FTC to stop policing these claims – the ability of consumers to protect themselves and the desire to promote vigorous price competition – have come full circle to the opposite result: an increase in pricing claim enforcement and litigation.

**Some Recent Cases and Results**

Although some of these recent cases have settled for substantial amounts, the results of cases actually litigated have been mixed. Aside from factual differences that drive different results, the courts have naturally been struggling develop a consistent approach to these claims given their sudden appearance in large volumes and the lack of any (yet) well-established appellate authority. But several cases are now pending on appeal, so the legal landscape is beginning to take shape. While the cases are too numerous to summarize, a few examples are illustrative.

A number of cases have been dismissed at the pleading stage because the court found the allegedly false representation to be too unspecific to be misleading or to pass muster under fraud pleading requirements. Thus, for example, in Rubenstein v. Neiman Marcus Grp. LLC, No. CV 14-07155 SJO (JPRX), 2015 WL 1841254 (C.D. Cal. Mar. 2, 2015), the court dismissed a complaint alleging that Neiman Marcus through the use of "Compare To" labels falsely compared prices of inferior Last Call outlet store products to regular products sold in traditional Neiman Marcus stores. Id. at *1. In a decision that is now on appeal, the court found that there was no advertising that indicated Neiman Marcus' "Last Call" stores sold products that were formerly sold at Neiman Marcus' flagship stores, and that consumers would mostly likely view the "Compared To" tags as a comparable

40 *Rougvie v. Ascena Retail Grp., Inc.*, No. CV 15-724, 2016 WL 4111320, at *1 (E.D. Pa. July 29, 2016).

41 *Gattinella v. Kors*, No. 14CV5731, 2016 WL 690877, at *1-*2 (S.D.N.Y. Feb. 9, 2016).

42 *Horosny v. Burlington Coat Factory of California,* No.CV 15-05005 SJO, Docket No. 77 Order Preliminarily Approving Class Action Settlement and Certifying Settlement Class (C.D. Cal. Jan. 26, 2017).

43 *Id*.

value comparison and not a former price comparison. Id. at *5-*6. The court reached a similar result in Sperling v. DSW Inc., No. EDCV 15-1366-JGB (SPX), 2016 WL 354319, at *6 (C.D. Cal. Jan. 28, 2016), where it dismissed claims that DSW's "Compare At" prices falsely suggested that the same products regularly sold elsewhere at the "Compare At" prices when in fact those prices were substantially higher than actual market prices. The court found plaintiffs' allegations to be too conclusory and lacking the necessary specifics showing the actual prevailing prices elsewhere of the products she purchased at the time she purchased them. Again, the decision is currently on appeal.[44]

Other courts have found similar allegations adequate to survive a motion to dismiss. Thus, in Branca v. Nordstrom, Inc., No. 14CV2062-MMA (JMA), 2015 WL 10436858, at *1 (S.D. Cal. Oct. 9, 2015), the court after partially granting an earlier motion to dismiss, denied a motion to dismiss an amended complaint challenging pricing comparisons at Nordstrom's Rack (outlet) stores. Id. at *1. The court found that plaintiffs had properly stated a claim by alleging that Nordstrom's "Compare At" price was misleading because it implied that the products had previously sold at Nordstrom or elsewhere for that amount when in fact the products were manufactured exclusively for Rack stores and thus never sold elsewhere at any price. Id. at *7. In Chester v. TJX Companies, Inc., No. 5:15-CV-01437-ODW (DTB), 2016 WL 4414768, at *7 (C.D. Cal. Aug. 18, 2016), the court denied a motion to dismiss by TJ Maxx, Marshalls and HomeGoods, finding that those retailers use of ambiguous "Compare At" pricing could falsely suggest that substantial sales of the products had occurred elsewhere at those prices. Similarly, in Jacobo v. Ross Stores, Inc., No. CV-15-04701-MWF-AGR, 2016 WL 3483206, at *3 (C.D. Cal. June 17, 2016), the court denied dismissal of certain of plaintiffs' claims finding adequate the allegation that consumers were misled by Ross' "Compare At" prices because those prices referred to similar, and not identical, items sold elsewhere.

Many of these recent pricing cases are still pending, on appeal or have settled, but a few examples of those that have proceeded past the pleading stage highlight the risks. Thus, in Spann v. J.C. Penney Corp., 307 F.R.D. 508, 517 (C.D. Cal. 2015), modified, 314 F.R.D. 312 (C.D. Cal. 2016), the court granted certification of a California class of purchasers who bought a private or exclusive J.C. Penney brand that was advertised at a discount of at least 30% off of a stated "original" or "regular" price and who had not received a refund. It found that class certification was appropriate because "the thrust of plaintiff's claim . . . is that defendant operated a systematic and pervasive unlawful price comparison policy" that did not require individual proof, and because "'causation, on a classwide basis, may be established by materiality, meaning that if the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class[.]'" Id. at 522. Since the items at issue were sold only in J.C. Penney stores, it found that sales at J.C. Penney stores (and not sales of similar items in other stores) was the proper baseline for determining the actual prevailing prices. This also led the court to conclude that that common questions predominated. Id. at 523-27. Most troubling from a defense perspective was the court's analysis of possible classwide monetary relief which it concluded could be measured under various methods: "1) complete restitution, measured by the full purchase price paid by each class member; 2) restitution based on the false 'transaction value' promised by JC Penney, measured by the amount that each class member would have paid had JC Penney offered a discount from the actual 'regular' price; or 3) restitution in the amount that JC Penney profited from sales of products based on deceptive price comparisons." Id. at 529-31. Not surprisingly, the case settled soon after this ruling with J.C. Penny agreeing to pay up to $50 million in claims and to modify its sales practices. Spann v. J.C. Penney Corp., No. SACV 12-0215 FMO (KESX), 2016 WL 5844606, at *2-*3 (C.D. Cal. Sept. 30, 2016).

In Chowning v. Kohl's Dep't Stores, Inc., No. CV 15-08673 RGK(SPX), 2016 WL 1072129 (C.D. Cal. Mar. 15, 2016), the court took a different approach and granted summary judgment on plaintiffs' restitution claims. Citing to the Kwikset/Hinojos decisions, the court found that plaintiffs had sufficiently alleged economic harm for standing purposes under California law. Id. at *2. But it also found that to obtain restitution, plaintiff must abide by three principles: "restitution cannot be ordered exclusively for the purpose of deterrence"; "any proposed method [of restitution] must account for the benefits or value that a plaintiff received at the time of purchase"; and "the amount of restitution ordered must represent a measurable loss supported by the evidence." Id. at *6. Using these principles, the court found that plaintiff was not entitled to restitution. The court concluded that a "full refund" model (i.e., rescission) was inappropriate because it did not account for the value received. Id. at*7. The court also for the same reason rejected the notion that restitution could be measured by the profits earned on the deceptively labeled goods: "Plaintiff does not dispute that she gained some value from the mislabeled items. Therefore, a disgorgement of full profits would be inappropriate because the amount of Defendant's profit does not accurately represent the amount Plaintiff lost in this case." Id. at *9. Finally, the court rejected a restitutionary model whereby the plaintiff received the benefit of the discount she was

44 *See also Nunez v. Best Buy Co.*, 315 F.R.D. 245 (D. Minn. 2016) (dismissing false discount allegations under FRCP 9(b) for failure to provide details of the fraud including information showing that the advertised regular price for his product was different than represented on a date prior to his purchase); *Waldron v. Jos. A. Bank Clothiers, Inc.*, No. 12CV02060DMCJAD, 2013 WL 12131719, at *3 (D.N.J. Jan. 28, 2013) (dismissing allegations that Jos. A. Bank falsely promotes "sales" of limited duration when in fact its products are perpetually on sale, finding that plaintiffs did not adequately allege that Jos. A. Bank's conduct deviated from the norm of reasonable business practices or that the purported "sale" price is the same as the true regular price.).

promised in the deceptive labels because it is more akin to expectation damages instead of plaintiff's lost money. Id. at *10. Thus in short, although plaintiff suffered "lost money or property" (because she purchased a product she would not have purchased had she known the truth), the court found the plaintiff did not pay more than what she received and was not entitled to restitution and thus granted summary judgment as to the restitution claim in favor of the defendant.

Despite this favorable defense outcome, Kohl's ended up having to pay a lot of money to resolve the claims. After granting Kohl's summary judgment, the Chowning court went on to deny class certification of an injunctive relief class, finding the Chowning action duplicative of another action against Kohl's brought by plaintiff Russell. See Chowning v. Kohl's Dep't Stores, Inc., No. CV 15-08673 RGK (SPX), April 1, 2016 Civil Minutes, Docket No. 123) (C.D. Cal.). But in the Russell v. Kohl's action, Kohl's ultimately settled with the court certifying a settlement class consisting of California consumers who purchased from Kohl's items at a discount of at least 30% off the stated "original" or regular price. See Russell v. Kohl's Dep't Stores, Inc., No. EDCV 15-1143 RGK (SPX), 2016 WL 6694958, at *3 (C.D. Cal. Apr. 11, 2016); see also id. at Docket Nos. 86-1 (8/15/16 Memo. In Support of Motion for Final Approval), 89 (9/12/16 Minutes Granting Approval). Under the settlement terms, Kohl's agreed to make available $6.15 million to resolve the litigation, with roughly $3.6 million available to the Class and to be distributed in the form of gift cards, and with the remainder set aside of administration costs, attorneys' fees, and class representative payments. Russell, 2016 WL 6694958, at *3; Docket No. 86-1 at 1.

In sum, there presently is no consistent outcome in these cases even on basic issues such as whether the term "Compare At" is alone actionable or whether restitution is available and if so how it is measured. The risks, especially of class certification, are thus substantial.

**Some Modest Proposals for Mitigating the Risks**

Retailers facing these risks can take several measures to help mitigate these growing risks.

First, and perhaps obvious, retailers should familiarize themselves with the laws applicable to their sales. As noted, the FTC guides are an important starting point, but some states have very specific requirements for making certain kinds of price comparisons and the rules do vary, sometimes significantly, by state.

Second, retailers should develop a pricing policy that is both substantively and procedurally defensible under applicable law. This will likely will mean putting into place more robust controls and practices around how a "comparable" price reference is derived. While retailers will not have access to competitors' sales information, they can research competitor prices online or at stores. Choosing as the comparison price only the highest price observed at a single outlet will be riskier than choosing a price advertised extensively by others. The latter is easier to defend as a "prevailing" price while the former could easily be discounted as isolated and insignificant. Retailers choosing to compare discounts to their own former prices should ensure that the products were offered at the former price for a reasonable period of time in the recent past. For example, some states, including California, require that former prices be the prevailing price at which the product was offered in the prior three months. See supra at n. 11. Pricing personnel should receive regular training on pricing laws and company policies. Comparison prices should be updated on a periodic basis so they do not become stale, and retailers, especially large retailers, should consider a periodic internal audit/approval process to ensure that comparisons are defensible.

Third, retailers should (1) document and (2) preserve records showing the work they put into deriving accurate and contemporaneous reference prices. Without written records of what was done, pricing personnel will unlikely remember what they did to verify any price, let alone the hundreds of prices over time that are typically at issue in any litigation. Factfinders may also disbelieve retailers who claim price verification without written records or at least conclude that the lack of written records demonstrates a lack of seriousness in documenting accurate prices. Whatever survey information was relied upon in adopting reference prices should be preserved for the length of any applicable statute of limitations period. In California, the four-year limitations period under the Unfair Competition Law would be a sensible guide.

Fourth, retailers should consider the context and ordinary meaning of terms used in any comparative pricing claims. For example, "Compare to MSRP" will be more meaningful than simply "Compare At" if the reference is to MSRP.[45] Similarly, if the comparison reference price is at the higher end of the spectrum of observed prices elsewhere, consider adding descriptive language to the comparison, such as "up to__ elsewhere."

Fifth, retailers should where possible provide customers with accessible disclosure of the meaning of terms used in any comparative pricing claims. Thus, for example, if a "Compare At" price is meant to refer to a "comparable value," item, and not the same exact item, that fact should be disclosed to customers at point of sale. This is easier to do for online sales where terms and conditions can be provided

45 This is example is used for illustrative purposes only. Thus, as described elsewhere herein, any reference to MSRP can be risky if actual sales do not occur at MSRP. But the point is to include enough information in the description so as to avoid misinterpretation.

to customers prior to check out. Even there, retailers should consider the conspicuousness considerations set forth in the FTC guides for .com disclosures or in other applicable state law. While point of sale disclosures are more difficult for brick and mortar stores, retailers should consider making the most important disclosures on any "Compare At" type labeling or at least on signage in the stores. If detailed disclosures are not practical, consider at least signage that says something like: "For more information on our 'Compare At' Prices, Please Consult A Sales Associate or visit www.___.com" Sales representatives should then be given scripts with appropriate disclosures that can be provided on request.

