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Classing Up Your Class Action Act

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Classing-Up Your Class Action Act – The Supreme Court Gives and Takes From Class Action Litigants Last Session
Greg Marshall

The Supreme Court's last term was a truly unique one. It began just a month before a contentious presidential election, the death of one of the Court's most iconic justices (Justice Ruth Bader Ginsburg), and the nomination of Justice Amy Coney Barrett, expanding the conservative wing to six. Amidst the turmoil, the Court managed to give and take a little from everyone in the arena of class action litigation. Here we profile the last term's most significant decisions affecting class action litigation, what they mean for defendants, and what lower courts have been doing with those decisions since.

The Supreme Court guts Telephone Consumer Protection Act (TCPA) class actions in Facebook v. Duguid

Businesses using automated technologies to call and text consumers breathed a collective sigh of relief last April, as the Supreme Court confirmed in Facebook v. Duguid[1] what defense lawyers have been arguing for years – equipment that is merely "capable" of storing and dialing telephone numbers is not an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act (the "TCPA"). Rather, the equipment must also use "a random or sequential number generator." That is the type of equipment that concerned Congress when enacting the TCPA.

Enacted in 1991, the TCPA imposed restrictions on abusive telemarketing practices. In particular, ATDS technology allowed companies to dial blocks of telephone numbers automatically, which could tie up the lines of emergency services and businesses alike. In response to this then-emerging technology, Congress made it unlawful to make certain calls using an ATDS, and created a private right of action allowing consumers to recover up to $1,500 per unlawful call. This created the potential for truly staggering liability for defendants in class actions.

Fast forward 30 years. Like many businesses concerned with consumer data and privacy, Facebook has a security feature that automatically sends users texts when an attempt is made to access their accounts from unknown devices or browsers. Such technology has a lot of utility, serving the interests of both consumers and businesses. Facebook sent such texts to Mr. Duguid, who did not have a Facebook account, and did not give Facebook consent to call or text him. This, Duguid argued, violated the TCPA.

Under section 227 of the TCPA, an ATDS is equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers. To be sure, Facebook's equipment did store and text numbers, but it did not use a "random or sequential number generator." On the question of whether equipment like Facebook's met the ATDS definition, the circuits were split. The Supreme Court resolved the split last April.
Closely parsing the text of section 227, the Supreme Court concluded that the clause "using a random or sequential number generator" modified both verbs that preceded it ("store" and "produce"). 141 S.Ct. at 1169. Simply auto calling stored numbers was not enough to make Facebook's equipment an ATDS, if the numbers were not produced "using a random or sequential number generator," the Supreme Court

1 Facebook, Inc. v. Duguid, 141 S. Ct. 1161 (2021).

concluded.

This interpretation aligns with the context of the TCPA, the Supreme Court noted, which made it unlawful to call emergency telephone lines or multiple lines of the same business at the same time, for example. Id. at 1171. Expanding the definition to include any equipment that merely stores and then dials telephone numbers (like modern cell phones) would "take a chainsaw to these nuanced problems." Id.

Since, plaintiff class action lawyers have been testing the bounds of Facebook, most notably arguing that a platform that uses a random number generator to determine the order in which to pick telephone numbers from a preexisting list is also an ATDS, citing to footnote 7 of the Facebook opinion. But lower courts have largely rejected that expansive reading, generally dismissing claims where the allegations are that numbers were called from a preexisting customer list.[2] That's good news for defendants.

There remains many reasons to proceed with caution, however, as the TCPA still has plenty of bite. The TCPA covers more than just ATDS calls. The provisions covering pre-recorded and artificial voice calls remain, as do the TCPA's limitations on calls to numbers on the national Do-Not-Call registry, the violations of which will likely continue to fodder class actions with crippling damages claims for years to come.

Back-filling the void of cases resulting from Facebook is litigation arising from pre-recorded and/or artificial voice calls, perhaps because of the increased sophistication and use of Interactive Voice Response ("IVR") technology. So too are the number of so-called "wrong number cases," in which numbers previously provided to businesses with consent to call are later reassigned to consumers who did not give consent. These so-called recycled or reassigned number cases are particularly problematic for defendants, because the Reassigned Numbers Database (RND) only became operational as of November last year. That's cold comfort for defendants who placed calls to reassigned numbers previously.

Just as before, businesses should consider taking great care in selecting and contracting with venders providing telemarketing services, or any services that involve calls or texts using automated means. Thoughtful contracting, careful record keeping and retention, periodic auditing, and indemnification remain key to limiting TCPA exposure before and after Facebook.

The Supreme Court Snaps Defendants' Winning Streak on Personal Jurisdiction Challenges in Ford v. Montana

Ending defendants' ten (10) year reign on personal jurisdiction challenges, the Supreme Court cabined the defense-friendly rationales expressed in prior cases before the decision in Ford v. Montana.[3] While the decision was a set-back for defendants, the Supreme Court gave defendants a fist-bump by reinforcing the same anti-forum shopping sentiments that underpinned the Court's 2017 Bristol-Myers Squibb Co. ("BMS") decision,[4] which will certainly aid class action defendants seeking to shut down litigation tourism.

The Ford decision arose from a pair of cases that presented the same basic facts. They were both car accident cases, in which the plaintiffs lived and were injured in the state where they filed suit. The disconnect with the forum, and the reason Ford challenged personal jurisdiction, was because the vehicles were purchased second hand and out of state. That is, there was no connection between Ford's conduct¾designing and selling the vehicles in question¾and the forum.

A few years ago, cases like this one never would have generated personal jurisdiction challenges, but the progeny of the Supreme Court for the past few years in particular allowed Ford to make the "logical extension" argument that led to this Supreme Court showdown. But this time, the Supreme Court snapped defendants' winning streak.

The Supreme Court's 2014 decisions in Daimler AG

2 See, e.g., Meier v. Allied Interstate LLC, No. 20-55286, 2022 WL 171933, at *2 (9th Cir. Jan. 19, 2022).

3 Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017 (2021).

4 Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty., 137 S. Ct. 1773 (2017).

v. Bauman and Walden v. Fiore[5] together limited general "all purpose" jurisdiction to a defendant's state of incorporation or principal place of business, and specific jurisdiction to a defendant's meaningful forum contacts. And the Court's 2017 decision in BMS required "a connection between the forum and the specific claims at issue." 137 S. Ct. at 1781.

So why didn't the logic of these decisions win the day for Ford? Because unlike BMS, the plaintiffs were injured and sued in their home state. They were not "tourist plaintiffs" shopping for the best forum.

The Supreme Court made that point early and often, starting in the first paragraph of the opinion: "The accident happened in the State where suit was brought. The victim was one of the State's residents." 141 S. Ct. at 1022. From there, the Court had little trouble finding Ford's substantial forum contacts enough to satisfy the BMS "arise from or relate to" inquiry, even without a direct causual link between the conduct designing and selling the vehicle in question and the forum.

In retrospect, the Supreme Court's unanimous decision finding personal jurisdiction was not surprising. The Supreme Court was simply not going to tell these plaintiffs who lived and were injured in the state where they filed suit to go sue somewhere else -- not when they were both injured by the product of a manufacturer who pervasively marketed and sold the very same products (the vehicles) in the forum. As the Court said, they "brought suit in the most natural State." Id. at 1031.

Still, the Court left defendants with something important, as this decision can by no means be read to give succor to forum shoppers who so often vex defendants. The Court even went so far as to call out the plaintiffs in BMS for what they were: "In short, the plaintiffs [in BMS] were engaged in forum-shopping¾suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State." Id. at 1031. Thus, in-state product use and injury remain paramount to the Court's specific personal jurisdiction analysis.

The Supreme Court also left many battles to fight, with little bright line analysis, allowing a wide berth for defendants to test the bounds of the "relate to" inquiry. The Supreme Court in Ford made clear that it's not a causation test¾that's what the other half of the phrase "arise from or relate to" means. 141. S. Ct. at 1026. And we know from Ford that a national manufacturer who pervasively markets and sells the same product in the forum will suffice. So the substantial battle ground going forward lies in the broad field between.

Lower court decisions since have focused on this inquiry, scrutinizing which sorts of contacts amount to purposeful availment to the forum, and when such forum contacts can be said to arise out of or relate to the subject of the litigation.[6] These issues can be particularly fact intensive and difficult to analyze when the contacts are premised on internet transactions that can involve passive conduct.

The Supreme Court hardens the concrete requirement for Article III injuries in TransUnion LLC v. Ramirez

Resting on a pithy rule¾"No concrete harm, no standing" ¾the Supreme Court's 5-4 decision in TransUnion LLC v. Ramirez last June[7] promised to intensify the already-pitched battles over Article III standing invited by the Court's prior 2016 decision in Spokeo Inc. v. Robins,[8] and may limit the size of class actions while narrowing the damage theories class action plaintiffs may advance.

The Ramirez suit was a class action arising under the Fair Credit Reporting Act ("FCRA"). At stake was whether consumers in various postures of having false or misleading information about them transmitted by TransUnion and misused by third parties had Article III standing to sue TransUnion.

Reversing the Ninth Circuit, the Supreme Court held that no class member had standing unless TransUnion actually sent their credit report with the false or misleading information to a third party. The Supreme Court's majority explained that even assuming TransUnion violated FCRA's obligation to use reasonable procedures to maintain credit files

5 Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014).

6 See, e.g., Hood v. American Auto Care, LLC, et al., 21 F.4th 1216 (10th Cir. 2021) (TCPA class action).

7 TransUnion LLC v. Ramirez, No. 20-297, 2021 WL 2599472, -- S. Ct. -- (2021).

8 Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

on all class members, only those whose reports were actually disseminated had a sufficiently concrete injury to confer standing.

To the Supreme Court's majority, the mere maintenance of potentially defamatory information on TransUnion's database was not a concrete injury that could establish Article III standing. The majority reasoned that these plaintiffs could not establish a harm closely related to those serving as a basis for civil liability in American law (here, defamation, which requires the defamatory statement to be published).

An unfortunate by-product of Ramirez appears to be an erosion of federal court jurisdiction over class actions, effecting a pulling-back from the expansion brought about by the Class Action Fairness Act (CAFA). This is because only half of the states follow federal standing principles,[9] so standing can often be satisfied in state courts when it cannot in federal court under Ramirez.

Take for example an August 2021 decision, Voss v. Quicken Loans. This was a putative class action filed against Quicken for failing to release liens timely under state law. There, Quicken removed the case to federal court and moved for summary judgment, arguing that the named plaintiff lacked standing because he was not aware that his lien release was recorded late. The court agreed, but did not give Quicken the judgment it wanted. Instead, it gave plaintiff a remand, right back to the state court where plaintiff wanted to be.

Class action plaintiffs have been seizing on this argument too, moving to remand removed cases arguing that they do not have an Article III injury under federal law.[10] In this way, class action defendants may be giving plaintiffs exactly what they want when arguing that federal courts lack jurisdiction under Ramirez to hear their claims. Careful thought should be exercised when deploying Ramirez defensively.

The risk of future harm theory

An important aspect of the Ramirez decision is what the Supreme Court said about the risk-of-future-harm theory of damages. Citing Spokeo's oft-quoted passage that a material risk of harm can "satisfy the requirement of concreteness," Ramirez argued that even if misleading information merely appearing in credit files is not itself concrete enough for an Article III injury, the risk that misleading information would in the future be transmitted to third parties was sufficiently concrete.

But the Supreme Court shrugged off that argument, noting that its 2013 decision in Clapper v. Amnesty International USA - the source of the relevant language in Spokeo¾involved injunctive relief, which is an inherently forward-looking species of injury. There, the Supreme Court held that a plaintiff must "demonstrate standing separately for each form of relief sought," and that standing to seek injunctive relief does not necessarily endow plaintiffs with standing to seek retrospective damages.

The Supreme Court reiterated that any risk of future harm must cross the line from speculative to imminent and substantial, and suggested that when plaintiffs are not even aware of the risk, as was apparently the case for much of the Ramirez class, it is insufficiently concrete. Because risks are often inherently of unrealized conditions, this may be a significant limitation on the potential that a risk may itself be sufficiently concrete to support standing.

With consumer data breach class actions so often premised on the risk of future harm, it is hard to see how Ramirez should not have a dampening effect on their viability. Take for example the Ninth Circuit's 2018 decision in In re: Zappos.com,[11] in which hackers breached the servers of online retailer Zappos.com and allegedly stole millions of customers' personal identifying information. The supposed damage upon which that suit was based was the risk of a future fraud or identify theft, not a presently existing injury, and on that basis was permitted to proceed.

Ramirez should have thrown the viability of Zappos.com into question. In addition to the fact that the risk of future damages in data breach cases will often be more speculative than certainly impending, the

9 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

10 See, e.g., Lagrisola v. North American Financial Corp., Case No. 21cv1222 (S. Dist. Cal, Oct. 5, 2021).

11 In re Zappos.com Inc. Consumer Data Security Breach Litigation, 888 F.3d 1020 (9th Cir. 2018).

only reason putative class members would even know of any risk of future harm is through legally-required notices by the very businesses victimized by the cyber-attacks should not themselves be the proximate source of the supposed class injury.