Sixth, certainly for any online sales, retailers should consider adding a class-waiver arbitration provision to the terms and conditions of service. The provision should clearly and conspicuously disclose that by buying items online, customers are (1) agreeing to individually arbitrate any disputes arising out of or relating in any way to their purchases, (2) waiving any right to a trial in court or by jury and (3) waiving any right to proceed in arbitration or elsewhere is a class or other representative capacity.

Seventh, retailers should consider offering a written price guaranty or other money back policy to dissatisfied customers who claim they were misled by any price comparison and should advertise the guaranty as part of any price claim. While perhaps not dispositive from a legal perspective, courts may be less likely to certify a class where consumers have a much simpler, convenient and expeditious remedy that would afford them complete relief.


## C. Brandon Wisoff

**Partner**
**Farella Braun + Martel (San Francisco, CA)**

**415.954.4449 | bwisoff@fbm.com**
**http://www.fbm.com/C_Brandon_Wisoff/**


Brandon Wisoff has a broad-based commercial trial practice both in state and federal courts. Mr. Wisoff has extensive experience representing both plaintiffs and defendants in complex class action, securities, commodities, antitrust, financial institution and consumer unfair business practices litigation. He formerly served as chair of the firm's Business Litigation Group.

Mr. Wisoff, representing the qui tam plaintiff joined by the State of California and hundreds of local governments, was one of the lead trial lawyers in a precedent-setting class action false claims case brought against a paying agent bank which resulted in a $187.5 million settlement after the completion of the first phase of a bifurcated trial. In a case alleging unfair business practices against a major credit card company, he obtained outright dismissal of all claims against the company on the first day of trial. He obtained a defense judgment following trial for a long-distance telecommunications firm sued on behalf of the general public in a consumer unfair business practices action. As lead class counsel in a nationwide commodity fraud action, he recovered a $40 million settlement of investor losses following a five-month federal jury trial.

Mr. Wisoff is a frequent lecturer on consumer class action claims under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL") and Consumer Legal Remedies Act ("CLRA"). He has defended numerous businesses, including retailers, manufacturers, product distributors, pharmacies, leasing and financing companies, against consumer claims alleging false advertising, unlawful pricing practices, the sale of defective products, unlawful call recording and for violations of the Telephone Consumer Protection Act ("TCPA").

He has also defended numerous securities class action and derivative claims involving allegations of options backdating, unlawful revenue recognition and misleading proxy statements. These actions have frequently involved parallel SEC enforcement actions and DOJ investigations.

In the antitrust area, Mr. Wisoff obtained summary judgment in favor a nationwide retailer that had been named as a defendant class representative in a consumer class action alleging a vertical price fixing conspiracy. He also reached an early favorable settlement on behalf of an international oil company client that had been sued by the State of Hawaii for alleged horizontal price fixing of the gasoline market.

Mr. Wisoff is also experienced in the area of energy litigation, having represented California's electric grid operator in a variety of claims arising from extraordinary price volatility in the wholesale electricity markets. He is listed in The Best Lawyers in America in the area of Commercial Litigation and Northern California Super Lawyers in the area of Business Litigation.

**Related Practices**
- Antitrust
- Business Litigation
- White Collar Crime and Internal Corporate Investigations

**Education**
- University of California, Berkeley, School of Law (J.D., 1985), Order of the Coif; Executive Editor, California Law Review

# Changing The Narrative In Employment Discrimination Cases

**Blake Marks-Dias**
**Corr Cronin Michelson Baumgardner Fogg & Moore (Seattle, WA)**
**206.501.3509 | bmarksdias@corrcronin.com**

Changing the Narrative in Employment Discrimination Cases

BLAKE MARKS-DIAS

CORR
CRONIN
MICHELSON
BAUMGARDNER
FOGG & MOORE LLP

*The general decline of the civil jury trial*

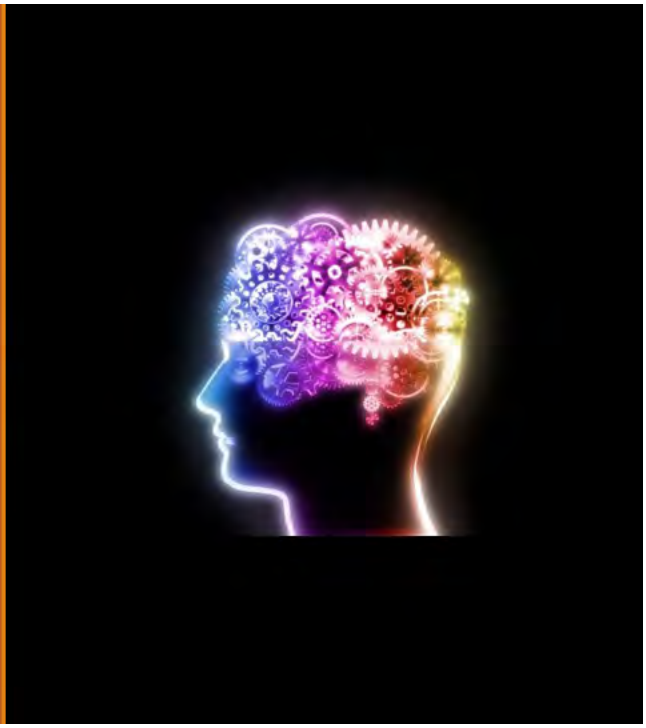
*Employment discrimination cases are an exception*

The percentage of employment discrimination trials in U.S. District Courts involving a jury increased **from 40% in 1990 to 86% in 2006**.

# Narrative in Jury Trials

ACCEPTING, AND UTILIZING, THE INEVITABLE

The Power of Narrative



"We dream in narrative, day-dream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revise, criticize, gossip, learn, hate and love by narrative."

-BARBARA HARDY

## The "Pentad" of a Story

- Actor
- Action
- Goal
- Scene
- Trouble

# Shifting the Focus

WHY, AND HOW, YOU SHOULD SHIFT THE STORY TO THE PLAINTIFF

*"I would never have done that."*

## Starting in Second Place

- Public Perception and Juror Biases
- First to Frame the Issues
- Jury Instructions

WIRED

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**TECH STILL DOESN'T TAKE DISCRIMINATION SERIOUSLY**

THE WALL STREET JOURNAL.

TECH

**U.S. Sues Oracle, Alleging Salary and Hiring Discrimination**

Labor Department alleges technology company pays white men more; favors Asian recruits for some jobs

The Washington Post

**Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company**

The New York Times

TECHNOLOGY

***Inside Uber's Aggressive, Unrestrained Workplace Culture***

## First to Frame the Issues

## Jury Instructions

To establish her "disparate treatment claim," Plaintiff has the burden of proving:

(1)That **Defendant** terminated Plaintiff; and

(2)That Plaintiff's national origin was a substantial factor in **Defendant's decision** to terminate.

## Jury Instructions

To establish its requirement is a bona fide occupational qualification, **Defendant** has the burden of proving:

(1)That **Defendant** applies the requirement uniformly to all applicants or candidates for the job; and

(2)That excluding individuals was essential to the purposes of the position.

# Jury Instructions

To establish his harassment claim, Plaintiff has the burden of proving:

. . .

That this language or conduct was **unwelcome** in the sense that Plaintiff regarded the conduct as undesirable and offensive, **and did not solicit or incite it**; . . .


Employment discrimination cases are increasingly getting past summary judgment and into trial. Too often, the defense focuses primarily on what the company did or did not do. This narrative plays right into the plaintiff's hands—the more the jurors talk about the company's actions (or inaction), the more opportunity for them to pick it apart. A winning strategy requires the defense to change the narrative, in subtle and respectful ways, leading the jury to instead focus on the plaintiff's conduct.

**Employment Cases Must be Prepared for Trial**

Legal scholarship of the last 20 years has bombarded readers with reminders that trial, and the jury trial in particular, is a dying art in this business. It takes little searching to find entire books on the "The Death of the American Trial" or law review articles opining on "The Decline of Civil Jury Trials." While there is no doubt that the likelihood of reaching civil trial in general has dissipated, that trend is not applicable across the board. Practitioners in the field of employment discrimination in particular need to be prepared to try their case.

Civil rights laws underwent major growth during the early 1990s[1] which expanded the types of claims and relief available to plaintiffs and broadened the scope of employment practices considered discriminatory.[2] For this and other reasons, employment discrimination claims accounted for about half of all civil rights filings in U.S. district courts from 1990 to 2006.[3] Further, the percentage of employment discrimination trials involving a jury in this courts increased from 40% in 1990 to 86% in 2006.[4]

A 2005 report from the Bureau of Justice Statistics provides a wealth of information on growing trends in state cases.[5] For example, in deep contrast with other types of civil trials, 91% of employment discrimination cases that made it to trial were decided by a jury as opposed to a bench trial.[6] Plaintiffs won in over 60% of all cases tried, and almost 65% of the time in jury trials.[7] A study of final awards from trials with plaintiff winners in state courts in 2001 in the nation's 75 largest counties found that 16% of plaintiffs won an award of over $1 million, with over 43% receiving over $250,000.[8]

Because employment discrimination cases are increasingly being tried before a jury, and because of the monetary risk they impose for employers, practitioners and their employer

1 Examples of this expansion include the passage of the Americans for Disabilities Act of 1990 and the Civil Rights Act of 1991. The Civil Rights Act of 1991 amended several federal employment discrimination laws including Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1871, the Age Discrimination in Employment Act of 1973, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990.

2 Civil Rights Complaints in U.S. District Courts, 1990-2006, Bureau of Justice Statistics 2 (available at https://www.bjs.gov/content/pub/pdf/crcusdc06.pdf).

3 *Id.*

4 *Id.* at 6.

5 Contract Bench and Jury Trials in State Courts, 2005, Bureau of Justice Statistics (available at https://www.bjs.gov/content/pub/pdf/cbajtsc05.pdf).

6 *Id.* at 2.

7 *Id.* at 4.

8 Contract Trials and Verdicts in Large Counties, 2001, Bureau of Justice Statistics 5 (available at https://www.bjs.gov/content/pub/pdf/ctvlc01.pdf).

clients need to be ready to present the best case possible to the jury.

**Your Narrative Matters**

"[N]arrative, both fiction and nonfiction, will always be more alluring than a collection of facts—for better or worse—because narrative is rooted in the human experience."[9] Indeed, this allure is one of the numerous reasons why trial lawyers are taught to weave a story in their case as opposed to merely presenting the facts. Storytelling has a deep human history, and provides the lens through which we interpret the world around us.

"Many social scientists who study juries have concluded that they interpret information not by considering and weighing each relevant piece of evidence in turn, but by constructing competing narratives and then deciding which story is more persuasive."[10] Thus, a juror will likely unconsciously rely on narrative to arrive at their verdict, and simply marching all the facts before them may not help in generating the best outcome. Further, "[j]urors are often instructed to interpret the evidence in light of their common sense and their experience in life, and they are traditionally praised by commentators for the perspective that they bring to the courtroom."[11] A combination of their natural inclinations and the subjective standards that govern our judicial system make it almost inevitable that a juror will impose some of their internal narrative, as well as the provided external narratives, onto your evidence.

Kenneth Burke, an American literary theorist, proposed that a well-formed story is composed of a "pentad" including "an Actor, an Action, a Goal, a Scene, and an Instrument—plus Trouble."[12] In an employment discrimination suit, the facts before the jury often involve the employer as the "actor" whose actions cause "trouble." This is why outlining exhaustive evidence explaining the actions of the employer – even positive actions – can hurt a case. "Experimental research has yielded the insight that jurors do not, by and large, estimate probabilities when determining the events that transpired in a case; rather, they draw conclusions based on whether information assembles into plausible narratives."[13] Thus, while you may envision the evidence involving the employer's actions as weighing on the "probable" side of no wrongdoing, pushing the focus onto the employer may backfire if your explanation does not align with the juror's "plausible narrative." Thus, shifting the focus to actions taken, or not taken, by the Plaintiff can be a valuable way to guide the jury into the narrative you desire. "[T]rials can best be understood as a hybrid of subjective and objective approaches to the interpretation of facts," and therefore, opportunities exist in presenting evidence for attorneys to "increase analytic processing" in ways valuable to their client's case.[14]

Writers are often taught the ominous sounding mantra to "murder your darlings."[15] For a writer, it is a reminder to purge anything that departs from your overall work out of your piece. It may be a detail or storyline that resonates strongly with you, or a vivid point that feels earth-changing—but if it digresses from your story, you have to delete it. This lesson can be duly imposed on a trial attorney; while you will be immersed and captivated by every detail of your case, and every piece of evidence that leans on the "good" side for you, that does not mean it must, or even should, be in front of the jury. Resist the temptation to describe every single action taken by the company. Less is more, and anything that slows, distracts, or confuses from the overall storyline you seek to create is doing you a disservice.