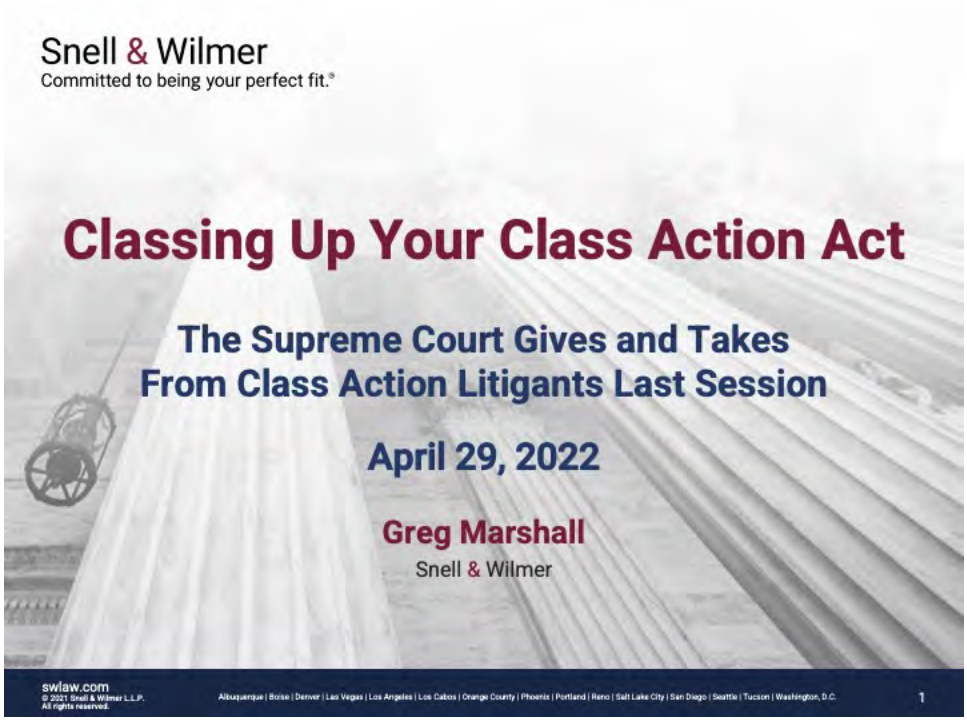
Unfortunately, since Ramirez, lower courts have been resistant to evaluate the "risk of future harm" theory without a factual record, having the effect of backloading consideration of what should be a threshold inquiry¾jurisdiction. Take for example the In Re Blackbaud, Inc., Customer Data Breach Litigation.[12] That case presented a standard ransomware attack in which consumer information was exposed.

On a motion to dismiss, the court noted in dicta that it would have rejected the standing argument even had it not been withdrawn by defendant, noting that "the court is not in a position to discern whether Plaintiffs have 'factually establish[ed]' that their risk of future harm materialized into a sufficient 'concrete' harm as held in Ramirez." That decision has since been cited with approval by at least one other court.[13]

Thus far, Ramirez has not brought-about the sea change in data breach class action cases that might have been predicted, although lower courts continue to grapple with its implications.

12 2021 WL 2718439 (D.S.C. July 1, 2021).

13 Cotter v. Checkers Drive-In Restaurants, 2021 WL 3773414 (M.D. Fl. Aug. 25, 2021).



What is the TCPA?

- Enacted in 1991
- Imposes restrictions on abusive telemarketing practices
- Private right of action (up to $1,500 per unlawful call or text)

What is an ATDS?

Equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers

What Happened in Facebook?

- Facebook's authentication security feature
- Facebook's equipment did store and text numbers, but it did not use a "random or sequential number generator"

The Series Qualifier Cannon

Regardless of whether the equipment is used to store or produce, a "random or sequential number generator" must be used

What Does Facebook Mean for Defendants?

- Predictive dialers and automated text systems (probably) okay for preexisting customer lists
- Watch out for reassigned/ recycled numbers

What Have Lower Courts Been Doing Since?

- Pre-recorded and/or artificial voice calls (Interactive Voice Response, IVR, technology) claims on the rise
- Reassigned Numbers Database (RND) now operational
- Careful contracting, record keeping and retention, auditing, and indemnification

Ford Motor Co. v. Montana

Defendants' Decade Long Winning Streak Snaps!

What is Personal Jurisdiction?

- General "all purpose" jurisdiction – Affiliations with the forum state so "continuous and systematic" that the corporation is rendered "essentially at home in the forum state"
- Specific "case limited" jurisdiction – Focuses on "the relationship among the defendant, the forum, and the litigation"

The Cases that Came Before

- 2011 – *Goodyear Dunlop Tires Operations, S.A. v. Brown* – Rejecting general jurisdiction in stream of commerce cases involving foreign subsidiaries
- 2014 – *Daimler AG v. Bauman* – General jurisdiction generally limited to defendant's state of incorporation or principal place of business

The Cases that Came Before (cont.)

- 2014 – *Walden v. Fiore* – Defendant's contacts must be with the forum, not just with plaintiff
- 2017 – *Bristol-Myers Squibb Co. v. Superior Court* – Specific jurisdiction cannot be based on contacts with other plaintiffs in the forum.

What Happened?

- Plaintiffs lived in the forum
- Plaintiffs were injured in the forum
- But the vehicles were purchased used, out of state

The "Arise From / Relate To" Test

- "Arise from" is a causation test
- "Relate to" means some relationship that will support jurisdiction without a causal showing

What Does It Mean for Defendants?

- The "arise out of or relate to" battleground
- Rebuke of tourist plaintiffs
- Application to putative class members?

What Have Lower Courts Been Doing Since?

- What sorts of contacts amount to purposeful availment of the forum
- What sort of forum contacts arise out of or relate to the subject of the litigation

TransUnion LLC v. Ramirez

The Supreme Court Hardens the Concrete

Why Standing Is Important?

- "Cases" and "controversies"
- Separation of powers
- Limits who can bring an action

Three "Irreducible" Elements of Standing

- Injury-in-fact – a "concrete and particularized" harm to a "legally protected interest"
- Causation – a "fairly traceable" connection between the injury-in-fact and the actions of the defendant
- Redressability – a non-speculative likelihood that the injury can be remedied by the requested relief

What Happened?

- The OFAC list – What's in a Name?
- Verdict form – TransUnion should "completely revamp" this practice
- The Fair Credit Reporting Act – failure to follow reasonable procedures
- $40 million ($32 million in punitive damages)

What Does "Concrete" Mean?

- Real impact on real persons, and not abstract
- Plaintiffs must have a "personal stake"
- First time violating a federal statute wasn't enough

The Risk of Future Harm Theory

- Injunctive versus money damages
- The "exposure" to harm itself must be concrete
- Must plaintiffs know of the risk?

What Does It Mean for Defendants?

- Has a "silver bullet" defense been strengthened?
- Is standing now a factual inquiry requiring discovery?
- Are plaintiffs going to bring more class actions in state court?

What Have Lower Courts Been Doing Since?

- Erosion of federal court jurisdiction
- Reluctance to extend to data breach class action litigation
- Defamation versus breach of privacy analogy

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Greg Marshall co-chairs the firm's Commercial Litigation and Financial Services Groups and has more than 20 years of experience defending companies in Arizona, Colorado, New Mexico, and around the country.

Greg's practice focuses on the defense of banks and lenders. His clients include national and regional banks, credit unions, mortgage lenders and servicers, FinTech companies, credit card issuers, automobile finance servicers, and money transmitters. His practice includes class actions and managing defense programs for pattern litigation. Greg has substantial experience litigating and trying claims involving deposit accounts, check fraud, mortgage fraud, Ponzi schemes, and lien priority disputes. He also has substantial experience defending claims arising under the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Reporting Act (FCRA), the Unfair Debt Collection Practices Act (UDCPA), state unfair and deceptive acts or practices (UDAP) statutes, and has advised clients regarding CFPB complaints, and rules and interpretations, including guidance issued during COVID.

Greg has tried commercial and product liability cases to verdict in state and federal courts and in arbitration. Greg's commercial litigation practice includes prosecuting and defending claims on behalf of businesses in a wide variety of civil and regulatory matters, including qui tam, class action, and multi-district litigation (MDL). Greg's class action experience includes defending claims under the Telephone Consumer Protection Act (TCPA) and data privacy, including claims arising under the California Consumer Privacy Act (CCPA). Greg's product liability litigation practice includes defending consumer and industrial product manufacturers in a wide variety of industries, including developing defense programs for pattern litigation.

Services

- Class Action Litigation
- Commercial Litigation
- Financial Services Litigation
- Insurance and Licensure
- International
- Non-Profit Law
- Personal Injury
- Product Liability Litigation
- Automotive

Professional Recognition and Awards

- Southwest Super Lawyers, Rising Stars Edition, Banking (2012-2013)
- Arizona's Finest Lawyers
- Top 50 Pro Bono Attorneys, Arizona Foundation for Legal Services & Education (2011)

Education

- Emory University School of Law (J.D.) -- Dean's Fellow; Order of the Barristers; Order of the Advocates
- University of Arizona (B.A., cum laude)

Workplace Behavioral Issues: Handling Thorny Situations

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Workplace Behavioral Issues: Appropriately Handling Thorny Situations
Malissa Wilson

Behavioral issues in the workplace resulting from an employee's mental health condition can present nuanced challenges for employers. If not handled appropriately, they have the potential to devolve into costly litigation that can disrupt business operations. Employers should be aware that employees with mental health conditions, such as depression, post-traumatic stress disorder or anxiety, are protected against discrimination at work because of their condition and may also have other legal rights that can help them perform and keep their job.

General Overview of the Americans with Disabilities Act

The Americans with Disabilities Act (ADA), 42 U.S.C. §12101, et seq., was signed into law on July 26, 1990. The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA. Title I of the ADA prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms and conditions, and privileges of employment. The ADA covers employers with 15 or more employees.

An individual with a disability is a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment.

A qualified employee with a disability is an individual who, with or without a reasonable accommodation, can perform the essential functions of the job in question. An employer is required to make a reasonable accommodation to the known disability of a qualified employee if it would not impose an "undue hardship" on the operation of the employer's business. Reasonable accommodations include "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 20 CFR § 16320.2(o).[1] Accommodations vary depending upon the needs of the individual employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation.

An employer does not have to provide a reasonable accommodation if it imposes an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considering factors such as an employer's size, financial resources, and the nature and structure of its operation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.[2]

Application of ADA Legal Requirements to Conduct and Performance Standards

It is illegal for an employer to discriminate against

1 See also 29 C.F.R. pt. 1630 app. - 1630.2(n) (2007) ("the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards").

2 See 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (2000); 29 C.F.R. §§ 1630.2(p), 1630.9(a) (2007); 29 C.F.R. pt. 1630 app. - 1630.2(o) (2007) (employer is not required to reallocate essential functions).

an employee simply because they have a mental health condition. This includes terminating, rejecting for a job or promotion, or forcing the employee to take leave. However, an employer does not have to retain an employee who cannot perform or poses a "direct threat" to safety (a significant risk of substantial harm to self or others). But an employer cannot rely on myths or stereotypes about an employee's mental health condition when deciding whether the employee can perform a job or whether the employee poses a safety risk.

The ADA generally gives employers wide latitude to develop and enforce conduct rules and performance standards. If an employee states that a disability is the cause of a conduct or performance problem and requests accommodation, the employer may still discipline the employee for it. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation. If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct or poor performance, or if the employee thinks there is an accommodation that could help avoid future incidents.

The only requirement imposed by the ADA is that a conduct rule or performance standard be job-related and consistent with business necessity when it is applied to an employee whose disability caused a rule violation. Certain rules or standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property.[3] Similarly, employers may prohibit insubordination towards supervisors and managers, and also require that employees show respect for, and deal appropriately with, clients and customers.[4] Employers also may:

- prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work);[5]
- prohibit employees from sending inappropriate or offensive e-mails (e.g., those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work;
- require that employees observe safety and operational rules enacted to protect others from dangers inherent in certain workplaces (e.g., factories with machinery with accessible moving parts); and
- prohibit drinking or illegal use of drugs in the workplace.

Whether an employer's application of a conduct rule or performance standard to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct or performance, the frequency of occurrence, the nature of the job, the specific conduct or performance standard at issue, and the working environment. These factors may be especially critical when the conduct or performance issue is not as clear-cut as the examples listed above. For example, "disruptive" behavior, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable.[6]

Reasonable Accommodations

Employees may be entitled to a reasonable accommodation for any mental health condition that would, if left untreated, "substantially limit" the employee's ability to concentrate, interact with

3 See Macy v. Hopkins Co. Sch. Bd. of Educ., 484 F.3d 357, 366 (6th Cir. 2007) (school board had legitimate, nondiscriminatory reason to terminate teacher with a head injury who threatened to kill a group of boys).

4 See Bing v. Danzig, EEOC Petition No. 03990061 (Feb. 1, 2000) ("[A] standard of employee workplace conduct that bars insubordination by employees . . . is by definition job-related and consistent with business necessity."); Mincer v. Alvarez, EEOC Petition No. 03990021 (May 25, 2000) (employee's removal for insubordination is job-related and consistent with business necessity). See also Ray v. The Kroger Co., 264 F. Supp.2d 1221, 1229 & n.4 (S.D. Ga. 2003) (upholding termination of grocery clerk who had uncontrollable outbursts of profanity, vulgar language, and racial slurs as a result of Tourette Syndrome because such conduct impermissible in front of customers); and Buchsbaum v. Univ. Physicians Plan, 55 F.App'x 40, 45 (3d Cir. 2002) (unpublished) (no pretext where deaf employee's transfer and subsequent termination are justified by his unacceptable behavior that included inappropriate comments to patients). Cf. Crandall v. Paralyzed Veterans of Am., 146 F.3d 894, 895 (D.C. Cir. 1998) (information specialist's unacceptable behavior included abusing library employees of a trade association resulting in the library threatening to bar all of PVA's workers from using its facility); and Mammone v. President & Fellows of Harvard Coll., 847 N.E.2d 276 (Mass. 2006) (applying state disability law, upheld termination of museum receptionist with bipolar disorder for numerous unprofessional disturbances in front of visitors).

5 See, e.g., Calef v. Gillette Co., 322 F.3d 75, 86 (1st Cir. 2003) (it is job-related and consistent with business necessity for a manager to be able to handle stressful situations without making others in the workplace feel threatened by verbal and physical threats and altercations); Grevas v. Village of Oak Park, 235 F.Supp.2d 868, 872 (N.D. Ill. 2002) (employee with depression terminated, in part, because of inability to get along with coworkers as evidenced by refusing to establish effective working relationships, making unfounded allegations against coworkers, and making abusive and/or inappropriate comments).

6 Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1087, not 38 (10th Cir. 1997) (permitting "employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA's protection of the mentally disabled").

others, communicate, eat, sleep, regulate thoughts or emotions, or do any other "major life activity."

An employee's condition does not need to be permanent or severe to be "substantially limiting." It may qualify by, for example, making activities more difficult, uncomfortable, or time-consuming to perform compared to the way that most people perform them. If symptoms are intermittent, what matters is how limiting the employee would be when the symptoms are present. Mental health conditions like major depression, post-traumatic stress disorder (PTSD), bipolar disorder, schizophrenia, and obsessive compulsive disorder (OCD) should easily qualify, and many others will qualify as well.

An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one.[7] If an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation.[8]

Once a reasonable accommodation is requested, the employer and the employee should discuss the employee's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide. An employee may ask for an accommodation at any time. Because an employer does not have to excuse poor job performance or misconduct, even if it was caused by a mental condition or the side effects of medication, an employee should ask for an accommodation before any problems occur or become worse at work.[9]

If an accommodation is requested, the employer should initiate the "interactive process." An employer can ask an employee to put a request for an accommodation in writing, and to generally describe the condition and how it affects the employee's job performance or conduct. The employer also can ask an employee to submit a letter from the employee's health care provider documenting the mental health condition, and the need for an accommodation because of it. If an employee does not want the employer to know the specific diagnosis, it is enough for the employee to provide documentation that describes the condition more generally (by stating, for example, that the employee has an "anxiety disorder"). An employer can also ask the employee's health care provider whether a particular accommodation would meet the employee's needs.

If a reasonable accommodation would help the employee's job performance or conduct, the employer must give the employee one unless the accommodation involves significant difficulty or expense. If more than one accommodation would work, the employer can choose which one to give the employee. An employer cannot legally fire an employee, or refuse to hire or promote an employee, because the employee asked for a reasonable accommodation or because the employee needs one. An employer cannot "charge" the employee for the cost of the accommodation.

The following are accommodation ideas for poor job performance or misconduct resulting from certain mental health conditions:

Flexible Schedule
- Job Restructuring
- Modified Break Schedule (e.g., scheduling work around therapy appointments)
- Reassignment
- Telework, Work from Home, Working Remotely
- Extra Time
- Modified Workspace
- Office/Workspace Relocation (e.g., relocating to a quiet office/workspace to reduce triggers)
- Supervisory Methods (e.g., meeting less frequently to discuss work matters; limit verbal interaction by providing instructions in writing)

If an employee cannot perform all the essential functions of the job to normal standards and does not have any paid leave available, an employee still may be entitled to unpaid leave as a reasonable

7 See Hill v. Kansas City Area Transp. Auth., 181 F.3d 891, 894 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination).

8 See Miller v. Nat'l Casualty Co., 61 F.3d 627, 630 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation even though the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").

9 Contreras v. Barnhart, EEOC Appeal No. 01A10514 (Feb. 22, 2002) (decision rejects employee's claim that employer should have known that a reasonable accommodation was not working and provided another one, rather than disciplining employee for poor performance, where employee failed to request a new accommodation and two of her doctors had indicated that the employer should continue providing the existing accommodation).

accommodation if that leave will help the employee get to a point where the employee can perform those functions. The employer should also consider whether the employee qualifies for leave under the Family and Medical Leave Act. The employee may ask the employer for a reassignment to a job that the employee can do as a reasonable accommodation, if one is available. If one is not available, and all other options have been exhausted, it is legally permissible for an employer to terminate a disabled employee if the employer can prove that it could not provide a reasonable accommodation to enable the employee to do the job.

Key Takeaways for Employers

About one out of every five employees is working with a mental disability. Employers should develop policies and procedures to respond effectively when mental illness arises in the workplace. Employers should always act when there is a clear safety concern, but these actions must be grounded in evidence. Vague or general fears that employees with mental disabilities are going to be violent in the workplace are not supported by the evidence and would not constitute a credible safety concern.

It important for employers to train supervisors on disability-related policies and procedures. Supervisors are very likely to be "first responders" to accommodation requests and set the tone for disability inclusiveness in the workplace. Having an effective Employee Assistance Program can also help set the tone for disability inclusiveness in the workplace and can go a long way toward creating a positive climate to help employees with mental disabilities perform their job duties.

Sources for Employers

The Equal Employment Opportunity Commission - www.eeoc.gov
Job Accommodation Network - www.jan.gov
ADA National Network - www.adata.org

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WORKPLACE BEHAVIORAL ISSUES

Appropriately Handling Thorny Situations

FormanWatkins

Forman Watkins & Krutz LLP

CATASTROPHE

Gunman who killed 8 workers at Indianapolis FedEx site had been detained for mental illness

PUBLISHED SAT, APR 17 2021·7:18 AM EDT

REUTERS

SHARE

FormanWatkins

Mental Health By The Numbers

- Anxiety Disorders: 19.1% (estimated 48 million people)
- Major Depressive Episode: 8.4% (21 million people)
- Bipolar Disorder: 2.8% (estimated 7 million people)

FormanWatkins

Americans With Disabilities Act

The ADA prohibits an employer from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms and conditions, and privileges of employment.

FormanWatkins

Which employee has a mental disability?

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FAQs

- Can an employer terminate or discipline an employee because of a mental disability?
- Can an employer terminate or discipline an employee with a mental disability?
- What if an employee's mental disability affects job performance?

FormanWatkins

Reasonable Accommodations

Does the mental health condition, if left untreated, **substantially limit** the employee's ability to concentrate, interact with others, communicate, eat, sleep, regulate thoughts or emotions, or do any other **major life activity?**

FormanWatkins

Reasonable Accommodations

An employer is required to make a reasonable accommodation to the known disability of a qualified employee if it would not impose an **undue hardship** on the operation of the employer's business.

FormanWatkins

Examples

- Flexible Schedule
- Job Restructuring/Reassignment
- Modified Break Schedule/Workspace
- Telework, Work from Home, Working Remotely
- Supervisory Methods

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Scenario #1

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Scenario #2

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Scenario #3

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Takeaways

- Employers should develop policies and procedures to respond effectively when mental illness arises in the workplace.
- Employers should train supervisors on disability-related policies and procedures.

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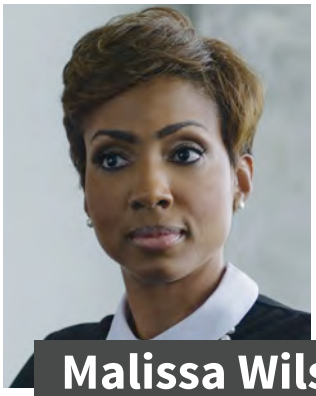

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Malissa Wilson

Partner | Forman Watkins & Krutz (Jackson, MS)

Before becoming an attorney, Malissa worked as a journalist and public relations practitioner in crisis communications. Though she is not a working journalist covering stories anymore, as an attorney, Malissa offers clients her ability to lay out and present the story-line of their cases clearly and efficiently to a judge or juror as demonstrated by her successful trials in state and federal court and oral arguments before the state supreme court. With her experience in crisis communications, she offers a calm and honest confidence that clients will find indispensable in the midst of tough litigation. A firm believer of the golden rule, Malissa handles every case how she would want an attorney to handle a case for her, always going the extra mile and never backing down from a challenge.

Malissa brings to the firm nearly 20 years of litigation and trial experience. Before joining FormanWatkins, Malissa was employed as a Special Assistant Attorney General for the Office of the Mississippi Attorney General in the Civil Division and as a Senior Assistant City Attorney for the City of Houston (Texas) in the Labor, Employment and Civil Rights Division. She has served as in-house counsel for a national insurance company overseeing cases in Texas, Oklahoma and Mississippi and for the state's largest public employer, The University of Mississippi Medical Center. In addition to handling employment matters, she has also worked in areas of Workers Compensation, Insurance Defense, Toxic Tort, Civil Rights and Media Law. Malissa's diverse background and vast array of knowledge make her a key asset to the creative, efficient work ethic of FormanWatkins. Ultimately, clients can expect a thorough job well done when working with Malissa, and will not find a kinder advocate.

Practice Areas

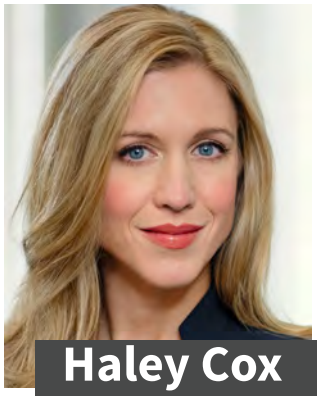
- Labor & Employment Law
- Insurance Coverage & Bad Faith Defense
- Media Law
- Personal Injury
- Political Law
- Premises Liability
- Workers' Compensation

Professional Recognition

- The Best Lawyers in America®, 2021: Litigation – Labor and Employment, Workers' Compensation Law – Employers
- Selected as one of Mississippi's 50 Leading Businesswomen by the Mississippi Business Journal (2019)
- Martindale-Hubbell® Silver Client Champion Rating
- Martindale-Hubbell NotableSM Peer Review Rating
- Selected as one of Mississippi's Top Ten Leaders in Law by the Mississippi Business Journal (2017)
- Leadership Jackson, class of 2005

Education

- University of Mississippi, J.D., cum laude
- Columbia University, Master of Science, Journalism
- Texas Southern University, B.A., Journalism, magna cum laude



The Rise of Nuclear Verdicts

Haley Cox

Lightfoot Franklin & White (Birmingham, AL)

Counteracting the Anchoring Effects of Plaintiff's Damages Request to Avoice Nuclear Verdicts

Haley Cox and Christina Marinakis

Recent headlines are filled with news of juries awarding jaw dropping, large nuclear verdicts, often in single plaintiff cases. Indeed, in August 2021, a Florida jury from a politically conservative county awarded more than $1 billion for the death of a plaintiff against two trucking companies, arising from a crash.[1] In the same month, a Georgia jury in a red county rendered a $200 million verdict against Malibu Boats for a child's death, based on a failure to warn claim.[2] These verdicts follow the trend from 2020 when, in October, a Florida jury awarded $411 million to a man hurt in a pileup.[3]

On a smaller — but still concerning — scale, in 2019, we saw juries award non-economic damages of $1.25 million to a woman on an insurance bad faith claim, $1.3 million to a phlebotomist who experienced racial harassment, $1.9 million to a cyclist who broke her hip and wrist, and $3 million to a teen who fell from a ski lift. Without any concrete guidelines from the courts, how do jurors arrive at such figures? King Solomon would be disappointed. Indeed, jurors in the ski lift case appeared to merely "split the baby," issuing an award that fell between the $6 million requested by plaintiff's counsel and $700,000 suggested by the defense. Would the result have been any different had counsel from either side not provided a number at all? Consider the following:

> Question: How did the jury arrive at the decision to award the plaintiff $20 million?
>
> Juror #1: We started with what the plaintiff was asking for – $80 million, which seemed like a very high amount, and went down and down from there.
>
> Juror #2: None of us had been on a jury before, so we had no idea where to start. What's a life worth? It would have been nice to have some precedent to go by, but we didn't. So, we started with what they gave us, and then took off a percentage.

Jurors are often at a loss when it comes to determining what constitutes fair and reasonable non-economic damages. Lawyers, who are constantly privy to plaintiff demands, settlement values, and jury verdicts, sometimes forget that most jurors have no references aside from the jaw-dropping figures they hear in the news.

Anchoring and Adjustment

Anchoring and adjustment is a psychological heuristic that influences the way people assess numerical estimates. When asked to come up with an appraisal or estimate, people will start with a suggested reference point (i.e., "anchor") and then make incremental adjustments based on additional information or assumptions. These adjustments are usually insufficient, giving the initial anchor undue influence. In a jury deliberation setting, we see this all the time.

> Juror A: What was it they were asking for – 50 million? That's ridiculous. No way.
> Juror B: What's fair then? Half of that? 25?
> Juror A: That still seems a little high. I'd cut that in half – make it an even 13.
> Juror C: You have to figure the lawyers are going to take at least a third of it, and another third will probably

1 Dzion v. AJD Bus. Servs. Inc., No. 45-2018-CA-000148 (Fla. Cir. Ct.).

2 Batchelder v. Malibu Boats, LLC, No. 2016-CV-0114-C (Rabun Cnty. Super. Ct.).

3 Washington v. Top Auto Express, Inc., No. 18-CA-000861 (Fla. Cir. Ct.).

> go to taxes, so you need to bump that up. I'd say $30 million, that way he'll end up with 10.
> Juror A: $30 million still seems a bit high to me.
> Juror B: That's still a lot less than what he's asking for.
> Juror A: Okay, I can go with $30 million.