**Shifting Focus to the Plaintiff**

Civil jury trials are structured in a way that puts the defendant a step behind out of the gate. Although the plaintiff may have the burden of proof, they also have the opportunity to frame the issues first. Once that storyline has stuck, defendants often spend the remaining time in trial on their heels, playing defense.

Within this structural difficulty, a common, reasonable defense mistake in employment discrimination trials is choosing to focus on the company's actions as opposed to actions or inactions of the plaintiff. It is an understandable mistake, as the blueprint of an employment discrimination case naturally errs toward a focus on the employer. For example, pattern jury instructions are generally tailored with a focus on the actions and decisions made by the employer:

> To establish [his] [her] "disparate treatment claim," (name of plaintiff) has the burden of proving each of the following propositions:
>
> (1) That (name of defendant) [terminated] [did not promote] [did not hire] [laid off] [(other tangible adverse action)] (name of plaintiff); and
>
> (2) That (name of plaintiff's) [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status] was a substantial

9 Lamb-Sinclair, Ashley, When Narrative Matters More Than Fact (The Atlantic, January 9, 2017) (available at https://www.theatlantic.com/education/archive/2017/01/when-narrative-matters-more-than-fact/512273/). Ms. Lamb-Sinclair is a high-school English teacher, the 2016 Kentucky Teacher of the Year, and the founder and CEO of Curio Learning.

10 Kern Griffin, Lisa, Narrative, Truth, and Trial, 101 Georgetown Law Journal 281, 285 (available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5450&context=faculty_scholarship).

11 *Id.* at 305.

12 Jerome Bruner, Acts of Meaning 50 (1990).

13 Kern Griffin, Lisa, Narrative, Truth, and Trial 293.

14 *Id.* at 285.

15 The phrase is widely attributed to Arthur Quiller-Couch, via his 1913-1914 Cambridge lectures "On the Art of Writing."

> factor in (name of defendant's) decision [to terminate] [not to promote] [not to hire] [to lay off] [(other tangible adverse action)].

Wash. Pattern Jury Instr. Civ. WPI 330.01 (6th ed.). In these instructions it is the defendant who is the entity behind the verb and the plaintiff who is the entity being affected. The actions of the employer are necessarily thrust into the spotlight. This focus is further emphasized if your case relies upon one or more affirmative defenses. For example:

To establish that [his] [her] [its] requirement is a bona fide occupational qualification, (name of defendant) has the burden of proving each of the following propositions:

> (1) That (name of defendant) applies the requirement uniformly to all applicants or candidates for the job; [and]
>
> (2) [That all or substantially all individuals who fail to meet the requirement are unable to perform the job safely and efficiently];[or] [and] [that excluding individuals was essential to the purposes of the position.]

Wash. Pattern Jury Instr. Civ. WPI 330.04 (6th ed.). Here, not only are the actions of the employer at interest, but additionally, the burden of proof is on their shoulders.

This is not to say that these types of instruction and all the evidence relevant to them should be avoided. You must, of course, address the relevant instructions. It is, instead, a matter of primary focus. To the extent that employers can avoid exacerbating this problem, and can shift the focus onto the actions of the plaintiff, it will help in crafting a winning narrative for the jury to align with. In viewing trials as a narrative, "readers necessarily become participants in the story."[16] Popular behavioral models "posit[] jurors speculating about facts external to the trial in order to complete the picture." Thus, any information you put before the jury will be dissected through their worldview, as "[r]eaders construct the events themselves 'in the light of the overall narrative,' and by the time an audience confronts a story, 'readers necessarily become coauthors of and participants in that world.'" With this understanding, imagine two scenarios in the jury deliberation room: in the first, they spend an hour discussing the actions taken by the employer, and in the second, they spend an hour discussing the actions taken by the plaintiff. Inevitably, they will find fault with either if they spend that much time debating the evidence. You want to put your client in the more favorable position of scenario two.

One way to do this is to emphasize the parts within the instructions that pull the focus away from the employer's actions. For example, in a sexual harassment, or quid pro quo, case, instructions often require:

To establish [his] [her] claim of sexual harassment, (name of plaintiff) has the burden of proving each of the following propositions:

> (1) That a [supervisor] [manager] subjected (name of plaintiff) to unwelcome sexual conduct or advances; and . . .

Wash. Pattern Jury Instr. Civ. WPI 330.22 (6th ed.) (emphasis added). Here, although the instructions again focus on the actions of the employer, the qualification of "unwelcome" provides an avenue to address the actions, or inactions, of the plaintiff. Another example can be found in instructions for hostile work environment cases, where the plaintiff must prove:

> (1) That there was language or conduct [concerning age] [concerning creed] [concerning a disability] [concerning marital status] [concerning national origin] [concerning sexual orientation] [concerning honorably discharged veteran status] [concerning military status] [of a racial nature] [of a religious nature] [of a sexual nature], or that occurred because of the plaintiff's [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status];
>
> (2) That this language or conduct was unwelcome in the sense that (name of plaintiff) regarded the conduct as undesirable and offensive, and did not solicit or incite it; . . .

Wash. Pattern Jury Instr. Civ. WPI 330.23 (6th ed.) (emphasis added). Again, the plaintiff will bear the burden of proving their own conduct was not welcoming, soliciting, or inciting. Lawyers can take the opportunity to focus on witnesses' interpretations of the plaintiff's behavior, or evidence like inter-office correspondence that supports the employer's case.

In addition, aside from potentially worrisome emails, employment cases tend not to be document intensive. Thus, witness testimony can quickly become the backbone, or Achilles' heel, of a case. Therefore, cross-examination is a vital time to employ the strategy of maintaining focus on the actions and inactions of the plaintiff. Indeed, "[t]he goal of cross-examination at trial should be to minimize the importance of the witness's direct examination and to avoid actually presenting evidence that supports the opposing party's case."[17]

16 Kern Griffin, Lisa, Narrative, Truth, and Trial 306.

17 Employment Law Trials: A Practical Guide 116 (available at http://media.straffordpub.com/products/witness-examination-strategies-in-employment-litigation-2013-01-23/reference-materials.

Therein lies the real question: how to focus on the plaintiff without being so aggressive that the jury turns against you. The topics addressed in employment cases are sensitive, and the concern that a lawyer will appear arrogant or attacking is heightened. Instead, retain control of the questioning, and maintain the focus on the plaintiff. This is the time to focus on negative performance reviews, the plaintiff's failure to report or follow employment guidelines and procedures, and the plaintiff's own inappropriate behaviors in the workplace.

In addition to cross-examination, there are many opportunities in the trial where lawyers can strengthen their case by focusing the lens on the plaintiff: opening statement and closing argument, illustrative exhibits (e.g., a calendar showing absences at work; etc.), direct examination, and careful objections all give the opportunity to shape the narrative that the jury will deliberate on. Take each of these opportunities to focus primarily on what the plaintiff did or did not do. The more the jurors hear about this evidence, the more opportunity for them to dissect it. A winning strategy requires the defense to change the narrative, in subtle and respectful ways, leading the jury to focus on the plaintiff's conduct, and, in turn, the employer's reasonable defense.

Ideally, but not always practically, implementation of this strategy begins before the lawsuit is filed. Shifting the focus onto the plaintiff is, naturally, much easier when there is objective evidence to support. A manager's testimony regarding an employee's poor performance is one thing; a well-written performance evaluation (i.e., trial exhibit) is quite another. Written (visual) evidence is far more persuasive than oral testimony alone. Visual evidence is also much more likely to be remembered during deliberations. Proper documentation of an employee's shortcomings, failures to meet job expectations, etc., is therefore not only good business practice – it is a highly powerful risk management tool.

pdf).


## Blake Marks-Dias

**Partner**

**Corr Cronin Michelson Baumgardner Fogg & Moore (Seattle, WA)**

**206.501.3509 | bmarksdias@corrcronin.com**

**http://www.corrcronin.com/our-team/blake-marks-dias/**


Blake is a partner in the firm. His practice focuses on cases which the client "must win" and, when necessary, which must be tried. Blake has been widely recognized by his peers for his trial skills. He has consistently been listed as a Washington Super Lawyer (top 5% of attorneys statewide), and in 2016 was listed as a Top 100 Super Lawyer. He is on the faculty of the National Institute for Trial Advocacy.

Blake is also actively engaged in the community. He is the President of the Board of Northwest Health Law Advocates (NoHLA) and is a member of the Board of Trustees for Childhaven.

Prior to joining the firm, Blake was a partner at Riddell Williams where he represented a broad mix of clients in complex litigation. In college, he earned the award of the top individual debater in the nation. He and his partner finished second in the 1995 national tournament (final round transcript published in one of the leading college speech and communications textbooks: Freeley and Steinberg, Argumentation and Debate (12th ed. 2009)).

**Representative Cases**

- Defense verdict for Fortune 50 client following jury trial in employment discrimination case.
- Defense verdict following a three-week jury trial on behalf of the University of Washington in alleged employment discrimination case.
- Favorable property valuation following two-week jury trial for public utility client in condemnation case.
- Multi-million dollar recovery on behalf of investor client in case involving mix of contract and professional negligence claims.
- Defense verdict following a three-week jury trial in Portland, Oregon, on behalf of client weatherproofing membrane manufacturer and its product consultant. The case involved a mix of product liability and professional liability claims.
- Dees v. Allstate, 933 F. Supp. 2d (W.D. Wash. 2013) – dismissing, on summary judgment, plaintiff's insurance bad faith and Insurance Fair Conduct Act claims related to plaintiff's PIP policy, and limiting plaintiff's recoverable damages.
- Suzlon Energy Ltd. v. Microsoft, 671 F.3d 726 (9th Circuit 2011) – finding Electronic Communications Privacy Act's protections applicable to foreigners in case of first impression.
- Unthaksinkun v. Porter, 2011 WL 4502050 (W.D. Wash. 2011) – order affirming motion for class certification and for preliminary injunction in case arising out of state's unlawful termination of health care benefits for over 11,000 class members.
- Somal v. Allstate, 165 Wn. App. 1025 (2012) – reversal of trial court and remand for dismissal of putative class action claims based on insurer's alleged duty to share recovery of deductibles.

**Professional Honors**

- Blake has been designated a Washington Super Lawyer® and Washington Top 100 Super Lawyer®.

**Education / Background**

- Blake received his B.A. from Gonzaga University, cum laude, in 1995. He received his J.D. from the University of Washington School of Law in 1998, where he was selected as a member of the Order of the Barristers and Moot Court Honor Board. He competed at the world finals of the Jessup Moot Court Competition.
- Blake is admitted to practice in Washington, Oregon, the Eastern and Western Districts of Washington, and the U.S. Court of Appeals for the Ninth Circuit.
- Member of American Bar Association, King County Bar Association and Washington State Bar Association

# Dude, Where's My Car??
# A Glimpse Of
# The Future Of Mobility

**Emily Frascaroli**
**Ford Motor Company**
**313.845.1376 | efrascar@ford.com**


Why the focus on Mobility?

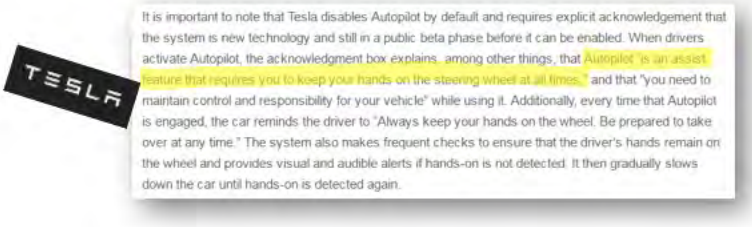

What is Mobility?