Had the plaintiff's attorney only requested $30 million, it is very likely the jury would have made similar adjustments and ultimately settled on a figure far less. Most plaintiff lawyers realize this and "shoot for the moon," knowing that they will end up among the stars even if they miss the mark. So how can defense counsel prevent jurors from using the plaintiff's request as an anchor? We suggest the following methods:

1) Removing the Anchor.

Jurors assume that lawyers know everything about the law, and the same applies when it comes to damages. Surely, if there is an amount the plaintiff's attorney is comfortable asking for, it's because some jury in the past has given it. These faulty assumptions lead jurors to defer to the trial lawyers. In fact, some jurors assume assessing damages is an "all or nothing" determination. Therefore, it is important to inform jurors that they are not bound by the plaintiffs' numbers, that those numbers are completely arbitrary, and to suggest that the jury give no weight to figures that are unsubstantianted. For example:

> The plaintiff's attorney has asked you to award a specific amount, but that's just a request; it has no basis in fact – it's not based on anything other than what they want. Should you decide my client is liable, although we firmly believe it is not, then we ask that you come up with your own figure that is fair and reasonable, and give no deference whatsoever to a number that is merely a request without any basis.

2) Exposing the Anchor

People are less likely to fall prey to mental processing errors involving anchoring when the tendency to engage in such thought is outwardly exposed. By drawing attention to the fact that the plaintiff's counsel is attempting to influence jurors with an anchor, jurors will be less likely to be persuaded by it. For example, most people are familiar with anchors being used to keep a boat from drifting too far. What you probably didn't know is that anchoring is a psychological persuasion tactic as well. Let me give you an example:

> I was at a conference in Vegas and wanted to bring back something nice for my wife, so I walked into one of those high-end purse stores. The salesman brings over a bag and I take a look at the price tag – $11,000! I tell him, "Hey, I love my wife, but that's just too high." "Ah! I have just the one for you," he says, and he brings over a different one. This purse was $2,000. "Okay," I'm thinking, "This is much more reasonable. I'll take it." When I got home, my wife was VERY happy, but asked why I would spend so much. Then it hit me. If the salesman had never shown me that $11,000 one, there is no way I would have spent $2,000 on a purse.

That's what anchoring is all about. And guess what? That's what the plaintiff's lawyer just tried to do to you. That $10 million request was an anchor, aimed at keeping you from drifting too much lower. Only you, as jurors, decide where that anchor touches down; it's not for the plaintiffs to set it for you.

3) Lowering the Anchor.

Although exposing and removing the anchor will have some effect on minimizing damages, in the absence of competing values, jurors will nevertheless use the plaintiffs' figures as the starting point. Thus, defense counsel would be well-served to identify an alternative amount that is fair and reasonable, without conceding responsibility. Consider the following:

> Juror A: For non-economic damages, what do you all think?
> Juror B: The plaintiff lawyer said $30 million, which seems like way too much.
> Juror C: I'm thinking closer to what the defense lawyer said, $2 million. The point is to put him whole, not put him up in a mansion.
> Juror B: I think he needs a little more than 2 – that doesn't last very long in this day and age.
> Juror C: Okay, what if we bump it up to 5?
> Juror A: Can everyone agree to $5 million? [all hands raise] Okay, we'll go with 5.

By offering a counter-figure, the defense "Lowers the Anchor," giving defense supporters and conservative jurors something to argue from which effectively lowers any potential award.

Anchors have the most "pull" when they are tied to a amounts based on facts. For example, defense counsel might suggest "twice the amount of the hospital bills" or "$20,000 for each year since the accident." Jurors tend to give more weight to figures that appear to be tied to evidence than to arbitrary numbers pulled out of thin air.

Does Lowering the Anchor Admit Liability?

Offering an alternative damages figure is a controversial technique, and trial lawyers are often reluctant to do so in fear that jurors will misconstrue it as a concession of liability. Years of experience talking to thousands of jurors suggest this usually is not the case. This is especially true when there is at least one or two sophisticated jurors on the panel and counsel is clear that there is no liability, and, thus, there should be no damages. Here, the trial lawyer is providing an alternative calculation to give the jury some guidance in the event individual jurors disagree.

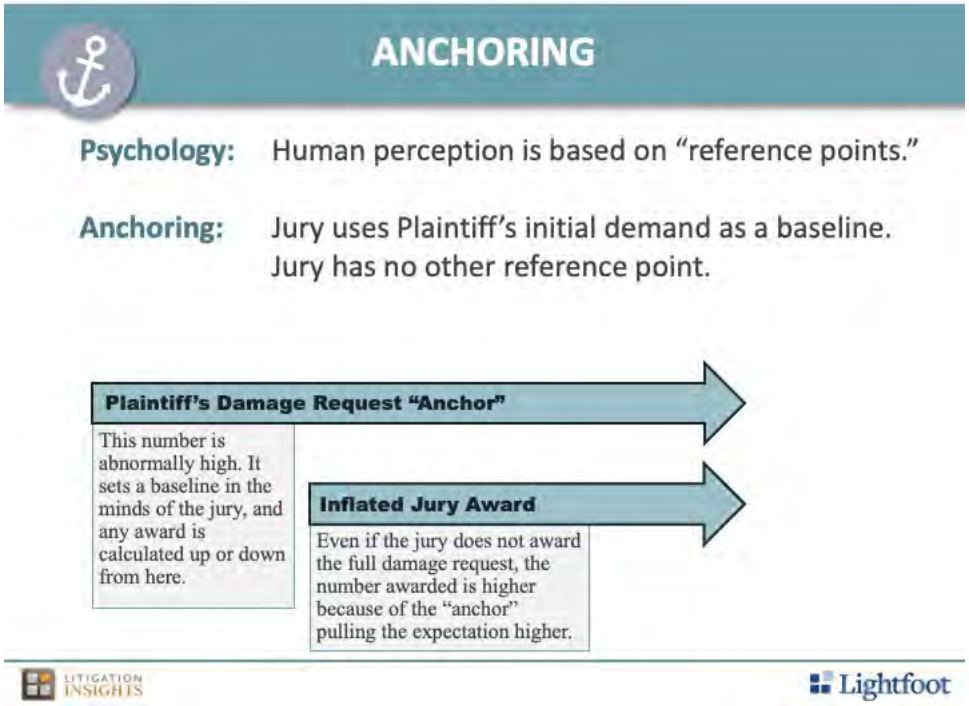
Empirical research supports the use of this technique. In one study, damages were 823% higher when the plaintiff requested $5 million as opposed to $250,000. However, jurors awarded 41% less damages when the defendant offered a counter anchor than when the defense ignored the request or attacked it as unreasonable. Most importantly, jurors were actually more likely to render a complete defense verdict when the defendant offered a counter anchor, suggesting that not only do most jurors not view the counteroffer as a concession of liability, but an opportunity to enhance the defense's credibility.

In another study, researchers found that counter anchors significantly reduced overall awards and had no effect on findings of liability when the defendant's case was weak or moderately strong. When the defense case was very strong, however, more jurors found the defendant liable when the defense offered a counter anchor than when it did not. Thus, in most cases, providing a counter anchor will not impede your chances of obtaining a defense verdict.

Conclusion

If there is one thing we can all agree upon, it is that there is no one-size-fits-all approach to litigating a case. The only way to ensure that a particular trial tactic is the right one for your case is to test it – either at trial, or with jury research incorporating a test of alternative defense approaches.


HOW TO COMBAT PLAINTIFFS' ANCHOR TO AVOID NUCLEAR VERDICTS
LITIGATION INSIGHTS
Lightfoot


ANCHORING
Psychology: Human perception is based on "reference points."
Anchoring: Jury uses Plaintiff's initial demand as a baseline. Jury has no other reference point.
Plaintiff's Damage Request "Anchor"
This number is abnormally high. It sets a baseline in the minds of the jury, and any award is calculated up or down from here.
Inflated Jury Award
Even if the jury does not award the full damage request, the number awarded is higher because of the "anchor" pulling the expectation higher.
LITIGATION INSIGHTS
Lightfoot

ANCHORING: DELIBERATIONS

Juror A: *What was it they were asking for – 50 million? That's ridiculous. No way.*

Juror B: *What's fair then? Half of that? 25?*

Juror A: *That still seems a little high. I'd cut that in half – make it an even 13.*

Juror C: *Yeah, but you have to figure the lawyers are going to take at least a third of it, and another third will probably go to taxes, so you need to bump that up. I'd say $30 million, that way he'll end up with 10.*

Juror A: *$30 million still seems a bit high to me.*

Juror B: *But that's still a lot less than what he's asking for.*

Juror A: *Okay, I can go with $30 million.*

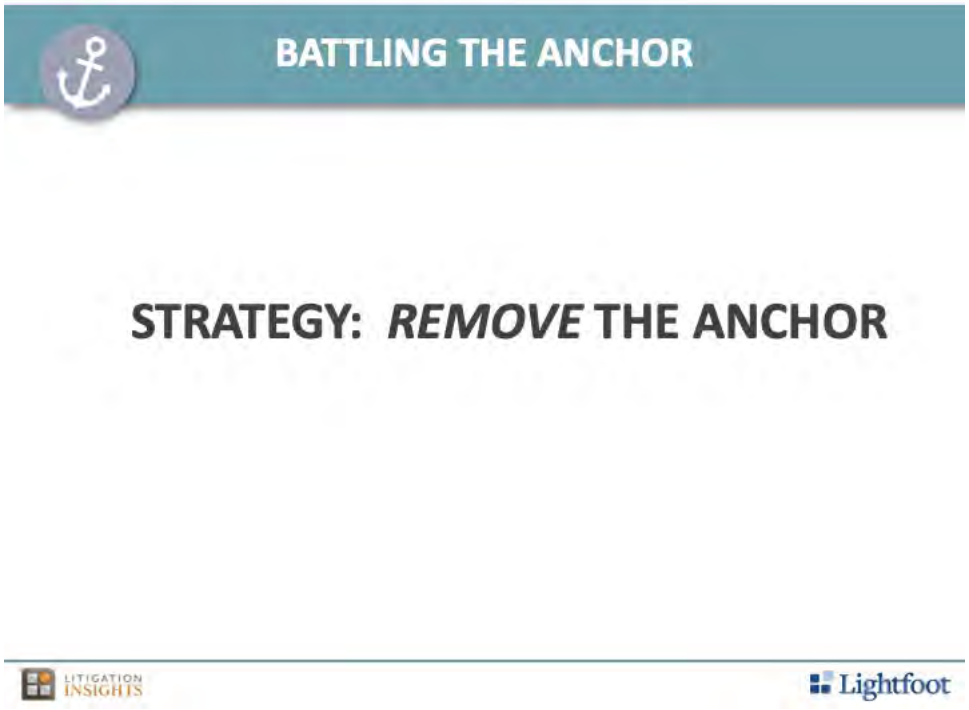
LITIGATION INSIGHTS Lightfoot

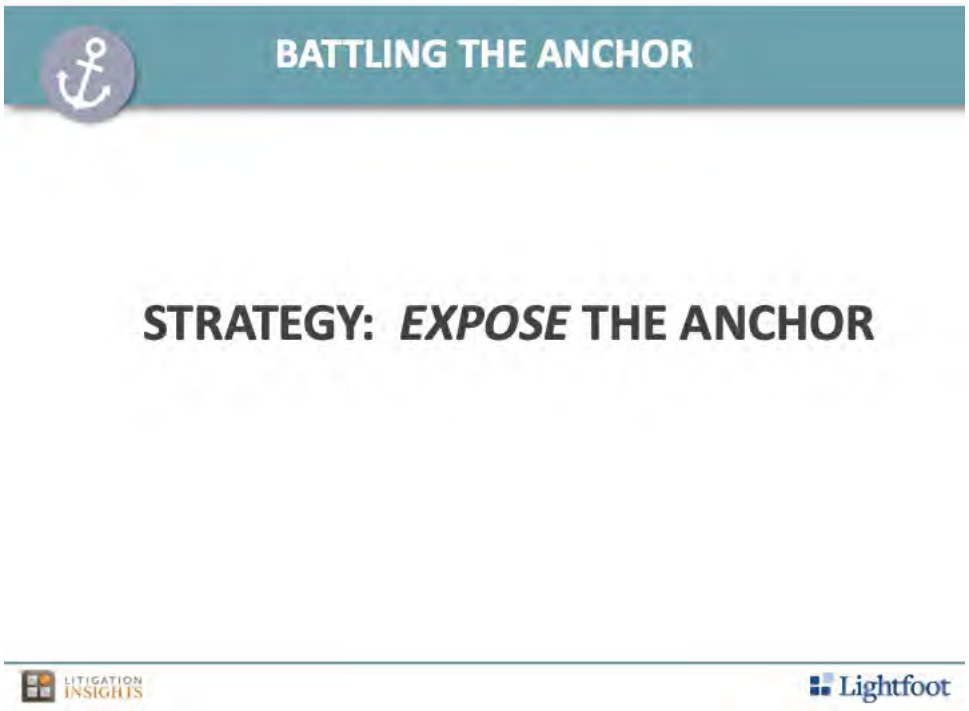
ANCHORING: POST-TRIAL INTERVIEWS

Question: *How did the jury arrive at the decision to award the plaintiff $20 million in non-economic damages?*

Actual Juror #1: *None of us had been on a jury before, so we had no idea where to start. What's a life worth? It would have been nice to have some precedent to go by, but we didn't. So, we started with what they gave us, and then took off a percentage.*

LITIGATION INSIGHTS Lightfoot


BATTLING THE ANCHOR
STRATEGY: *REMOVE* THE ANCHOR
LITIGATION INSIGHTS
Lightfoot


BATTLING THE ANCHOR
STRATEGY: *EXPOSE* THE ANCHOR
LITIGATION INSIGHTS
Lightfoot

BATTLING THE ANCHOR

STRATEGY: *LOWER* THE ANCHOR

Campbell & *Stein* study: MOST effective for creating change

LITIGATION INSIGHTS Lightfoot

DOES PROVIDING A COUNTER-ANCHOR ADMIT LIABILITY?