Inside the Self-Driving Tesla Fatal Accident

By ANJALI SINGHVI and KARL RUSSELL UPDATED July 12, 2016

The New York Times

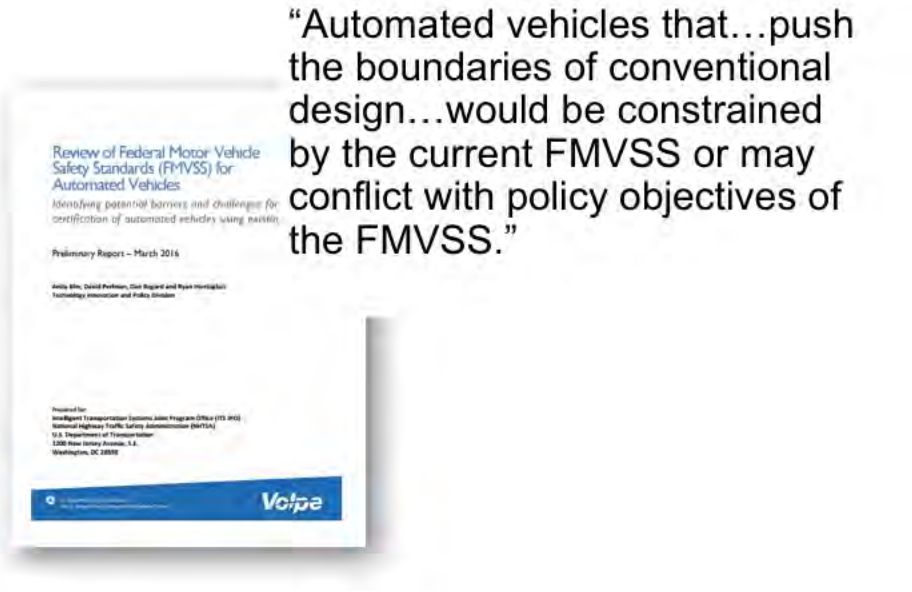
After Joshua Brown, 40, of Canton, Ohio, was killed driving a Tesla Model S in the first fatality involving a self-driving car, questions have arisen about the safety of the car's crash-avoidance Autopilot system. Tesla told Senate investigators that a "technical failure" of the automatic braking system played a role but maintains that Autopilot was not at fault.



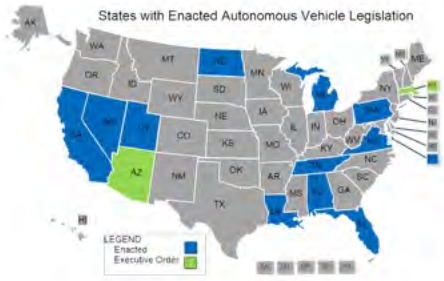
TESLA

It is important to note that Tesla disables Autopilot by default and requires explicit acknowledgement that the system is new technology and still in a public beta phase before it can be enabled. When drivers activate Autopilot, the acknowledgment box explains, among other things, that Autopilot "is an assist feature that requires you to keep your hands on the steering wheel at all times," and that "you need to maintain control and responsibility for your vehicle" while using it. Additionally, every time that Autopilot is engaged, the car reminds the driver to "Always keep your hands on the wheel. Be prepared to take over at any time." The system also makes frequent checks to ensure that the driver's hands remain on the wheel and provides visual and audible alerts if hands-on is not detected. It then gradually slows down the car until hands-on is detected again.

| SAE LEVELS OF AUTOMATION | | EXAMPLES |
|---|---|---|
| Human monitors the driving environment | | |
| 0 | No Automation | Lane Departure Warning |
| 1 | Driver Assistance | Automatic Emergency Braking<br>Adaptive Cruise Control |
| 2 | Partial Automation | Tesla Autopilot<br>GM Super Cruise |
| Automated Driving System Monitors the Environment | | |
| 3 | Conditional Automation | |
| 4 | High Automation | Google Car |
| 5 | Full Automation | |


"Automated vehicles that…push the boundaries of conventional design…would be constrained by the current FMVSS or may conflict with policy objectives of the FMVSS."
Review of Federal Motor Vehicle Safety Standards (FMVSS) for Automated Vehicles
Identifying potential barriers and challenges for certification of automated vehicles using existing
Preliminary Report – March 2016
Volpe


Federal Automated Vehicles Policy
U.S. Department of Transportation
Accelerating the Next Revolution In Roadway Safety
NHTSA
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION
September 2016


States with Enacted Autonomous Vehicle Legislation
LEGEND
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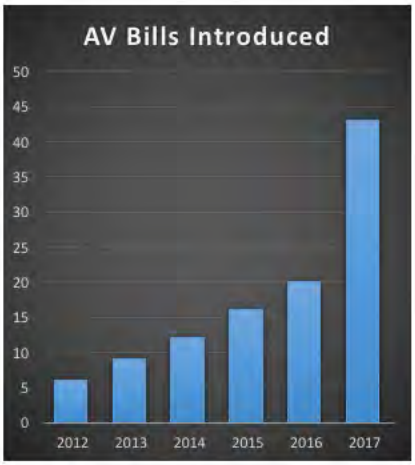
Executive Order


AV Bills Introduced
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S.MAIL


LAW JOURNAL
Liability Issues Create Potholes on the Road to Driverless Cars
"While technology is usually described as an enabler of autonomous vehicles, liability is often described as an impediment."
Liability could be roadblock for driverless cars
What about liability? Insurance?
No Need For Insurance: How Self-Driving Cars Will Disrupt A $200 Billion Industry
Will Lawsuits Kill The Autonomous Car?
Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles
Santa Clara Law Review
12-17-2012
The Coming Collision Between Autonomous Vehicles and the Liability System


Driver
Infrastructure
Who is at fault?
Manufacturer
Other


**The Future of Mobility: Changing the Way We Will Get to Where We Want to Go**
*Patrick X. Fowler - Snell & Wilmer LLP*

**What is Mobility?**

Mobility is how we choose to get around. While it applies to all scopes of movement – global, international, local or even within own homes – this presentation is focused on local and regional mobility (e.g., how we get around within the Phoenix metro area, or how we get between Phoenix and Tucson), and how it is evolving in real time.

**Is Mobility Evolving?**

Yes, certainly in the United States. Automobiles and mass transit (rail and bus, mostly) have been around for more than a century. They are not going away, but they may be augmented (Hyperloop, anyone?); moreover, how we use them is clearly changing, especially the automobile.

Particularly with respect to younger adults, there is a shift away from owning and driving personal automobiles compared to past generations, while there is a concurrent increase in the use of alternative mobility platforms – public transit, ride sharing, bicycles and walking. Even after accounting for the great recession, vehicle ownership rates and distance driven rates have decreased after hitting historical peaks in the early 2000s. Additionally, automotive technology is fundamentally changing towards more automated features (driver assist, automatic emergency braking, lane minding, self-parking, etc.) with the end-game being fully self-driving vehicles, perhaps in the next decade.

**What Do Studies Show?**

Vehicle ownership rates and distance driven rates in the United States have dropped since peaking in the early 2000s.

> In a study update released last month by the University of Michigan's Sustainable Worldwide Transportation research consortium, the vehicle-ownership rates per person and per household both reached their peak in 2006. The two rates for 2015 are down, on average, 4.4% from the 2006 peak.
>
> In addition, the distance-driven rates per person and per household both peaked in 2004. The two rates for 2015 are down, on average, 7.8% from their peaks.

America's young people are decreasing the amount they drive and increasing their use of transportation alternatives.

> Fewer young people are getting their driver's license. According to Federal Highway Administration, from 2000 to 2010, the share of 14 to 34-year-olds without a driver's license increased from 21% to 26%.

Fewer miles driven. According to the National Household Travel Survey, from 2001 to 2009, the annual number of vehicle-miles traveled by young people (16 to 34-year-olds) decreased from 10,300 miles to 7,900 miles per capita – a drop of 23%.

More use of public transit. From 2001 to 2009, the number of passenger-miles traveled by 16 to 34-year-olds on public transit increased by 40% per capita.

More bike trips. In 2009, 16 to 34-year-olds took 24% more bike trips than they took in 2001, despite the age group actually shrinking in size by 2%.

More walking. In 2009, 16 to 34-year-olds walked to destinations 16% more frequently than did 16 to 34-year-olds living in 2001.

Young people's transportation priorities and preferences differ from those of older generations.

According to a recent survey by KRC Research and Zipcar, 45% of young people (18-34 years old) polled said they have made an effort to replace driving with transportation alternatives – this is compared with approximately 32% of all older populations.

Many of America's youth prefer to live places where they can easily walk, bike, and take public transportation.

The National Association for Realtors reports that young people are the generation most likely to prefer to live in an area characterized by nearby shopping, restaurants, schools, and public transportation as opposed to sprawl.

Some young people reduce their driving to lessen their environmental impact.

In the KRC Zipcar survey, 16% of 18 to 34-year-olds polled said they strongly agreed with the statement, "I want to protect the environment, so I drive less." This is compared to approximately 9% of older generations[1].

**What Other Factors May Be Involved?**

Personal financial choices – student loan debts vs. car loan eligibility, funds for car payment, car insurance, gas money, monthly parking charges.

Availability of alternatives – telecommuting option, ride sharing, bike-sharing, fractional ownership, more cities with mass transit, bike lanes, etc.

Market forces – the shift to ride-sharing and self-driving vehicles is rapidly occurring because of the perceived efficiencies and cost-savings. On-demand ride-sharing services, delivery services, over-the-road freight shippers are all investing in self-driving vehicle technology.

**What Are Some Potential Impacts of this Mobility Evolution?**

Changes in land use, zoning and infrastructure: If vehicle ownership significantly decreases over time, then possibly:

- Decreased roadway expansion
- Decreased need for parking lots
- Higher-density residential development, close to mass transit
- More expensive/politicized permitting and zoning procedures
- Decreased number of auto loans and financing
- Decreased need for auto insurance
- Decreased tax revenue from gasoline sales

**Autonomous vehicle development**

Ultimately, a large reduction in the more than 30,000 U.S. traffic fatalities each year.

But to get there, many changes will be required:

Continued improvements in technology – challenges remain with regard to hardware and software

Federal motor vehicle safety standards will need to be amended to allow for driver-less vehicles to be sold in the United States

Traffic laws must be amended to permit self-driving vehicles on public roads

Policy input on ethical issues that will arise with self-driving vehicles

Insurance laws and tort liability must evolve to address who will be liable for accidents involving self-driving cars

Will the public accept sharing the roads with self-driving cars and trucks that have no steering wheel or brake pedals?

Privacy issues will need to be addressed.

Trip records – where you went, when you went, how often you went – who owns and may access that data?

What house of worship do you visit?

1 See more at: http://www.frontiergroup.org/reports/fg/transportation-and-new-generation#sthash.JXU3CcUX.dpuf

Do you visit drinking establishments? How often?

Do you go to medical facilities? Which ones and how often?

Facial recognition – self-driving cars will be capable of capturing images all around them as they drive down the street.

Cybersecurity – protecting self-driving cars from being hacked and used as weapons by remote bad guys

Intellectual property issues will be huge with the application of self-driving technologies

A hot-house of new ideas, designs, processes that will need protection.


## Emily Frascaroli

**Counsel • Environmental, Safety & Regulatory**
**Ford Motor Company**

**313.845.1376 | efrascar@ford.com**
**http://www.ford.com**


Emily Frascaroli serves as counsel for Ford Motor Company, where she advises globally on automotive safety, regulatory, and product liability issues, including a focus on autonomous vehicles, mobility, and cybersecurity.

She has extensive experience handling regulatory matters with NHTSA and other governmental entities, product defect investigations, and complex product litigation cases.

She is also a lecturer at the University of Michigan Law School where she teaches a class about the legal issues involved with autonomous vehicles, and she is co-chair of the Legal and Insurance Working Group of the University of Michigan Mobility Transformation Center.

Prior to practicing law, she worked in engineering at both Ford and NASA (Dryden Flight Research Center).