Campbell, Chao, Robertson & Yokum 2016 study:

- Awards were 41% ***less*** when the defendant offered a counter
- Jurors were ***more likely*** to find ***NO*** liability when there was a counter

Decker 2006 study:

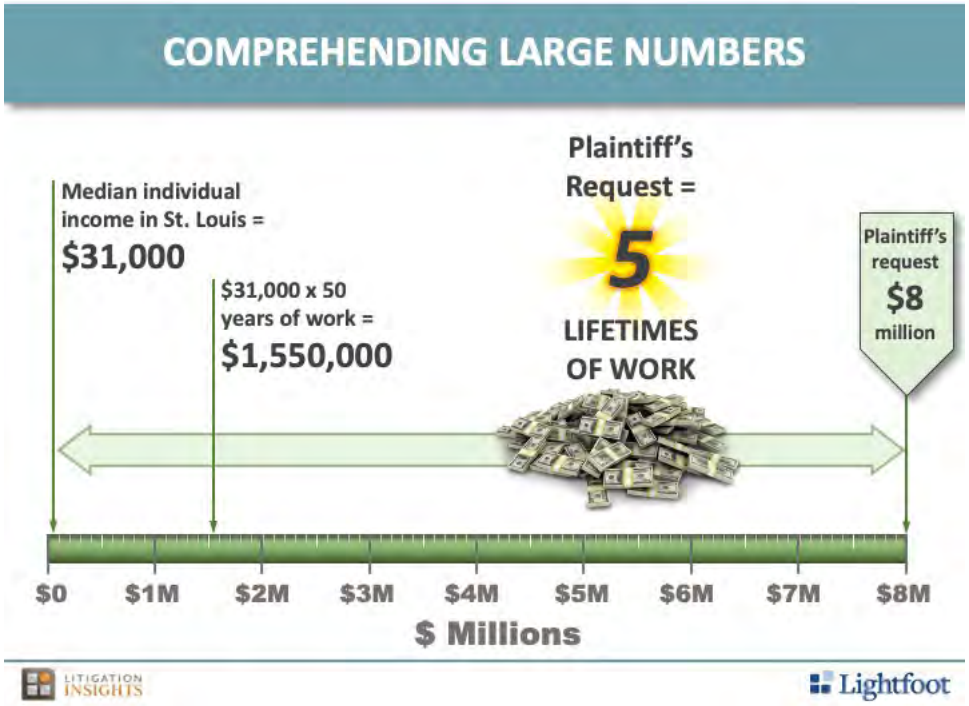
- Counter anchors ***did not*** influence the percentage of jurors who found the defendant liable

Ellis 2002 study:

- Counter anchors ***reduced awards*** and had ***no effect*** on liability when the defendant's case was weak or moderately strong
- However, when defendant's case was **very strong**, more jurors found the defendant ***liable*** when there was a counter anchor.

LITIGATION INSIGHTS Lightfoot


$9M
$5M
$3M
$2M
$1M
PSYCHOLOGICAL FACTORS:
LARGE NUMBERS
LITIGATION INSIGHTS
Lightfoot


COMPREHENDING LARGE NUMBERS
Median individual income in St. Louis =
$31,000
$31,000 x 50 years of work =
$1,550,000
Plaintiff's Request =
5
LIFETIMES OF WORK
Plaintiff's request
$8
million
$0
$1M
$2M
$3M
$4M
$5M
$6M
$7M
$8M
$ Millions
LITIGATION INSIGHTS
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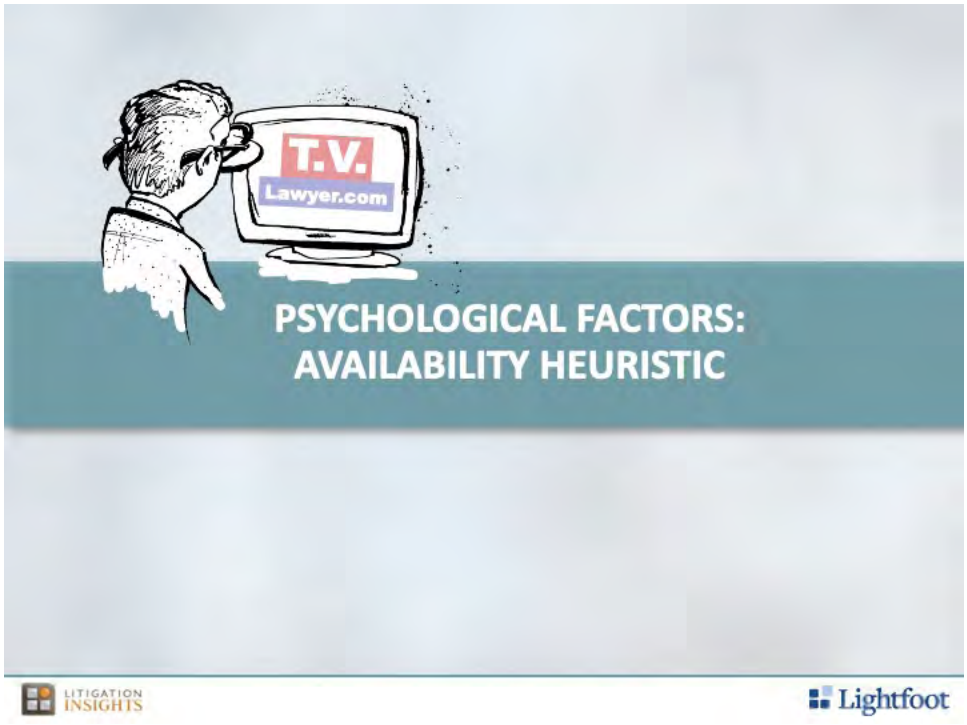
T.V.
Lawyer.com
PSYCHOLOGICAL FACTORS:
AVAILABILITY HEURISTIC
LITIGATION INSIGHTS
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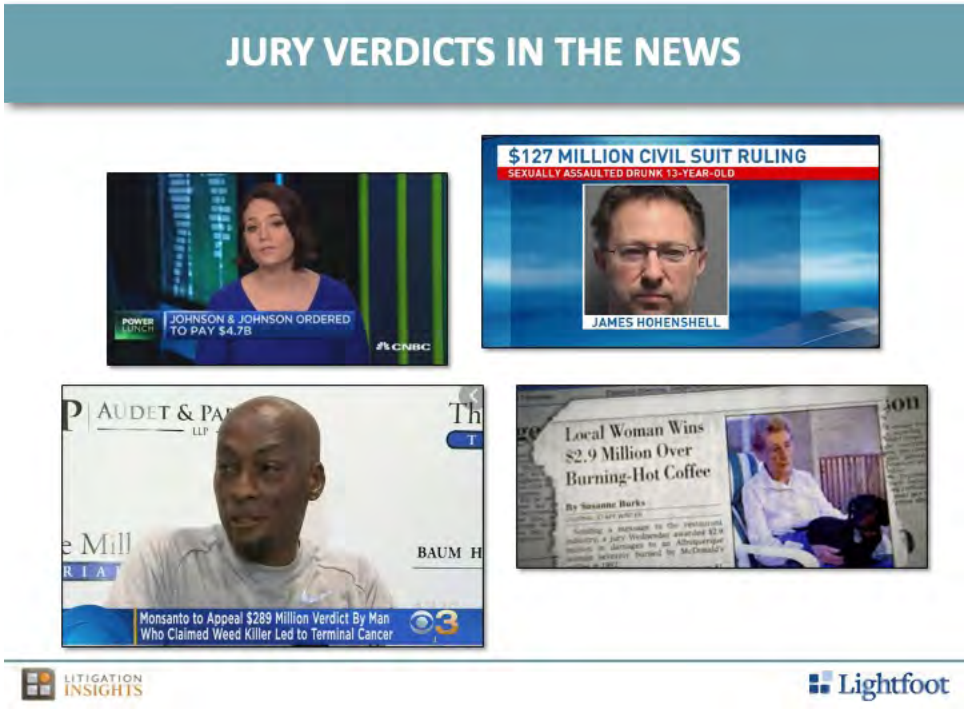

JURY VERDICTS IN THE NEWS
JOHNSON & JOHNSON ORDERED TO PAY $4.7B
CNBC
$127 MILLION CIVIL SUIT RULING
SEXUALLY ASSAULTED DRUNK 13-YEAR-OLD
JAMES HOHENSHELL
Monsanto to Appeal $289 Million Verdict By Man Who Claimed Weed Killer Led to Terminal Cancer
Local Woman Wins $2.9 Million Over Burning-Hot Coffee
LITIGATION INSIGHTS
Lightfoot

LAWSUIT ADVERTISEMENTS

LITIGATION INSIGHTS

Lightfoot

BATTLING THE MEDIA

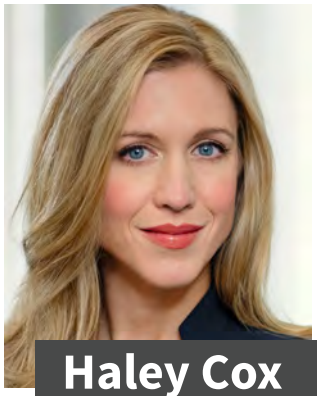
Science.
Not sensationalism.

Voir dire

- How many of you have heard about some recent lawsuits where people have been awarded $50 million or more for their cancers?
- Anyone hear about judges overturning these verdicts, or hear about cases were there was no award?
- Why do you think that is?
- Anyone ever see a news article, and then at the bottom, in tiny print, you realize it's actually an advertisement?
- Anyone think plaintiff law firms don't do that type of advertising, disguised as "news?"

LITIGATION INSIGHTS

Lightfoot



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Haley Cox

Partner | Lightfoot Franklin & White (Birmingham, AL)

Haley Cox knows from experience that winning takes work and attention to detail.

Haley tries cases and leads defense teams in a wide range of high-stakes cases, including claims of product defect, medical malpractice and serious personal injuries. She is admitted to the Alabama and Texas bars, and she has litigated in more than a dozen states.

Haley understands what it takes to win: the truth, hard work and delivering the client's story so it resonates with judges and juries. She also understands that winning is different to every client and in every case. A win may be a fair and swift resolution, or it may mean fighting all the way to a verdict. Either way, opponents know that Haley – like every Lightfoot lawyer – is prepared to take the case as far as it needs to go.

For more than 10 years, Haley has been instrumental in recruiting the next generation of Lightfoot lawyers to serve the firm's clients. She is committed to carrying out Lightfoot's mission of hiring only the most talented, driven and diverse lawyers, and then training them the right way.

Practice Areas
- Automotive
- Commercial Transportation
- Product Liability
- Medical Malpractice
- Catastrophic Injury
- Consumer Fraud & Bad Faith
- Professional Liability

Awards
- The Best Lawyers in America© by BL Rankings — Product Liability Litigation (2022)
- Alabama State Bar Leadership Forum (Class 11)
- Alabama Super Lawyers by Thomson Reuters, "Rising Star" — Litigation Defense (2014-15)
- Benchmark Litigation, "Top 250 Women in Litigation" (2020)
- Benchmark Litigation, "Local Litigation Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability (2021)
- Benchmark Litigation, "Future Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability (2018-20)
- Birmingham Business Journal, "Best of the Bar" (2021)
- Birmingham Business Journal, "Top 40 Under 40" (2020)
- Birmingham Business Journal, "Rising Star of Law" (2018)
- B-Metro magazine, "Top Women Attorneys" (2020)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Litigation Defense (2016-21)

Education
- Samford University, Cumberland School of Law (J.D., magna cum laude, 2006)
- University of Alabama (B.S., summa cum laude, 2003)

Panel: Are Non-Competes Dead? The Paths Forward for Businesses

Katie Reilly
Wheeler Trigg O'Donnell (Denver, CO)

Panel: Are Non-Competes Dead? The Paths Forward for Businesses
Kathryn Reilly and Natalie West

Labor market competition has increasingly become a focus of legislative, regulatory, and law enforcement activity at both the state and federal levels—with specific attention directed towards restrictive covenants that impede worker mobility and recruitment, such as non-compete and no-poaching agreements. This article provides an overview of these developments and identifies practical tips for businesses trying to navigate this shifting landscape.

Numerous states have enacted statutes aimed at non-compete agreements

The last several years have seen a wave of state legislative action aimed at constraining the use of restrictive covenants through bright-line statutory rules. These enactments range in scope from outright prohibition of all non-compete agreements to restricting their use to certain categories of employees or other defined limitations. Nonetheless, a few notable trends have emerged.

Many states have banned non-competes for low-wage or hourly workers, though the definition of "low-wage" varies widely (with compensation thresholds ranging from $30,000 to over $100,000 annually).[1] Several states have imposed other restrictions, such as temporal or age limitations, as well as pre-employment disclosure requirements.[2] Though less common, increased penalties on employers requiring illegal non-competes have also featured in recent legislation, including fee-shifting provisions favoring prevailing employees and enhanced civil penalties.[3] And one state—Colorado—has recently criminalized the use of void non-compete agreements by amending its non-compete statute to provide that a violation constitutes a class 2 misdemeanor that is punishable by up to 120 days in jail, a fine of up to $750, or both.[4]

On the far end of the spectrum, the District of Columbia recently joined California, North Dakota, and Oklahoma in banning all (or nearly all) non-compete agreements. [5]

The Biden administration targets non-compete agreements

On July 9, 2021, President Biden issued an executive order aimed at promoting competition in the American economy. Among dozens of other initiatives, President Biden encouraged the Federal Trade Commission (FTC) to "exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[6] While the FTC has yet to take any formal action in response to this directive, such action is likely forthcoming. The FTC and DOJ held a two-day

1 See, e.g., 820 ILCS 90/10; Me. Rev. Stat. Ann. tit. 26, § 599-A; Md. Code Ann., Lab. & Empl. § 3-716; N.H. Rev. Stat. § 275:70-a; Nev. Rev. Stat. § 613.195(3); Or. Rev. Stat. § 653.295; R.I. Gen. Laws § 28-59-3; Va. Code Ann. § 40.1-28.7:8; Wash. Rev. Code § 49.62.020–49.62.040.

2 See, e.g., Mass. Gen. Laws Ann. ch. 149, § 24L(c) (non-competes generally limited to one year and prohibited for certain types of workers and those age 18 or younger); N.H. Rev. Stat. § 275:70 (non-compete must be disclosed to employee before acceptance of employment); Or. Rev. Stat. § 653.295 (disclosure requirement and one-year limitation); Wash. Rev. Code § 49.62.020 (disclosure requirement); Utah Code Ann. 34-51-201 (one-year limit)

3 820 ILCS 90/25 (fee shifting); 820 ILCS 90/30 (civil penalties up to $10,000 may be imposed on employers engaged in a "pattern or practice" of violating non-compete statute); Nev. Rev. Stat. 613.195(7) (fee shifting); Va. Code Ann. § 40.1-28.7:8 (fee shifting and civil penalty of $10,000 for each violation).

4 Colo. Rev. Stat. § 8-2-113(4) (effective March 1, 2022).

5 D.C. Stat. § 32-581.02; Cal. Bus. & Prof. Code § 16600; N.D. Cent. Code § 9-08-06; Okla. Stat. tit. 15, § 219A.

6 Executive Order on Promoting Competition in the American Economy, Section 5(g), July 9, 2021, at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (last visited Mar. 3, 2022).

workshop in December 2021 to explore various issues affecting competition in labor markets, including the "increased use of restrictive contractual clauses in labor agreements."[7] During that workshop, FTC Chair Lina Khan announced that the agency is "scrutinizing whether certain terms in employment contracts . . . may violate the law" and is currently soliciting public comment on the use and effects of "contracts that may constitute unfair methods of competition."[8] Ms. Kahn further advised that the FTC would consider its "full range of tools, including enforcement and rulemaking," as it evaluates research and evidence on the impact of employers' use of contractual restrictions.[9]

It is difficult at this time to predict what specific action the FTC will take. Panelists at the December workshop expressed a range of views, with some calling on the FTC to ban non-compete agreements altogether, particularly for low-wage workers, while others acknowledged the value of non-compete agreements with an eye towards more nuanced approaches. It is apparent, however, that the FTC is laying the groundwork to initiate formal rulemaking proceedings in the near future.

DOJ and state antitrust enforcers crack down on no-poaching agreements; private litigants follow suit

In addition to the focus on non-compete agreements, federal and state antitrust authorities have targeted "no-poaching" agreements. These agreements, through which employers seek to restrict the recruitment and hiring of their respective employees, have long raised antitrust concerns due to their effect of reducing competition in the labor market. But the last five years have seen a substantial increase in enforcement activity concerning these agreements, including through the use of criminal prosecutions under federal antitrust laws.

In October 2016, the FTC and DOJ jointly released Antitrust Guidance for Human Resources Professionals (the "Antitrust Guidance"), with the stated goal of alerting these professionals to potential antitrust violations related to compensation, recruitment, and hiring practices.[10] The Antitrust Guidance advised that "naked" no-poaching agreements—meaning those that are not ancillary to a legitimate collaboration among employers—are per se illegal under the antitrust laws. The Antitrust Guidance also announced that, contrary to its historical practice of going after these agreements through civil enforcement actions, DOJ intended to proceed criminally against naked no-poaching agreements going forward. And it has—in 2021, DOJ filed at least four criminal cases against businesses and individuals for engaging in these agreements.[11]

Though not the focus of the Antitrust Guidance, no-poaching agreements that are ancillary to legitimate business collaborations have not escaped scrutiny—particularly in the franchise context. Various state attorneys general have brought civil enforcement actions in connection with the use of no-poaching clauses in franchise agreements, with the result being that numerous businesses have executed legally binding agreements not to enforce such clauses in existing franchise agreements and to stop using them in future agreements.[12] Private litigants have also filed a rash of putative antitrust class actions challenging no-poaching clauses, including those in franchise agreements. Those cases, however, have not produced clear rules concerning how those agreements will be treated, as many have either settled early or fizzled when the court denied class certification (as seems to be the trend, but for varying reasons).

Moreover, DOJ has filed statements of interest in these private lawsuits, weighing in on a key—and unresolved—debate as to whether franchise-related no-poaching agreements should be subjected to per se treatment under the antitrust laws or whether they are properly analyzed under the more lenient "rule of reason," which calls for analysis of an

7 See https://www.justice.gov/atr/events/public-workshop-promoting-competition-labor-markets (last visited Mar. 3, 2022).

8 Transcript of FTC – DOJ December Workshop, Day 1, Dec. 6, 2021, at p. 8, at https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf (last visited Mar. 3, 2022).

9 Id.

10 The Guidance is available at https://www.justice.gov/atr/file/903511/download.

11 Indictment, United States v. Patel, No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021), ECF No. 20; Indictment, United States v. Hee, No. 2:21-cr-00098 (D. Nev. Mar. 30, 2021), ECF No. 1; Indictment, United States v. DaVita, Inc., No. 1:21-cr-00229 (D. Colo. July 14, 2021), ECF No. 1; Indictment, United States v. Surgical Care Affiliates, LLC, No. 3:21-cr-00011 (N.D. Tex. Jan. 5, 2021), ECF No. 1.

12 See, e.g., AAG to testify to Congress as AG Ferguson's anti-poach initiative reaches 155 corporate chains, Oct. 28, 2019, at https://www.atg.wa.gov/news/news-releases/aag-testify-congress-ag-ferguson-s-anti-no-poach-initiative-reaches-155-corporate (last visited Mar. 4 2022); AG Racine Announces Four Fast Food Chains to End Use of No-Poach Agreements, Mar. 13, 2019, at https://oag.dc.gov/release/ag-racine-announces-four-fast-food-chains-end-use (last visited Mar. 4, 2022); Attorney General James Ends Harmful Labor Practices at One of Nation's Largest Title Insurance Companies, Puts in Place Policies to Protect Workers, Sept. 9, 2021, at https://ag.ny.gov/press-release/2021/attorney-general-james-ends-harmful-labor-practices-one-nations-largest-title (last visited Mar. 4, 2022).

agreement's economic effects and pro-competitive justifications. Notably, while the Trump-era DOJ argued that such agreements should be analyzed under the rule of reason,[13] DOJ recently signaled a potential shift towards more heightened scrutiny of such agreements. In February 2022, DOJ filed a motion requesting permission to file a statement of interest in Deslandes v. McDonald's USA, in which the agency stated that the earlier statement of interest filed during the Trump administration "does not fully and accurately reflect the United States' current views."[14] DOJ's current views on the issue, however, remain unclear. The agency did not preview its current views in its motion requesting leave, and the court has since denied DOJ's request to file a statement of interest.

Practical tips for businesses going forward

Businesses should expect continued legislative and regulatory scrutiny of restrictive agreements that impact competition in the labor market. While the law remains fluid, businesses can and should take the following steps to limit exposure to both enforcement actions and private litigation:

- Stay alert to statutory and regulatory enactments concerning non-competes and other restrictive agreements, particularly from the FTC and the states in which their employees work.
- Review restrictive clauses in existing or standardized contracts to ensure they comply with applicable law.
- Make sure that restrictive clauses are used only when there is a legitimate business interest at stake, such as the protection of goodwill or trade secrets and other confidential information, and that any restrictions are narrowly tailored to protect that interest.
- Avoid entering into non-compete or other restrictive agreements with low-wage or hourly workers.
- Establish an antitrust compliance program to ensure that senior executives and human resources personnel are aware that agreements with other employers to restrict hiring and recruitment violate the antitrust laws. A firm antitrust compliance policy can provide clear guidelines for deterring antitrust violations, and periodic antitrust training can sensitize personnel to antitrust concerns and assist them in detecting potential violations.

13 Statement of Interest of the United States of America, Stigar v. Dough Dough, Inc., No. 2:18-CV-00244-SAB (E.D. Wash. Mar. 3, 2019), ECF No. 34.

14 United States' Mot. for Leave to file Statement of Interest at p. 1, Deslandes v. McDonald's USA, LLC, No. 19-cv-05524 (N.D. Ill. Feb. 17, 2022), ECF No. 446.

Are Non-Competes Dead?
The Path Forward for Businesses

Moderator: Katie Reilly, Wheeler Trigg O'Donnell
Panelists: Marcy Heronimus, Lumen Technologies
Sherin Sakr, WellBiz Brands
Tammy Westerberg, Wheeler Trigg O'Donnell

The Trial Network Litigation SuperCourse
April 29, 2022

Wheeler TriggO'Donnell LLP

Wheeler TriggO'Donnell LLP

Today's Panel

- **Marcy Heronimus:** Assistant General Counsel, Lumen Technologies
  - Fortune 500 technology and telecommunications company
- **Sherin Sakr:** General Counsel, WellBiz Brands, Inc.
  - One of the largest health and wellness companies in the United States. The company manages three separate franchise brands: Fitness Together®, Amazing Lash Studio®, and Elements Massage®.
- **Tammy Westerberg:** Partner, Wheeler Trigg O'Donnell

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State Statutes Emerging

Wheeler Trigg O'Donnell LLP

State Statutes Emerging

- Restrictions: earnings, time/tenure, age, other
- Employer penalties: fee shifting for prevailing employees, enhanced civil penalties
- Non-compete bans: California, North Dakota, Oklahoma, Washington D.C.
- Colorado: criminal penalties for using void non-compete agreements
  - Class 2 misdemeanor
  - Up to 120 days in jail and/or $750 fine.

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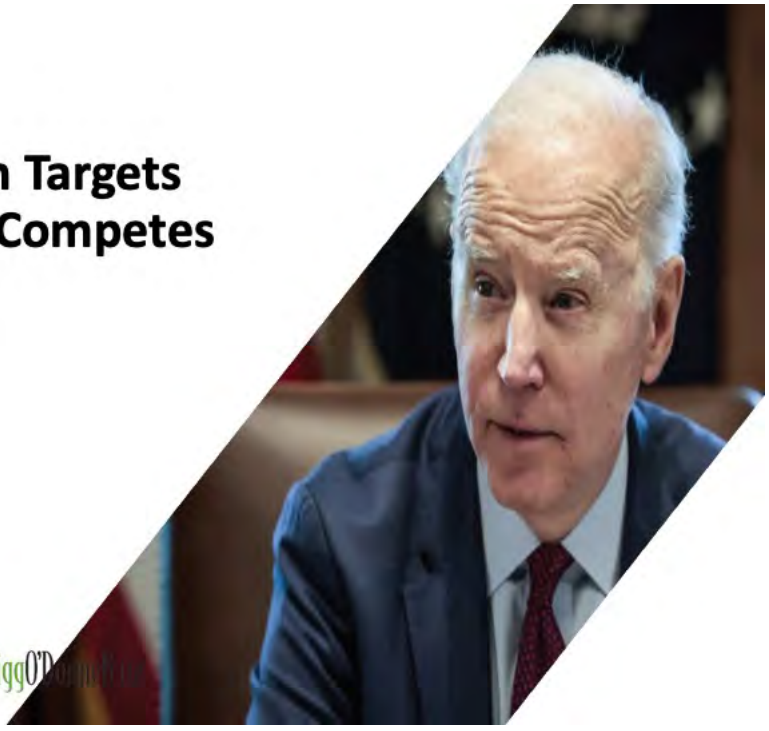
Biden Targets Non-Competes



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Biden Targets Non-Competes

- December 2021 FTC workshop explored use of restrictive clauses in labor agreements
- Agency considering options
- Unclear what will happen, but FTC laying foundation for formal rulemaking

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DOJ, States Crack Down on No-Poaching Agreements

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DOJ, States Crack Down on No-Poaching Agreements

- Past 5 Years: Significant increase in federal enforcement against no-poaching agreements—including criminal prosecutions
- 2016 "Antitrust Guidance" declared "naked" no-poaching agreements illegal
- Result: DOJ filed at least 4 criminal cases in 2021

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Collaboration Exceptions Also Challenged

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Collaboration Exceptions Also Challenged

- DOJ: "naked" no-poaching agreements defined as not ancillary to legitimate collaboration among employers, such as in franchise agreements
- BUT . . . even where collaboration exists, state civil actions have limited use of such agreements

Wheeler TriggO'Donnell LLP

Private Litigation on the Rise

Wheeler TriggO'Donnell LLP

Class Actions on the Rise

- Private class action litigation has challenged these agreements.
- DOJ shifts from Trump era posture toward "rule of reason" to Biden era scrutiny.
  - See statement of interest motion in *Deslandes v. McDonald's USA*

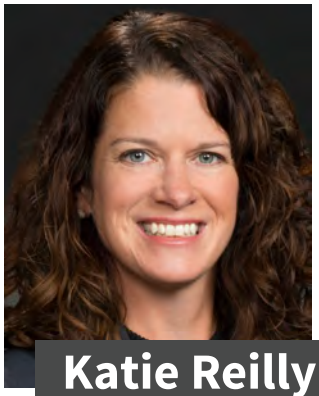
Wheeler TriggO'Donnell LLP

Practical Tips for Businesses

Wheeler TriggO'Donnell LLP

Practical Tips for Businesses

- Stay alert to FTC and state updates
- Review restrictive clauses in current/standard contracts
- Use restrictive clauses only when legitimate business interest exists
  - Protection of good will or proprietary information
- Tailor restrictions narrowly
- Don't use restrictive clauses with low-wage or hourly workers
- Establish antitrust compliance program



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Katie Reilly

Partner | Wheeler Trigg O'Donnell (Denver, CO)

Kathryn Reilly represents clients in complex commercial litigation, including antitrust matters and class actions in highly regulated industries. BTI Consulting named Katie a nationwide 2022 Client Service All-Stars MVP based on input from corporate counsel, and Chambers USA ranks her for commercial litigation in Colorado. For five straight years, Law Week Colorado has named Katie either the "Barrister's Choice" or "People's Choice" Best Antitrust Lawyer. Katie serves on the firm's five-member management committee.