**Education / Background**

- She earned her JD, cum laude, from Wayne State University (2001) and was an editor of the Wayne Law Review.
- She received her BS in aerospace engineering from the University of Southern California (1995) and her MEng in aerospace engineering from the University of Michigan (1996)

# Panel:
# Proactive Strategies For Compliance And The Protection Of Assets

**Sandra Heller**
**Akerman (Fort Lauderdale, FL)**
**954.463.2700 | sandra.heller@akerman.com**

## View From the General Counsel's Office:
## Proactive Strategies for Compliance and the Protection of Assets

**Moderator: Sandra Heller**

## Panelists:

- Lin Cherry
  HBO (Coral Gables, FL)
- Roger Franks
  KLX (Miami, FL)
- Peter Shakow
  UnitedHealth (Minnetonka, MN)
- Ashley Watson
  Merck & Co. (Rahway, NJ)

**What are the most challenging risk avoiding issues that you face?**


# Industry Specific

## Insurance

- **Insurance fraud is an $80 billion problem in the United States**

# Industry Specific

## Broadcasting

- Piracy/Fraud
- Compliance mis-steps
- Cross border issues
- TBD
- TBD

# Industry Specific

## Aviation Manufacturing & Distribution

- Inventory management services, demand planning
- OEM, military defense and aftermarket customer demands
- Global delivery
- Inspection authority
- Quality Assurance
- Delivery speed & accuracy
- TBD
- TBD

## Data Breaches

- 81,342 security events / 12, 017 attacks, 109 incidents (per average per company)
- Retail (33.2%)
- Technology (17.7)
- Government (17.42%)
- Financial (12.29%)
- Other (10.84%)
- Healthcare (8.55%)

## Corporate Employee Fraud

- 81% of companies
- Senior/Middle management responsible for 1 in 3 corporate frauds
- $3.7 Trillion in revenue lost to employee and executive fraud

**What are the most challenging issues that you look to outside counsel for assistance?**


**What are some examples of outside counsel adding value in security?**

**In compliance?**

**In risk avoidance?**


## Sandra L. Heller

**Partner**
**Akerman (Fort Lauderdale, FL)**

**954.463.2700 | sandra.heller@akerman.com**
**http://www.akerman.com/bios/bio.asp?id=1648**


Sandra Heller focuses her practice on the analysis, investigation, and litigation of civil recovery actions in health insurance fraud cases and multi-claim insurance fraud cases on behalf of large national carriers, resulting in the creation of impactful and transformative case law in this arena. Sandra has investigated and litigated insurance related matters involving Personal Injury Protection (PIP), Bodily Injury (BI), and Uninsured/Underinsured Motorist (UM) related coverages in both state and federal courts in Florida and other jurisdictions. Additionally, Sandra provides guidance and support to her insurance clients, including implementation strategies resulting from legislative changes and other key strategic concerns. Sandra has spoken extensively on insurance fraud related topics at numerous national conferences.

Sandra began her career as a District Attorney in Tarrant County, Fort Worth, Texas. She was a member of the elite Crimes Against Children's Unit, in which she took over 90 prosecutions to jury verdict.

**Practice**
- Fraud and Recovery

**Areas Of Experience**
- Corporate Theft
- Insurance Fraud
- Insurance Litigation

**Representative Experience**
- Representation of a major auto insurance carrier in Federal Court involving claims of Fraud, Florida Deceptive and Unfair Trade Practices Act and Unjust Enrichment against a medical provider.
- Representation of a major auto insurance carrier in State Court action involving Florida Deceptive and Unfair Trade Practices Act and Unjust Enrichment.
- Representation of a major auto insurance carrier in State Court declaratory action pertaining to allegations of provider coding and billing practices in contravention of American Medical Association guidelines and the Florida No Fault Act.
- Representation of clients in defense of claims against major auto insurance carriers and their insureds, wherein damages included certain spinal procedures performed on personal injury claimants.
- Representation of client in a matter involving counter-claims for fraud and unjust enrichment, on behalf of a major auto insurance carrier in an action including defense of breach of contract claims pertaining to Personal Injury Protection benefits.

**Education**
- J.D., Texas Tech University School of Law, 1994
- B.B.A., Texas A & M University, 1991; Management

# This Is A Conspiracy - And Everyone's In On It

**Steve Finley**
**Gibbons (Philadelphia, PA)**
**215.446.6265 | sfinley@gibbonslaw.com**

GIBBONS

## This is a Conspiracy – and Everyone's in on it!

Steve Finley
Gibbons P.C.
Philadelphia, Pennsylvania

gibbonslaw.com

## Conspiracy (def.)

- An agreement to do something illegal or to do something legal employing illegal means
- An intentional tort
- Not an independent cause of action

## Why Allege a Conspiracy?

- Inflame the tone of the litigation
- Apply added pressure to the defendant
- Plead around limitations to a cause of action
- Play games with jurisdiction or venue rules
- Expand the scope of discovery
- Introduce otherwise inadmissible evidence

## Pleading a Conspiracy Claim

"It generally takes fewer factual allegations to state a claim for simple battery than to state a claim for … conspiracy."

*W. Penn Allegheny Health Systems v. UPMC*, 627 F.3d 85, 98 (3rd Cir. 2010)

## Pleading a Conspiracy Claim

- Plaintiff must plead an intent to injure or harm motivated by malice toward the target of the conspiracy
- Some jurisdictions require additional showing that the sole purpose of the conspiracy was to harm the plaintiffs

## Defending a Conspiracy Claim

## Defending a Conspiracy Claim

Rule 12(b)(6) Considerations:

- *Twombly* involved conspiracy allegations
- "Generic pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*."

## Defending a Conspiracy Claim

Conspiracy typically pled concurrently with a fraud claim, so challenge the fraud claim:

- Is Rule 9 satisfied?
- Has scienter requirement been pled?
- Has reliance been pled sufficiently?
- Is fraud claim barred on facts pled?

## Defending a Conspiracy Claim

Beware of Gamesmanship

## Defending a Conspiracy Claim

- Not all causes of action support a claim for civil conspiracy
  - Breach of Contract
  - Negligence
  - Product Liability
  - Uniform Commercial Code
  - Statutory Causes of Action

## Defending a Conspiracy Claim

"Logic and case law dictate that a conspiracy to commit negligence is a non sequitur."

*Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416 (S.D. Fla. 1996).

## Defending a Conspiracy Claim

- It is "incomprehensible" that the defendants conspired to cause "damages under a strict liability theory…" *Campbell v. A.H. Robins Co.,* 615 F. Supp. 496 (W.D. Wis. 1985).
- State Product Liability Acts may preclude concurrent assertion of conspiracy claim.

## Defending a Conspiracy Claim

Parallel Conduct: when the left hand doesn't know what the right hand is doing

## Defending a Conspiracy Claim

Develop the Record:

- Contradictory allegations
- The "benevolent co-conspirator"
- Innocent conduct

## Defending a Conspiracy Claim

Present a Compelling Narrative

- Defense of contract, fraud and conspiracy claim involving a distribution agreement
- Manufacturer of a specialty coating alleged:
  1. Insufficient sales and marketing efforts
  2. Key personnel "conspired" to thwart sales

## Defending a Conspiracy Claim

- Motion to Dismiss Fraud and Conspiracy Allegations narrowed the claims
- Evidence showed:
  1. The plaintiff made first contact with defendant

## Defending a Conspiracy Claim

- *Evidence showed (cont.):*
  2. Key employees had never heard of the plaintiff

## Defending a Conspiracy Claim

- *Evidence showed (cont.):*
  3. Defendant spent thousands of dollars to perform under the agreement, appointed a "product champion" and passed up other opportunities to focus on the distribution agreement

When plaintiffs assert civil conspiracy claims, defendants find themselves facing allegations that they not only did something wrong, but that they did so as part of an illicit agreement with others to cause harm. Few events that lead to litigation, however, actually involve an agreement among the defendants to intentionally injure or damage the plaintiff. Yet civil conspiracy claims are far too common, needlessly turning routine cases into complex, protracted litigation. This article outlines how to defend against civil conspiracy claims.

A civil conspiracy is an agreement by two or more persons to do something illegal or to do something legal in an illegal manner or by illegal means. It is an intentional tort and requires an allegation and proof of intent to harm a plaintiff. A conspiracy count is generally not a standalone cause of action and cannot be maintained without a valid underlying claim.

**Challenging a Claim for Civil Conspiracy through a Motion to Dismiss**

A defendant confronted with a civil conspiracy claim should look to the United States Supreme Court's decision in Bell Atlantic Corp. v. Twombly, which involved consideration of conspiracy allegations. 550 U.S. 544 (2007). Twombly and its progeny are a defendant's primary means to attack the adequacy of a plaintiff's pleading of a conspiracy count through motion practice.

Pleading a conspiracy claim is no small task. "It generally takes fewer factual allegations to state a claim for simple battery than to state a claim for… conspiracy." W. Penn Allegheny Health Systems v. UPMC, 627 F.3d 85, 98 (3rd Cir. 2010). A plaintiff's burden in endeavoring to state a viable civil conspiracy claim is met only where the plaintiff alleges that a defendant acted with the intent to cause injury to the plaintiff, often described as "malice." Without sufficiently alleging an evil motive on the part of the defendant, the plaintiff has not stated a claim for conspiracy, and the claim should be dismissed at the pleadings stage. In some jurisdictions, the plaintiff must go one step further and plead that the sole purpose of the conspiracy was to harm the plaintiffs. See, e.g., Morilus v. Countrywide Home Loans, Inc., 651 F. Supp. 2d 292 (E.D. Pa. 2008).

It is also incumbent upon a plaintiff to articulate in the complaint, with respect to each supposed co-conspirator, facts that plausibly give rise to an entitlement of relief against that particular defendant. See, e.g., In re Elevator Antitrust Litigation, 502 F.3d 47, 50 (2d Cir. 2007) (holding that a complaint that lists "in entirely general terms without any specification of any particular activities by any particular defendant" is "nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatsoever."); see also Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552. F.3d 430, 436 (6th Cir. 2008)("[N]owhere did Plaintiffs allege when Defendant joined the … conspiracy, where or how this was accomplished, and by whom and for what purpose… [g]eneric pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by Twombly.") Additional pleading requirements should also be considered, such as the obligations imposed under Federal Rule of Civil Procedure 9 and its state rule analogues.

**Challenging the Underlying Cause of Action**

A claim for civil conspiracy is generally not a standalone cause of action and cannot be maintained without a viable underlying cause of action. See, e.g., Spain v. Brown & Williamson Tobacco Corp., 872 So. 2d 101, 123 (Ala. 2003) ("[C]onspiracy itself furnishes no cause of action. The gist of the action is not the conspiracy, but the underlying wrong that was allegedly committed. If the underlying cause of action is not viable, the conspiracy claim must also fail.") As a result, challenging the underlying cause of action, either through motion practice or armed with facts developed in discovery, is a key tool to defeat a plaintiff's civil conspiracy claim.

In every case involving a claim for civil conspiracy, there is a threshold question: has the plaintiff pled a viable cause of action that can serve as the underlying claim in support of the conspiracy claim? Many causes of action cannot, as a matter of law, serve as the underlying claim. For example, "[o]ne does not have a cause of action against another contracting party for conspiracy to breach the agreement between them." North Shore Bottling Co. v. C. Schmidt & Sons, Inc., 239 N.E. 2d 189, 193 (NY 1968). Claims for negligence also cannot substantiate a claim for civil conspiracy. Many courts find the notion of a "negligent conspiracy" to be completely illogical and inconsistent with the concepts of negligence. See, e.g., Sonnenreich v. Philip Morris Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996) ("Logic and case law dictate that a conspiracy to commit negligence is a non sequitur.") Likewise, product liability claims, regardless of the theory asserted, generally cannot serve as the predicate for a civil conspiracy claims. See, e.g., Campbell v. A.H. Robins Co., 615 F. Supp. 496, 500 (W.D. Wis. 1985) (explaining that it is "incomprehensible" to hold that the defendants conspired to cause "damages under a strict liability theory….") In states that have codified their product liability law, those product liability acts have been applied to prohibit a product liability plaintiff from maintaining a conspiracy claim. See, e.g., Brown v. Philip Morris, Inc., 228 F. Supp. 2d 506 (D.N.J. 2002) (holding that the New Jersey Product Liability Act subsumed the claim for civil conspiracy). Even a well pled complaint, with facts suggesting conspiratorial conduct by the defendants, cannot survive a motion to dismiss where the principal cause of action does not permit concurrent

assertion of a conspiracy claim.

**Develop Evidence of Innocent Motive and Good Conduct**
A civil conspiracy claim is an indictment of the defendant's motives. Therefore, evidence of innocent motive, benevolent intent, and good conduct all serve to undercut the plaintiff's allegations that a pernicious intent and a desire to do harm drove the wrongdoing claimed.

In many instances, what a plaintiff alleges is a common scheme to injure or harm is entirely innocent conduct. In Burnside v. Abbot Laboratories, the Pennsylvania Superior Court explained "[t]he mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy." 505 A.2d 973, 980 (Pa. Super. Ct. 1985). Complaints of perfectly legal activities have been consistently rejected when offered as evidence of conspiracy. For example, membership in trade associations and industry groups, while certainly done in concert with others, is not actionable as a conspiracy. See, e.g., Thomas v. Mallett, 701 N.W.2d 523 (Wis. 2005); see also Payton v. Abbot Labs., 512 F. Supp. 1031 (D. Mass. 1981).

Evidence reflecting a defendant's good conduct and altruistic motivations will stand in stark contrast to allegations of malicious wrongdoing. In the In re Welding Fume Prods. Liab. Litig., MDL, the court rejected a conspiracy claim against a manufacturer that was found to have worked at "cross-purposes" with the alleged conspiracy. 526 F. Supp. 2d 775, 803 (N.D. Ohio 2007). In In re Welding Fume, the plaintiffs alleged that the defendants took affirmative steps to prevent medical evaluations of plaintiffs. The record revealed, however, that one of the alleged "co-conspirators" first proposed the medical testing the plaintiffs claimed had been denied to them. This benevolent "co-conspirator" was awarded summary judgment, as the record clearly demonstrated the defendant's altruistic motivations, not malice towards the plaintiffs.

In defending a conspiracy claim, it is critical that a defendant develop record evidence of "good company" conduct and facts it can point to in a motion for summary judgment or at trial that refute the plaintiff's claim of "evil motive" and "malicious intent." These facts are not only critical to defending against a conspiracy claim, they also recognize the reality that few defendants accused of wrongdoing actually undertook to harm anyone.

Finally, beware of gamesmanship by plaintiffs asserting conspiracy claims. Efforts to use conspiracy claims to circumvent limitations on causes of action, create venue, or destroy diversity of citizenship are routinely rejected.

**Conclusion**
A civil conspiracy claim can turn a routine legal dispute into a far-reaching litigation. It is important to remember, however, that most routine legal disputes are just that and not the rare case where a civil conspiracy claim should survive motion practice. Where a civil conspiracy claim is pled, the defendant should respond with a motion to dismiss attacking the sufficiency of the allegations and the basis for the conspiracy claim. Should the conspiracy claim survive motion practice and progress to discovery, work to recast the case as a dispute involving common questions of negligence, breach of contract, product liability, or other routine claims that do not involve conspiratorial activities. Framing the case in this way, while developing a record disproving any pernicious motive, will bring an end to the plaintiff's claim for civil conspiracy.

**Stephen J. Finley, Jr.**
**Director, Products Liability**
**Gibbons (Philadelphia, PA)**

**215.446.6265 | sfinley@gibbonslaw.com**
**http://www.gibbonslaw.com/stephenfinley/**

Mr. Finley is a litigator who dedicates his practice to the defense of cases involving wrongful death, catastrophic personal injury, and major property loss. He defends companies involved in complex litigation, including multidistrict litigation, mass tort litigation, class action lawsuits, and serial lawsuits. A frequent author on emerging issues in products liability law, he has represented defendants facing novel products liability claims, such as publishers and patent holders. He has been selected to the Pennsylvania Super Lawyers Rising Stars list annually since 2010.

In addition to his product liability practice, Mr. Finley handles the prosecution and defense of commercial matters, including breach of contract disputes and business tort claims.

Mr. Finley is a member of the firm's E-Discovery Task Force and regularly publishes regarding developments in this area of the law. Mr. Finley is frequently called to represent the interests of defendants in complex products liability matters in the state and federal courts in Pennsylvania and New Jersey. He represents manufacturers and distributors of petrochemicals, pharmaceuticals, medical devices, industrial equipment, construction tools, building materials, juvenile products, and consumer goods. He has also defended the interests of non-traditional defendants in products liability cases, such as publishers and patent holders.

He also represents defendants in toxic tort litigation, such as those involving claims of exposure to asbestos, benzene, silica, polychlorinated biphenyls, and polyvinyl chloride.

Mr. Finley is a member of the Gibbons Electronic Discovery Task Force. He is frequently called to serve as the e-discovery liaison in the products liability and commercial cases he handles. In addition, Mr. Finley regularly publishes and lectures about key developments and important cases in the law of electronic discovery.

**Services**
- Business & Commercial Litigation
- Electronic Discovery & Information Management Counseling
- General Products
- Pharmaceutical & Medical Device
- Products Liability

**Professional Activities**
- Philadelphia Bar Association; State Civil Litigation Section
- Defense Research Institute

**Honors and Awards**
- Selected to the Pennsylvania Super Lawyers Rising Stars list, Personal Injury Products: Defense.

**Education / Background**
- Villanova University School of Law (J.D.)
- Catholic University of America (B.A.)

# ESI Discovery And Delivering On The Promise Of Proportionality

**Jason Lien**
**Maslon (Minneapolis, MN)**
**612.672.8319 | jason.lien@maslon.com**

## E-Discovery and Delivering on the Promise of Proportionality


Jason A. Lien
Maslon LLP

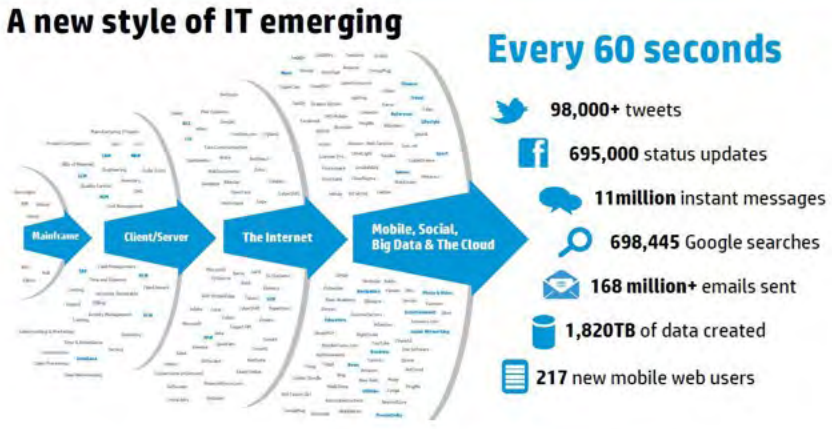


MASLON

## Agenda

- Impetus for 2015 Amendments to FRCP
- Changes Intended to Impact E-Discovery
- Have the Amendments Had an Impact?
- Tips for Using the Amended Rules to Your Advantage in E-Discovery

## The ESI Problem



## The ESI Problem

- Unintended consequences of 2006 Amendments to FRCP
- Increased burden on companies
- Increased and inconsistent use of e-discovery sanctions by courts
- Proportionality was all but forgotten

## The 2015 Amendments to FRCP

- 2010 Advisory Committee
- Rule 1 modified to set the tone
- Elevated the importance of proportionality
- Created a uniform standard for e-discovery sanctions

## The 2015 Amendments to FRCP

Revised Rule 26 "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."

- Chief Justice John Roberts

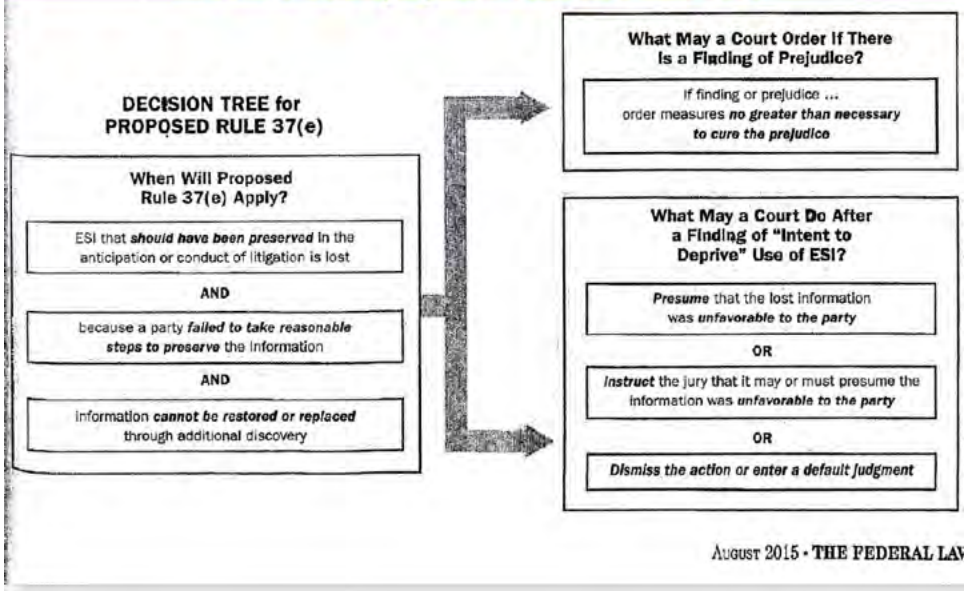
## Change to Rule 26(b)(1)

- Elimination of "reasonably calculated" language from definition
- Added explicit consideration of proportionality with factors
- New test for scope of discovery: relevant ***and*** proportional

## Amended Rule 37(e)

- Three part test for application of possible sanctions for ESI spoliation
- If three part test met, next step is to determine if there was intent to deprive or, if not, whether the court can make a finding of prejudice
- Only serious sanctions possible if an intent to deprive found

## Rule 37(e) Decision Tree

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## 2016 Decisions Applying Rule 26(b)

- *Gilead Sciences, Inc. v. Merck & Co.*, 2016 WL 146574 (N.D. Cal Jan. 13, 2016)
  - "Proportionality in discovery under the Federal Rules is nothing new."
  - "What will change-hopefully-is mindset. No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery is proportional to the needs of the case."

## 2016 Decisions Applying Rule 26(b)

- *Bell v. Reading Hospital*, 2016 WL 162991 (E.D. Pa. Jan. 14, 2016)
  - "[P]roportionality determinations are to be made on a case-by-case basis using the factors listed in Rule 26(b)(1), and [] no single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional."

## 2016 Decisions Applying Rule 26(b)

- *Wilmington Trust Co. v. AEP Generating Co.*, 2016 WL 860693 (S.D. Ohio Mar. 7, 2016)
  - Court denied a request that would have resulted in a production of a million pages of ESI.
  - After considering proportionality factors, court found that cost of searching and reviewing the ESI vastly outweighed the handful of relevant documents that might be produced.

## 2016 Decisions Applying Rule 37(e)

- *Nuvasive, Inc. v. Madsen Med. Inc.*, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016)
  - Prior to amendment, court granted sanctions for party's negligent failure to preserve text messages.
  - On reconsideration after Rule 37(e) amended, court vacated decision finding that the new rule did not permit sanctions based on mere negligence.

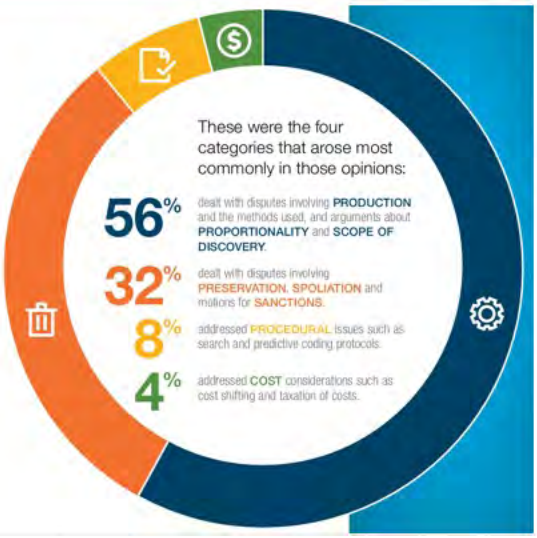
## 2016 Decisions Applying Rule 37(e)

- *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016)
  - Although met 3 steps to be eligible for sanctions under Rule 37(e), court declined to issue any.
  - No prejudice because majority of lost text messages were found elsewhere or were not important.
  - No finding of an "intent to deprive."

## Have the Changes Had an Impact?

- Too early to tell how changes will be embraced in the long term.
- However, initial decisions show courts are taking notice and following intent of drafters.
- Large number of cases applied proportionality in Rule 26(b) to rein in e-discovery.
- Many decisions applied Rule 37(e) to deny e-discovery sanctions altogether or make them proportional.

## December 8, 2016 Study by *Kroll Ontrack*




## Practice Tips

- Implement rule changes early during Rule 26(f) conference and case management.
- Include e-discovery provisions in scheduling order.
- If objecting to discovery, be specific, remember ***proportionality***, and know your costs.
- Implement reasonable ESI preservation plan to avoid sanctions altogether.