Katie has favorably represented antitrust clients in matters involving monopolization, conspiracy, price fixing, exclusive dealing, and other competition-related disputes, including trade secrets and non-compete actions. She has extensive knowledge of the regulatory hurdles and obligations her clients face, and she develops effective litigation and trial strategies based on her clients' business priorities. Katie also routinely provides antitrust counseling to clients in connection with their formation of joint ventures, development of pricing policies, collaborations with competitors, and other activities potentially involving antitrust laws.

Practice Areas

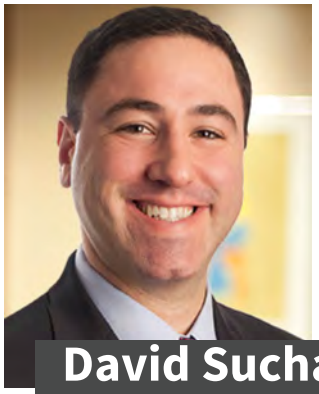
- Commercial Litigation
- Antitrust & Competition
- Class Actions
- Investigations & Compliance
- Appellate
- COVID-19

Legal Memberships, Activities and Honors

- Chambers USA - Band 2, General Commercial Litigation - Colorado, 2021; Band 3, General Commercial Litigation - Colorado, 2020; Band 4, General Commercial Litigation - Colorado, 2018-2019; Up and Coming, General Commercial Litigation - Colorado, 2016-2017
- BTI Consulting - Client Service All-Star MVP, 2020, 2022; Client Service All-Star, 2019
- The Best Lawyers in America - Litigation - Antitrust Lawyer of the Year, Denver, 2021; Commercial Litigation, 2018-2022; Antitrust Litigation, 2018-2022; Mass Tort Litigation / Class Actions - Defendants, 2022
- Benchmark Litigation - Under 40 Hot List, 2016-2017; Future Star, 2020, 2022
- 5280 Magazine Top Lawyers - Antitrust, 2020-2021; Civil Litigation, 2021
- Law Week Colorado - Top Women Lawyers, 2016; "People's Choice" Antitrust Lawyer, 2016-2018, 2020; "Barrister's Best" Antitrust Lawyer, 2019
- Denver Business Journal - "Forty Under 40," 2012
- Colorado Super Lawyers - Antitrust Litigation, 2017-2022; Top 100, 2018-2022; Top 50 Women, 2018-2022
- Colorado Rising Stars - Business Litigation, 2009-2016

Education

- New York University School of Law - J.D., 2001, cum laude
- University of Virginia - B.A., 1998, Classics and English, with distinction



Panel: Blockchain, Smart Contracts and Cryptocurrency: Addressing Litigation Risks

David Suchar
Maslon (Minneapolis, MN)

Blockchain, Smart Contracts and Cryptocurrency: Addressing Litigation Risks
Judah Druck and David Suchar

Crypto is everywhere. What were once niche terms and concepts—"DeFi," "Web3," "initial coin offering"—have now become ubiquitous, with billions of dollars being poured into the world of crypto by banks, hedge funds, governments, and individual investors. Decentralized finance is no longer reserved for individual futurists: Coinbase went public in April with a nearly $100 billion valuation. TurboTax will now allow users to deposit tax refunds into crypto accounts. El Salvador accepts Bitcoin as legal tender. Jamie Dimon once called Bitcoin a "fraud"; now, JPMorgan has a bank in the "Metaverse." The debate over whether crypto is here to stay, appears to have subsided.

But, as with all trends, the growth in crypto raises novel legal issues and risks. Coinbase has been sued for allegedly doing too little to prevent the hacking of and theft from user accounts. Celebrities like Kim Kardashian and Floyd Mayweather have been drawn into litigation for participating in alleged crypto "pump and dumps." The SEC is currently engaged in a first-of-its-kind litigation with Ripple Labs over its offering of a digital coin in violation of federal securities laws. Corporations have filed a new wave of lawsuits seeking to protect their intellectual property from NFT "owners."

None of the questions implicated by these lawsuits lend themselves to obvious answers. Indeed, they raise fundamental questions regarding the ways in which preexisting laws can (and should) be applied in this new world. This article assesses the litigation risks within four primary areas in the world of crypto (blockchain, cryptocurrencies, NFTs, and the Metaverse), and how statutory and common law has been applied to ameliorate—but often exacerbates—these risks.

BLOCKCHAIN

Any discussion of decentralized finance must start with the blockchain, which serves as its keystone. The blockchain is a public, universally distributed ledger that records transactions, including, but not limited to, those involving the exchange of cryptocurrencies or other crypto-assets. Before a transaction can occur, it must be verified to ensure that the transfer is valid, which includes confirmation that the funds (say, Bitcoins) being transferred are not duplicates or counterfeit. Once the transaction is verified, its details (including source, destination, and date/time) form a "block," which is added to the ever-expanding blockchain. This process repeats itself each time a transaction takes place.

The transparent nature of the ledger assures its trustworthiness. Any attempt to change transaction records or edit the underlying code would be futile, as millions of users, each with their own copy of the blockchain, would quickly spot inconsistencies and discard them. Blockchain users continue to develop additional ways to maintain the ledger's security, with companies like JP Morgan and Toshiba recently introducing quantum physics as a way to protect the blockchain from computer attacks.

Despite the inherent benefits in the blockchain—trust, decentralization, improved security and privacy—courts have expressed skepticism about its reliability. In Hunichen v. Atonomi LLC,[1] for example, a Washington federal court refused to take judicial notice of blockchain evidence,

1 No. C19-0615-RAJ-MAT, 2020 WL 6875558 (W.D. Wash. Oct. 6, 2020)

explaining that it was not convinced such evidence "is necessarily complete, its contents not subject to reasonable dispute or varying interpretation, and its use not improper as a defense to otherwise cognizable claims." The court's skepticism went even further, noting that defendants had "fail[ed] to identify a single case in which a Court has found such evidence properly considered in support of a Rule 12(b)(6) motion to dismiss." Thus, while the blockchain is increasingly gaining acceptance in the financial industry, attorneys should be aware that courts may be less enthusiastic (or less familiar) with the emerging technology.

Nor is the blockchain's purported freedom from third-party oversight without limits. In United States v. Gratkowski,[2] the Fifth Circuit considered whether an individual had a privacy interest in the information held on the blockchain (which consists of the amount transferred, the address of the sending party, and the address of the receiving party). Federal agents had used an outside service to analyze blockchain and identify the Bitcoin addresses controlled by an illicit website, which they then used to subpoena Coinbase for the identity of any accounts that had sent Bitcoin to the website's addresses. Defendant was one such customer, whose motion to suppress such evidence presented the "novel question" of whether an individual has a Fourth Amendment privacy interest in the records of their Bitcoin transactions. The Fifth Circuit answered in the negative. Citing caselaw concerning bank records and cell-site location information ("CSLI"), the court explained that "Bitcoin users are unlikely to expect that the information published on the Bitcoin blockchain will be kept private," and that even though users "enjoy a greater degree of privacy than those who use other money-transfer means," it was "well known that each Bitcoin transaction is recorded in a publicly available blockchain," which made it "possible to determine the identities of Bitcoin address owners by analyzing the blockchain." Thus, Defendant lacked a privacy interest in his information on the blockchain. Users of blockchain technology should therefore be wary that the "decentralized" and "anonymous" nature of blockchain does not currently carry any constitutional privacy protections or any true "confidentiality" at all.

2 964 F.3d 307 (5th Cir. 2020).

CRYPTOCURRENCIES

Cryptocurrencies are digital assets that resemble regular currencies—they can be purchased, traded, and exchanged. Rather than relying on bank or government control, however, cryptocurrencies are wholly decentralized, allowing anyone to easily transfer funds with few restrictions. Transactions are recorded on the blockchain, and while Bitcoin was the world's first cryptocurrency, it is now joined by thousands of alternatives (known as "altcoins"), including Ethereum, Dogecoin, and Tether (a "stablecoin" pegged to the US dollar).

As with the blockchain, courts and regulators struggle to fit cryptocurrencies into preexisting legal concepts. In fact, how to even define cryptocurrencies remains an open question. While courts have agreed that cryptocurrencies are "commodities in interstate commerce" and, therefore, subject to regulation by the Commodities Futures Trading Commission,[3] they are not currently treated as "legal tender" or even "money" under federal law.[4] Nor is it clear at this time whether cryptocurrencies are "commodities" or "securities." While the Securities and Exchange Commission successfully sued a company for offering a cryptocurrency, alleging that the defendant failed as part of a public sale of securities to file a registration statement.[5] The treatment of cryptocurrencies is still being debated, and indeed is central to the SEC's current dispute with Ripple Labs.[6] Companies looking to participate in a coin offering should make sure to keep up to date on the latest regulatory guidance.

Separate from determining which regulatory scheme should properly encompass cryptocurrencies, end-users have been at the forefront of recent litigation concerning cryptocurrencies. In Archer v. Coinbase, Inc.,[7] the court considered the responsibilities of cryptocurrency exchange platforms to its users when a theft occurs. In Archer, plaintiff sued Coinbase after his third-party cryptocurrency coin ("Bitcoin

3 Dekrypt Cap., LLC v. Uphold Ltd., No. 82606-9-I, 2022 WL 97233 (Wash. Ct. App. Jan. 10, 2022).

4 Atwal v. NortonLifeLock, Inc., No. 20-CV-449S, 2022 WL 327471 (W.D.N.Y. Feb. 3, 2022).

5 U.S. Sec. & Exch. Comm'n v. Kik Interactive Inc., 492 F. Supp. 3d 169 (S.D.N.Y. 2020).

6 "Ripple's Legal Brawl With SEC Could Help Settle When Cryptocurrencies Are Securities," Wall Street Journal (February 2, 2022), available at https://www.wsj.com/articles/crypto-industry-hopes-looming-legal-brawl-will-thwart-secs-regulation-push-11643724002.

7 53 Cal. App. 5th 266 (2020).

Gold") was stolen through a hack. Coinbase refused to support the new currency, but plaintiff alleged that Coinbase was negligent and breached the parties' contract.

The court granted summary judgment in Coinbase's favor, explaining that the parties' User Agreement did not require that Coinbase "provide services related to any particular digital currency created by a third party," and that "Coinbase had no legal duty to provide any services beyond those it agreed to provide in the user agreement." Parties, therefore, face litigation risks if they are unfamiliar with the contractual terms they enter into with an exchange or other third-party cryptocurrency facilitators, including by failing to appreciate the scope of the contractual relationship and/or the responsibilities of the parties.

Finally, litigation risks may arise using "smart contracts," which are self-executing agreements placed on the blockchain. For example, an apartment rental "smart contract" may require that a certain amount of Bitcoin be automatically transferred to the owner every month; a failure to transfer will automatically lock the apartment. The use of such agreements has increased in recent years, given their removal of intermediaries, the need to monitor and enforce the contract, and any concerns of theft, misappropriation, or tampering. But the use of "contract" is a misnomer of sorts, as it is currently unclear whether a smart contract is subject to the same contract laws applicable to a typical written instrument. Is a smart contract a "written" agreement such that the Uniform Commercial Code is applicable? Where is the smart contract located for purposes of determining a proper forum and state's law to apply in the event of litigation? Are disputes concerning smart contracts arbitrable? How might a court interpret ambiguous terms in a smart contract, notwithstanding the automatic execution of the smart contract's terms? Such questions remain unresolved, leaving those entering the smart contract space with few guaranteed legal protections.

NFT

A non-fungible token ("NFT") is a blockchain-based token tied to a specific digital asset, like a drawing of an ape wearing clothing (known as a "Bored Ape" for example, each one part of the "Bored Ape Yacht Club," a 10,000 NFT grouping with a current floor price of approximately $235,000 per NFT). Ownership of the NFT reflects ownership of that asset: thus, while users can save a picture of an ape on their own computers, true ownership lies with the individual listed as having purchased the token on the blockchain (much in the same way a tourist with a picture of the Mona Lisa does not actually "own" the Mona Lisa). The discussion of the merits of and investment in NFTs is largely moot; the market has spoken. Indeed, the NFT market grew to approximately $41 billion in 2021, including the sale of an NFT by internet artist Beeple for $69 million.