In 2010, the Advisory Committee on the Federal Rules of Civil Procedure sponsored a symposium to discuss current problems in civil litigation. A common theme emerged: the exponential growth of discovery-particularly e-discovery-had made civil litigation "too expensive, time consuming, and contentious."[1] The language of the rules lagged far behind the massive strides made in information storage and transfer over the past 20 years, which have drastically increased the amount of discoverable information available to litigants. The Advisory Committee then set about drafting amendments to the Federal Rules in the hopes of addressing these concerns, which went into effect on December 1, 2015. These amendments represented the most significant revisions to the Federal Rules in decades. This article first highlights two significant rule changes that were intended to impact e-discovery practice. Next, we examine whether these changes have had an appreciable impact on discovery and sanctions related to ESI. This article concludes by offering tips on how to make use of these rule changes to take control of e-discovery in your case.

**The Amendments Impacting E-Discovery**

A summary of the 2015 amendments to the Federal Rules are attached to this article in Appendix A. However, two major revisions stood alone in their potential impact on e-discovery practice: Rule 26's changed definition on the scope of discovery and Rule 37's clarification on spoliation sanctions. As explained below, both of these changes were made to specifically address problems that the Committee believed had developed over the years with e-discovery in federal cases.

The 2015 amendment to Rule 26(b)(1) removes a substantial amount of the rule's previous language, including the oft-cited phrase "reasonably calculated to lead to the discovery of admissible evidence." For years, this functioned as the only meaningful limit on the scope of discovery provided by Rule 26. In the Committee's estimation, this language led many courts to overlook the need for proportionality, so the Committee amended to rule to "restore the proportionality factors to their original place in defining the scope of discovery."[2] The new language allows discovery of any relevant, nonprivileged matter that is "proportional to the needs of the case."[3] Thus, to be discoverable, the new Rule 26(b)(1) requires the information be: (a) relevant to a party's claim or defenses and (b) proportional to the needs of the case. The rule then provides several factors to guide courts in making determinations of "proportionality": (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

The 2015 amendment to Rule 37(e) also represented a major change to the availability of spoliation sanctions for destroyed or lost ESI, which presented a welcome change to the defense bar and corporate legal departments. The amendment was intended to resolve a split in the circuit courts that had developed as to the duty to preserve ESI and the degree of culpability required for sanctions when ESI was destroyed or lost.[4] Amended Rule 37(e) now provides the following uniform test for federal courts to apply when addressing discovery sanctions for the failure to preserve ESI:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replacement through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.[5]

Accordingly, the new rule first requires an initial analysis of whether certain elements have been met before even considering sanctions, specifically whether the ESI should have been preserved, whether the ESI has been lost, whether the party took reasonable steps to preserve ESI, and whether the lost ESI can be restored or replaced through additional discovery. Only after clearing these hurdles can a court then consider one of two sets of possible remedies to address ESI spoliation. The first set of remedies under subsection (1) requires that, upon a finding a prejudice, the court may impose curative measures no greater than necessary to cure that prejudice. The second set of remedies

1 Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary*, p. 4.

2 Committee Notes, p. 19, Fed. R. Civ. P. 26(b)(1).

3 Fed. R. Civ. P. 26(b)(1).

4 H. Christopher Boehning and Denial J. Toal, *FRCP Amendments Take Effect, Impacting E-Discovery Practice*, New York Law Journal, Vol. 254-No. 104 (Dec. 1, 2015) (citing the Minutes of the April 10-11, 2014 Civil Rules Advisory Committee, p. 17 and the Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, p. 8).

5 Fed. R. Civ. P. 37(e).

under subsection (2) requires that, upon a finding of acting with intent to deprive another party of the ESI (irrespective of prejudice), a court may, at its discretion, impose one of three possible severe sanctions.[6] The Note to Rule 37(e) explains that the intent was to restrict a court's ability to use severe sanctions for only extreme cases and prohibit them from being applied in cases involving only negligence or gross negligence.[7]

**Initial Trends in Case Law Applying Proportionality and Sanctions**

The first cases applying the amendments to Rules 26 and 37 have established that, while some federal courts appear hesitant to apply the new language, many have jumped at the chance to limit wanton discovery and fishing expeditions and curtail the use of spoliation sanctions.

A. Some Courts Expressed Uncertainty

As might be expected, many federal courts have balked when first presented with disputes under the amended Rule 26. A number of cases make only conclusory references to proportionality, without providing any real guidance as to how they applied the language.[8] Some courts even continue to cite the "reasonably calculated" language, suggesting they are unaware of its deletion or simply reticent to alter their approach.[9] Presumably, as more courts examine the language and provide their interpretations, federal courts will begin to apply the proportionality principle with more consistency and increased vigor.

B. Relevancy Still Reins

As suggested by the rule's language, federal courts need not consult the proportionality factors if the information sought is not relevant. The court in Lightsquared Inc. v. Deere & Co. [10] acknowledged the new proportionality requirement, but found that, because the requests sought information far outside of the case's relevant time period, there was no need to address proportionality.

The threshold for relevant discovery is largely unchanged. As they did before the amendments, courts continue to use the language found in Federal Rule of Evidence 401 to determine whether information might be relevant.[11] Federal courts also continue to cite pre-amendment case law in relation to relevance inquiries, most notably the landmark 1978 decision laid out in Oppenheimer Fund v. Sanders, which ruled that "relevance" has been construed quite broadly in the discovery context.[12] In keeping with the Committee's hopes, however, many federal courts have not hesitated to deny discovery of relevant information if it is found to be disproportionate, as discussed below.

C. Application of Proportionality

While some federal courts have hesitated to apply the new language, many others have lauded the amended rule and willingly applied its new emphasis on proportionality. One district court suggested that the new language would lead to a whole new "mindset" that might "fix the scope of all discovery demands in the first instance."[13] Not all federal courts have been quite so effusive, but many have denied expansive ESI discovery that might have succeeded under the old standard.

The proportionality factors set out in Rule 26(b)(1) have no explicit hierarchy. In fact, the reference to the "amount in controversy" was moved from the first place in the list to prevent courts from giving it too much weight.[14] Federal courts seem to have taken note of this non-hierarchical approach and have tended to apply the factors relevant to the case in question. Thus far, where courts have found ESI requests disproportionate, they have relied on a handful of bases: the volume of documents produced by the request, the sufficiency of prior productions, and the cost-economic and otherwise-of producing the information. Federal courts have tended to consistently weigh each of these against the likely relevance of the information sought, suggesting that any of the factors could be overcome if the information would be highly relevant to a significant issue in the case.

Unsurprisingly, one of the first issues federal courts have addressed with the proportionality principle is the sheer volume of documents an ESI request can encompass. For example, in Wilmington Trust Co. v. AEP Generating Co., [15] the court denied a request that would have led to production of "as many as a million pages" of ESI documents. The court found that "both parties have some stake in addressing the various relevant factors," and the requesting party had failed to meet its burden in this regard. Though the request would likely produce hundreds of thousands of pages, the requesting party failed to show that it would lead to any more than a small number of relevant documents. The court found that "[c]learly, the question of proportionality is raised by this scenario," and ruled that the cost of searching and reviewing such a flood of documents vastly outweighed the handful of

6 *Id*.

7 Fed. R. Civ. P. 37, Advisory Committee's Note.

8 *See, e.g., Theidon v. Harvard Univ*., No. 15-cv-10809-LTS, 2016 WL 447447, at *4 (D. Mass. Feb. 4, 2016); *Eramo v. Rolling Stone LLC*, 314 F.R.D. 205, 211 (W.D. Va. 2016).

9 *See State Farm v. Fayda*, 2015 WL 7871037 at *2 (S.D.N.Y Dec. 3, 2015); *Vailes v. Rapides Parish Sch. Bd.*, 2016 WL 744559, at *3 (W.D. La. Feb. 22, 2016).

10 2015 WL 8675377 (S.D.N.Y. Dec. 10, 2015).

11 *See, e.g., Sumpter v. Metropolitan Life Ins. Co.,* 2016 WL 772552 (S.D. Ind. Feb. 29, 2016).

12 *Wit v. United Behavioral Health*, 2016 WL 258604 at *10 (N.D. Cal. Jan. 21, 2016) (applying Oppenheimer even though it "construe[s] language contained in Rule 26 prior to 2015 amendments").

13 *Gilead Sciences, Inc. v. Merck & Co., Inc*., 2016 WL 146574 (N.D. Cal. Jan. 13, 2016).

14 Duke Subcommittee Guidelines, 99 *Judicature* 47, 54 (2015).

15 2016 WL 860693 (S.D. Ohio, Mar. 7, 2016).

relevant documents it might produce.

Even when a request might produce a respectable amount of relevant information, courts have denied discovery where the results would be cumulative or duplicative of earlier productions. In Pertile v. General Motors, LLC, [16] the plaintiff sought production of "original and native" files relating to the design of several GM vehicles. All parties agreed that these files could yield relevant information, but GM argued, and the court agreed, that this was disproportionate, as GM had already produced 150,000 documents related to the design of the vehicles. The court found that the new production, though "helpful," did not amount to "need." It should be noted that the files in question contained trade secrets, which, according to the court, increased the non-monetary cost of production, weighing heavily against plaintiff's desire for "helpful" information.

Though ESI has increased the scope of information that a party may discover, it has also increased the ease with which it can be located and produced. This can cut against a party claiming that an ESI request is disproportionate, as shown in Goes Int'l AB v. Dodur Ltd.[17] There, the court determined that the information sought was proportional because it was relevant to the claim and "should be relatively ready to hand. Or readily gotten using data-analysis software." This does not mean, however, that parties with vast resources will be more vulnerable to enormous production requests. The Advisory Committee specifically noted that "consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party." The court in Salazar v. MicDonald's[18] took this to mean that the financial resources a party can bring to bear on discovery costs are of little relevance.

D. Reining in Sanctions with Rule 37(e)

A survey of district court decisions applying Rule 37(e) this past year shows that this rule change has brought predictability and generally curtailed the use of severe sanctions for lost or destroyed ESI. The case of Nuvasive, Inc. v. Madsen Med., Inc. illustrates the powerful impact of new Rule 37(e).[19] Prior to the amendment, the court in this case had granted sanctions in the form of an adverse inference instruction for a party's negligent failure to preserve text messages. After Rule 37(e) was amended, the court on reconsideration vacated its prior sanction because new Rule 37(e) did not permit an adverse inference instruction sanction based on a finding of mere negligence.

Other decisions from 2016 illustrate the challenge of demonstrating prejudice or an intent to deprive in order to obtain sanctions. In Living Color Enters., Inc. v. New Era Aqua, Ltd.[20], the plaintiff sought sanctions for a defendant that failed to preserve discoverable text messages on his cell phone. Despite finding that the conduct satisfied the initial hurdles to be eligible for sanctions under amended Rule 37(e), the court ultimately declined to issue sanctions because there was no prejudice in light of the fact the vast majority of lost text messages were available from other custodian's devices and the other missing texts "appear[ed] to be unimportant." In addition, the court found there was no intent to deprive the plaintiff of this evidence. A similar result was reached by the district court in Orchestratehr, Inc. v. Trombetta, [21] where the plaintiffs sought sanctions following the discovery that defendant had deleted e-mails. Despite finding that the defendant had intentionally deleted said e-mails, the court declined to impose sanctions because there was insufficient evidence to show that he had acted in bad faith to deprive the plaintiffs of the evidence.

And even where prejudice or an intent to deprive were found, some courts have stressed that the sanction remedy should be proportional to the wrong committed. Rejecting more serious sanctions requested by the defendant for the plaintiff's intentional destruction of source code, the court in BMG Rights Mgt. LLC v. Cox Comm., Inc.[22] ruled that its sanction of a permission of adverse inference instruction was proper because Rule 37(e)(2) requires that "the remedy should fit the wrong." Based on this reasoning, the court declined severe sanctions because lesser remedies were available to rectify the loss of ESI. Virtually identical reasoning was used in First Fin. Sec., Inc. v. Freedom Equity Group, LLC,[23] which involved sanctions of a permissive adverse inference instruction for the destruction of text messages. There, the court declined to impose more serious sanctions in light of the fact the destroyed evidence did not cause severe prejudice to plaintiff.

However, several cases showed that courts are still willing to impose serious sanctions under the new Rule 37(e) where strong evidence existed of an intent to deprive and prejudice is apparent. In GN Netcom, Inc. v. Plantronics, Inc.,[24] a senior executive of the defendant had intentionally deleted e-mails to make them undiscoverable in the case and also ordered others to do the same. Based on those facts, the court ordered sanctions in the form of an adverse inference jury instruction, attorneys' fees and costs, a punitive sanction of $3 million, and other possible evidentiary sanctions to be determined at trial. Another example of serious sanctions

16 2016 WL 1059450 (D. Colo., March 17, 2016).

17 2016 WL 427369 (N.D. Cal. Feb 4, 2016)

18 2016 WL 736213 (N.D. Cal. Feb. 25, 2016).

19 2016 WL 305096 (S.D. Cal. Jan. 26, 2016).

20 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016).

21 178 F.Supp.3d 476 (N.D. Tex. Apr. 18, 2016).

22 2016 WL 4224964 (E.D. Va. Aug. 8, 2016).

23 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016).

24 2016 WL 3792833 (D. Del., Jul. 12, 2016).

involved Brown Jordan Int'l, Inc. v. Carmicle[25] where the defendant had intentionally wiped his company-owned iPad, refused to unlock his company-owned laptop computer, and failed to preserve data on his personal devices and computers. Finding there was an intent to deprive, the court granted sanctions in the form of adverse inference instructions at trial but declined to dismiss the case for this conduct.

**Have the Amendments Succeeded?**

In general, the case law from 2016 shows that the amendments have made an appreciable impact on the scope of e-discovery and the use of sanctions to address destroyed or lost ESI. Unlike the previous iteration, the new language will not allow discovery to go forward with nothing but the scent of relevant information. It has placed proportionality back in the center of discovery disputes, and many judges appear more than ready to bring the new limitations to bear. Likewise, the change to Rule 37(e) has helped bring consistency to e-discovery sanctions and limited the use of severe penalties for only outrageous transgressions.

Statistics support this observation. A December 8, 2016 study found that 56 percent of all 2016 federal judicial opinions involving e-discovery disputes dealt with arguments of proportionality and the scope of discovery, compared to only 35 percent in 2015.[26] This same study also noted that 35 percent of all 2016 e-discovery opinions focused on issues involving preservation, spoliation and motions for sanctions under Rule 37(e).[27] In addition, a poll conducted of 125 e-discovery professionals showed that over half believed the amendments had a positive impact on litigation practices, while another 25 percent said the rule changes could go even farther to help address problems with e-discovery.[28]

**Tips to Utilize the Rule Changes**

Get an early start. The rule changes set the expectation that the parties will discuss preservation and collection of ESI even before the commencement of discovery. Be prepared at the Rule 26(f) conference to discuss custodians, sources, preservation, and other e-discovery related issues. New Rule 26(d)(2) allows a party to serve Rule 34 document requests on another party before the Rule 26(f) conference to help set the scope of discovery for discussion purposes at the Rule 26(f) conference. Other rule changes, including amended Rule 26(f)(3)(C), requires the parties to specifically discuss preservation of ESI as part of the discovery plan.

Include e-discovery provisions in the scheduling order. Changes to Rule 16 contemplate the parties will include in the scheduling order provisions relating to the "disclosure, discovery, or preservation of electronically stored information." You no longer need to establish a separate order governing e-discovery. At a minimum, you should ask the court to include terms regarding e-discovery preservation obligations, search protocol, and production format.

If seeking discovery, identify the information you seek and know its value. Most federal courts that have denied discovery under the new amendments have faulted the requestor for failing to establish the relevance, value, and necessity of the information sought. When seeking discovery, be prepared to specify what you intend to find, and why this particular method is necessary. Though parties seeking discovery do not need to preemptively establish the proportionality of the request, they do share the burden of proof once the other side has objected.

If objecting to discovery, know your costs and seek a protective order. If objecting on proportionality grounds, be ready to provide specific costs and burdens associated with providing the requested discovery, and be able to identify the non-monetary resources at your disposal. Seek a preemptive protective order under Rule 26(b)(2)(B) as opposed to waiting for a motion to compel.

As always, preserve all documents. The Comments do not address the effect of proportionality requirement on preservation. One might infer that the scope of the duty to preserve is tied to Rule 26(b)(1), but the Committee specifically removed comments hinting that proportionality might impact preservation planning.[29] As courts sift through the effects of the new rule, it may be that preservation will be limited to correspond with the narrower scope of discovery. There is not currently enough authority to support any change in preservation planning, however, so for now, continue to establish sufficient litigation holds as early as possible.

**Conclusion**

Whether the amendments lead to the sweeping changes envisioned by the Committee and Chief Justice Roberts remains to be seen, but early cases applying the rule changes suggest that many courts are perfectly eager to finally slow the tide of e-discovery and scale back on the use of sanctions for lost or destroyed ESI. As the Chief Justice noted, "I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics." These amendments will hopefully help prove that belief correct.

25 2016 WL 815827 (S.D. Fla. Mar. 2, 2016).

26 Kroll Ontrack, *2016 e-Discovery Case Law: New FRCP Amendments Drive 60 Percent Increase in Proportionality Opinions* (Dec. 8, 2016).

27 *Id*.

28 *Id*.

29 Draft Committee Note, Rule 37(e) Initial Proposal, p. 327.

# APPENDIX A
# 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE



| FRCP Rule | Topic | Amendment | Notes |
|---|---|---|---|
| 1 | Scope | Emphasizes that the rules should be carried out by the court *and the parties* to secure the just, speedy, and inexpensive determination of proceedings. | Extensive changes regarding proportionality and acceleration of deadlines are driven by party obligations under Rule 1. |
| 4(m) | Pleading | Deadline for service of complaint on defendant reduced from 120 to 90 days. | **Significant Change.** Reduces delay at the onset of litigation. |
| 16(b)(1)(B) | Pretrial Conference | Discourages exchange of emails for Rule 16(b) scheduling conference but does not require a face-to-face meeting. | Encourages "direct simultaneous communication" in person, by telephone, or by sophisticated electronic means. |
| 16(b)(2) | Pretrial Conference | Deadline for issuance of scheduling order reduced from 120 to 90 days after any defendant has been served, or from 90 to 60 days after any defendant has appeared, "unless the judge finds good cause for delay." | **Significant Change.** Reduces delay at the onset of litigation; will require an earlier Rule 26(f) discovery conference and initial disclosures. |
| 16(b)(3)(B) | Pretrial Conference | A scheduling order may provide for (1) preservation of ESI, (2) agreements regarding disclosure of information covered by attorney-client privilege or work-product, and (3) a requirement that a party must request a conference with the court before bringing a discovery motion. | Parallel amendments in Rules 26(f)(3) and 37(e). Codifies the practice of many judges and parties and encourages further use. Specifically authorizes quick-peek and clawback agreements as contemplated by Fed. R. Evid. 502. |
| 26(b)(1) | Discovery - Proportionality | Adds requirement for proportionality in discovery requests and factors for determining proportionality, including the parties' "relative access to relevant information." | **Significant Change.** Moves proportionality factors to their original place at the beginning of Rule 26 in order to reinforce the parties' obligations to consider those factors when making discovery requests. Amendment not intended to change any existing responsibilities (i.e., the amendment does not allow a boilerplate objection that a discovery request is disproportional). |
| 26(b)(1) | Discovery - Proportionality | Deletes provisions that describe discoverable information as "any matter relevant to the subject matter," or evidence "reasonably calculated to lead to the discovery of admissible evidence." | Provisions had been mistakenly cited by courts as *definitions* of discoverable information. Amendment clarifies the scope of discovery. |
| 26(b)(2)(C)(iii) | Discovery - Proportionality | Reiterates that Rule 26(b)(1) outlines the scope of permissible discovery. | |
| 26(c)(1)(B) | Discovery - Proportionality | Protective order may be based on "allocation of expenses." | Makes explicit that the court has authority to grant such a protective order, but does not intend to make cost-shifting a common practice. Parties will generally continue to bear their own costs of responding. |
| 26(d)(2) | Discovery - Timing | Early Rule 34 requests may be made any time 21 days after a party has been served with a complaint. | **Significant Change.** Effort to reduce delay at the onset of litigation and gives more time to responding party. Time to respond does not begin to run until the first Rule 26(f) conference. Early discovery request may trigger specific preservation requirements. |

**Jason A. Lien**
**Partner**
**Maslon (Minneapolis, MN)**

**612.672.8319 | jason.lien@maslon.com**
**http://maslon.com/jlien**

Jason is a partner and serves as co-chair of Maslon's Litigation Group. His litigation practice is focused on representing clients from the construction, real estate, financial services, and food industries. Jason also frequently represents policyholders in insurance coverage and bad faith disputes. Prior to joining Maslon in 2002, Jason honed his trial and appellate skills as a Naval Officer with the United States Navy Judge Advocate General's Corps, where he led hundreds of courts-martial, administrative hearings, and military appeals.

Jason regularly appears in federal and state court on behalf of food companies, design-build firms, general contractors, architects, specialty contractors, property management companies, real estate owners, and lenders. He has also litigated disputes involving product liability, insurance coverage, international trade, land use, business torts, unfair competition, intellectual property, healthcare fraud, non-compete agreements, and medical malpractice. Jason was selected for inclusion on the 2015 and 2016 Minnesota Super Lawyers® lists as well as the 2006-2009 and 2011-2012 Minnesota Rising Stars lists.

Outside of the office, Jason is an avid triathlete and recently finished his first Ironman triathlon.

**Areas Of Practice**
- Litigation
- Appeals
- Business Litigation
- Competitive Practices/Unfair Competition
- Construction & Real Estate Litigation
- Insurance Coverage Litigation
- Tort & Product Liability
- Real Estate Condemnation & Eminent Domain

**Recognition**
- Noted Practitioner in Minnesota for Construction, Chambers USA, 2016
- North Star Lawyer, Minnesota State Bar Association, 2015 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.)
- Recognized on Minnesota Super Lawyers® list, 2015-2016 (Minnesota Super Lawyers® is a designation given to only 5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2006-2009, 2011-2012 (Minnesota Rising Stars is a designation given to only 2.5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Named JAG of the Quarter by the Navy Judge Advocate General and JAG of the Year for the region by the Commanding Officer of the Naval Legal Service Office Central, 2001
- Corpus Juris Secundum Award, Civil Procedure, 1996

**Education / Background**
- University of Minnesota Law School; J.D., cum laude, 1998
- Hamline University; B.A., cum laude, 1994; Majors: Political Science, Legal Assistance

# Litigation Management Break-Out Sessions - Sample Agenda

**IDENTIFYING THE INITIAL GOALS AND PLANS**

- What is the primary goal from the start (Settlement or Trial)?
- What should be conveyed by in-house counsel on primary objective?
- What should be conveyed by outside counsel to client?
- Does exposure dictate how case is handled?
- Are the days gone where we take the case all the way to trial, regardless of cost/exposure formula?
- Is ADR or settlement talk ever effective early on in the case before discovery?
- At what point do you think parties should explore resolution?
- What are your experiences with having direct contact with in-house counsel and plaintiff's attorney to discuss resolution? Should this be done without outside counsel present?

**MANAGING AND CONTROLLING THE LITIGATION**

- How much of our strategy to we want to set out in paper discovery early on?
- Do we want to take depositions of everyone in sight, or selective depositions?
- At what stage do we get experts on board?
- Do we want to go with in-house experts AND outside experts, or one or the other?
- Do we want to depose opposing expert in every case, or are there advantages in not deposing experts?

- What is it that we want to accomplish by taking expert deposition? Do we really need to take a deposition to know what their opinions are? What is it we want to know for $500 an hour we are paying the expert?
- What are the difficult questions we want to ask the expert?
- How should in-house counsel and outside counsel coordinate and plan for experts?
- At what stage do we start planning for Frye/Daubert motions? Do we argue these motions only when we feel very confident that they will be granted pre-trial, or is there an advantage in arguing the motions and revealing our strategy to other side so they can be more prepared on voir dire of witness in trial?
- What are the most important things the in-house counsel wants from their trial counsel during discovery and pre-trial state?
- What are the most important things trial counsel wants from client and in-house counsel?

**WINNING THE CASE AT TRIAL**

- What is the most important part of the trial? (Voir Dire, Opening, Cross-examination, Direct Examination, Closing).
- Studies show 60-80% jurors form initial impression on liability after opening statement. What has been your experience?
- Do you put on a damage defense case?
- When do you attack damages?
- When, if ever, do you ignore damages?
- How do you handle punitive damages at trial?
- What are the advantages/pitfalls or bifurcation of liability and damages?
- Do you put on damage experts? (Product liability, construction litigation, etc.)
- Do use an economist or just attack plaintiffs?
- Do you use medical damage experts? (RN v. LPN v. Attendant care)
- What should role of in-house counsel be during trial?