NFTs have been the subject of numerous lawsuits focused on the "ownership" component of the NFT, as well as intellectual property disputes concerning the subject of the underlying digital asset itself. For example, in Playboy Enterprises Int'l, Inc. v. www.playboyrabbitars.app,[8] a district court issued an injunction against a website selling Playboy Rabbit NFTs, which improperly used the Playboy trademark. Companies like Nike have filed similar lawsuits to protect their intellectual property from the growing NFT market.[9] Individuals seeking to buy or sell NFTs should, therefore, investigate all IP implications, including whether the NFT at issue is truly an original work and/or whether the IP owner has provided permission for its sale/distribution.

Additionally, and as seen with cryptocurrency exchanges, NFT purchasers have taken action against marketplace websites for the theft of their assets. OpenSea—one of the largest NFT marketplaces—was sued in February by a user whose Bored Ape NFT was stolen due to an alleged exploit within the website.[10] As in Archer, the determination of OpenSea's liability will likely turn on the user agreement entered into between OpenSea and its NFT vendors, including any contractual obligations or responsibilities arising therefrom (if any).

8 No. 21 CIV. 08932 (VM), 2021 WL 5299231 (S.D.N.Y. Nov. 13, 2021).

9 Nike, Inc. v. Stockx LLC, No. 1:22-CV-00983 (S.D.N.Y. Feb. 3, 2022).

10 McKimmy v. OpenSea, No. 4:22-CV-00545 (S.D. Tex. Feb. 18, 2022).

METAVERSE

Finally, the "Metaverse" introduced an entirely new set of litigation risks. The Metaverse, as described by a district court in the recent high-profile antitrust litigation between Epic Games and Apple, is "a digital virtual world where individuals can create character avatars and play them through interactive programed and created experiences," which "both mimics the real world by providing virtual social possibilities, while simultaneously incorporating some gaming or simulation type of experiences for players to enjoy."[11] As the court recognized, the Metaverse represents "an ongoing trend of converging entertainment mediums where the lines between each medium are beginning to mesh and overlap." Such overlap makes the introduction of legal concepts even more difficult. In the Epic litigation, for example, the court recognized the difficulty in determining whether the Metaverse constituted a "video game" or merely "entertainment," a question it believed was best left "to the academics and commentators."

These questions remain unanswered, even with Facebook's recent entry into the Metaverse (along with its corresponding name change to "Meta"). But we can glean some of the larger legal implications of the Metaverse from earlier cases involving similar digital worlds. In Evans v. Linden Research, Inc.,[12] a California federal court certified a class action filed by users of Second Life, an "internet role-playing virtual world" that allows users to buy and sell "virtual items," including property. The dispute in question concerned the meaning of "ownership" within Second Life. Plaintiffs argued that they were entitled to "an actual ownership interest in the virtual land and items in Second Life's virtual world," while defendants argued that users only possessed copyrights. The case settled before any rulings on the merits occurred but the case represents an example of similar disputes that will likely arise over "ownership" in the virtual world, particularly with certain "lots" of Metaverse property exceeding millions of dollars.

As with NFTs, IP rights will likely be a significant source of litigation in the Metaverse. Users in Second Life have sued one another for alleged copyright infringement, including over the alleged copying of "virtual animal" breeds.[13] Users have also obtained Certificates of Registration from the U.S. Copyright Office for digital artwork in Second Life and have sued to enforce those rights.[14] Procedural law has also been implicated, including when a court ruled that representations made by Second Life's CEO to a global audience were sufficient to establish minimum contacts for specific personal jurisdiction, while also declaring Second Life's arbitration clause within its terms of service unconscionable.[15] Similar disputes will undoubtedly arise in the Metaverse, making it critical that participants think through these issues before setting up a virtual shop.

11 Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640-YGR, 2021 WL 4128925, at *13 (N.D. Cal. Sept. 10, 2021).

12 Evans v. Linden Rsch., Inc., No. C 11-01078 DMR, 2012 WL 5877579 (N.D. Cal. Nov. 20, 2012).

13 Amaretto Ranch Breedables v. Ozimals Inc., No. C 10-05696 CRB, 2012 WL 359729 (N.D. Cal. Feb. 2, 2012).

14 FireSabre Consulting LLC v. Sheehy, No. 11-CV-4719 CS, 2013 WL 5420977 (S.D.N.Y. Sept. 26, 2013).

15 Bragg v. Linden Rsch., Inc., 487 F. Supp. 2d 593, 598 (E.D. Pa. 2007).

BLOCKCHAIN, SMART CONTRACTS AND CRYPTOCURRENCY

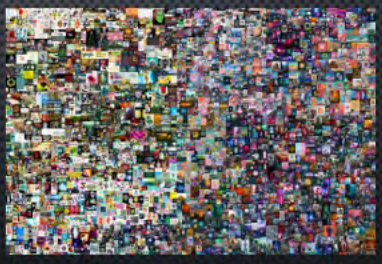
Addressing Litigation Risks

CRYPTO IS EVERYWHERE

- More than just Bitcoin
- But Bitcoin: $750B Market Cap; increasingly recognized as a store of value
- Total Market cap of cryptocurrencies $2.3T at end of 2021

CRYPTO IS EVERYWHERE

- Artist Beeple sells an NFT for $69M at Christie's



Beeple's collage, *Everydays: The First 5000 Days*

CRYPTO IS EVERYWHERE

- Numerous Applications Built on Ethereum and Other Blockchains
- Decentralized Finance (DEFI): attempt to create a new financial system that removes intermediaries
- Nearly $200 Billion Locked in DEFI protocols at end of 2021.

CRYPTO IS EVERYWHERE

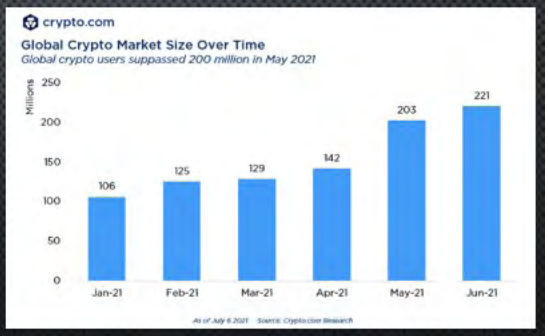
- Real World Applications
- Parametric crop insurance
- Hybrid smart contract to replace classic insurance relationship
- Simpler contract with results based on consensus of oracle network to use data to trigger automatic payouts
- Application backed by Chainlink: a tokenized cryptocurrency

CRYPTO IS EVERYWHERE

- Ukraine has raised over $100M in cryptocurrency to support its defense
- Russians are using cryptocurrency to avoid sanctions

CRYPTO IS EVERYWHERE

- GLOBAL ADOPTION OF CRYPTO SURGED IN 2021
- MORE THAN 200M USERS AS OF MAY 2021
- ADOPTION RATE PARALLELS INTERNET ADOPTION
- AT ONE POINT $3T MARKET CAP



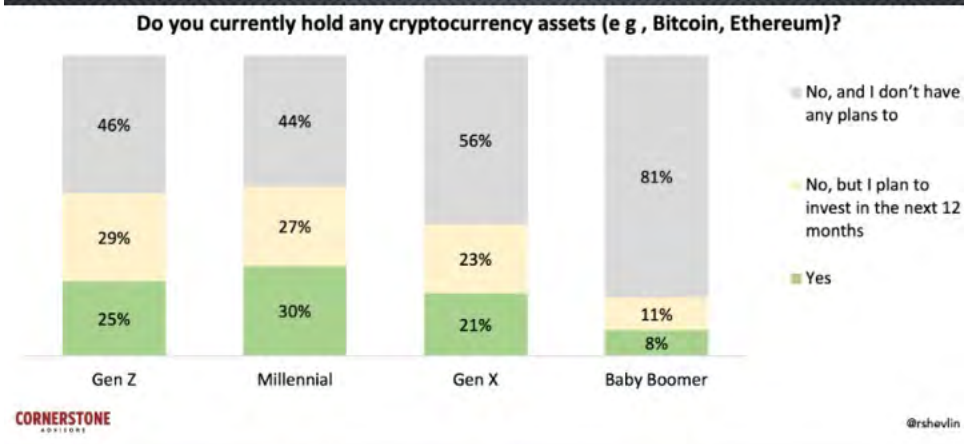
CRYPTO IS EVERYWHERE

- JP MORGAN OPENS LOUNGE IN DECENTRALAND METAVERSE

CRYPTO IS EVERYWHERE

- KPMG CANADA ADDS BITCOIN AND ETHEREUM TO TREASURY AND BUYS WORLD OF WOMEN NFT

CRYPTO USE IS GROWING



Americans' crypto plans SOURCE: CORNERSTONE ADVISORS

CRYPTO IS EVERYWHERE

- ConstitutionDAO raised over $40M in 7 days to bid on a copy of the U.S. Constitution

WHAT IS BLOCKCHAIN?

- Public, universally distributed ledger that records transactions
- Transparent and decentralized
- Once a transaction is verified, its details form a "block," added to the ever-expanding blockchain

NON-FUNGIBLE TOKENS (NFTS)

- BLOCKCHAIN-BASED TOKEN TIED TO A SPECIFIC DIGITAL ASSET
- OWNERSHIP OF THE NFT REFLECTS OWNERSHIP OF THAT ASSET
- TRANSFERRABLE VIA BLOCKCHAIN-BASED EXCHANGES

DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

- NEW FORM OF CORPORATE GOVERNANCE?
- COLLECTION OF OFTEN-ANONYMOUS INDIVIDUALS
- ORGANIZED AROUND A COMMON PURPOSE
- USING DECENTRALIZED DECISION-MAKING AND ENCODED RULES

THE METAVERSE?

- DIGITAL VIRTUAL WORLD
- USERS INTERACT THROUGH CHARACTER AVATARS
- ALLOWS USERS TO BUY AND SELL VIRTUAL ITEMS, INCLUDING PROPERTY

LEGAL ISSUES WITH CRYPTO: PRIVACY INTERESTS

- DO USERS HAVE A PRIVACY INTEREST IN THEIR BLOCKCHAIN TRANSACTIONS?
- BLOCKCHAIN TRANSACTIONS ARE PUBLIC BUT ANONYMOUS
- WALLET ADDRESSES CAN BE TIED TO INDIVIDUALS
- *STATES V. GRATKOWSKI*, 964 F.3D 307 (5TH CIR. 2020)
  - "BITCOIN USERS ARE UNLIKELY TO EXPECT THAT THE INFORMATION PUBLISHED ON THE BITCOIN BLOCKCHAIN WILL BE KEPT PRIVATE"

LEGAL ISSUES WITH CRYPTO: SECURITIES REGULATION

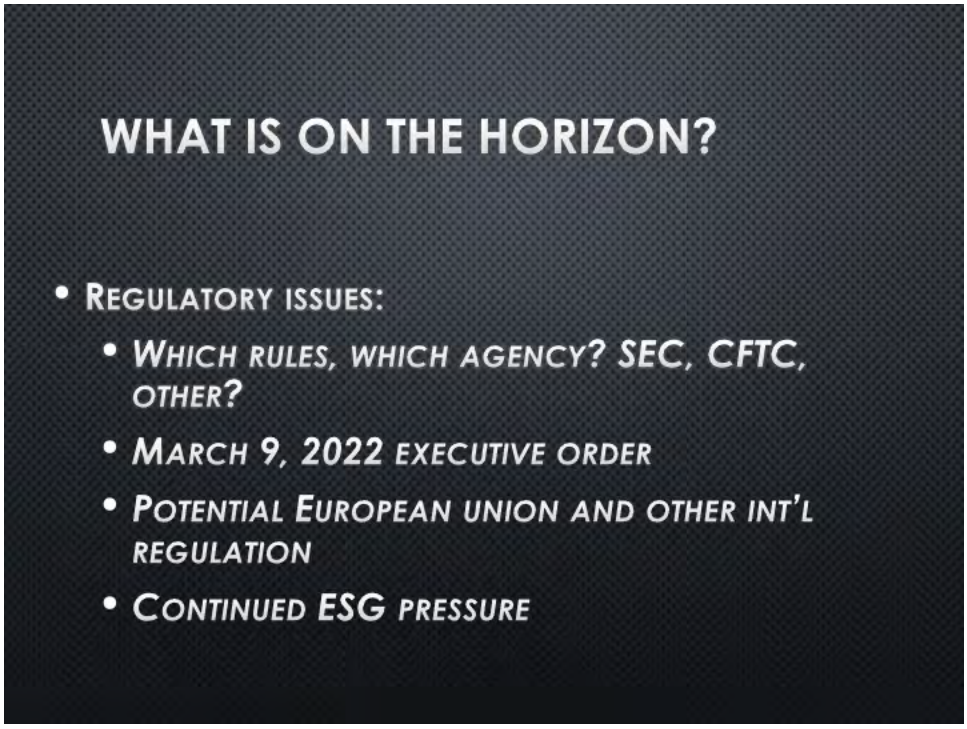
- WHO HAS JURISDICTION?
- ARE CRYPTO-ASSETS SECURITIES?
- *SEC V. RIPPLE LABS, INC., ET. AL* (S.D.N.Y. 20-CV-10832)
- HOW DOES THE *HOWEY* TEST APPLY TO CRYPTO ASSETS?

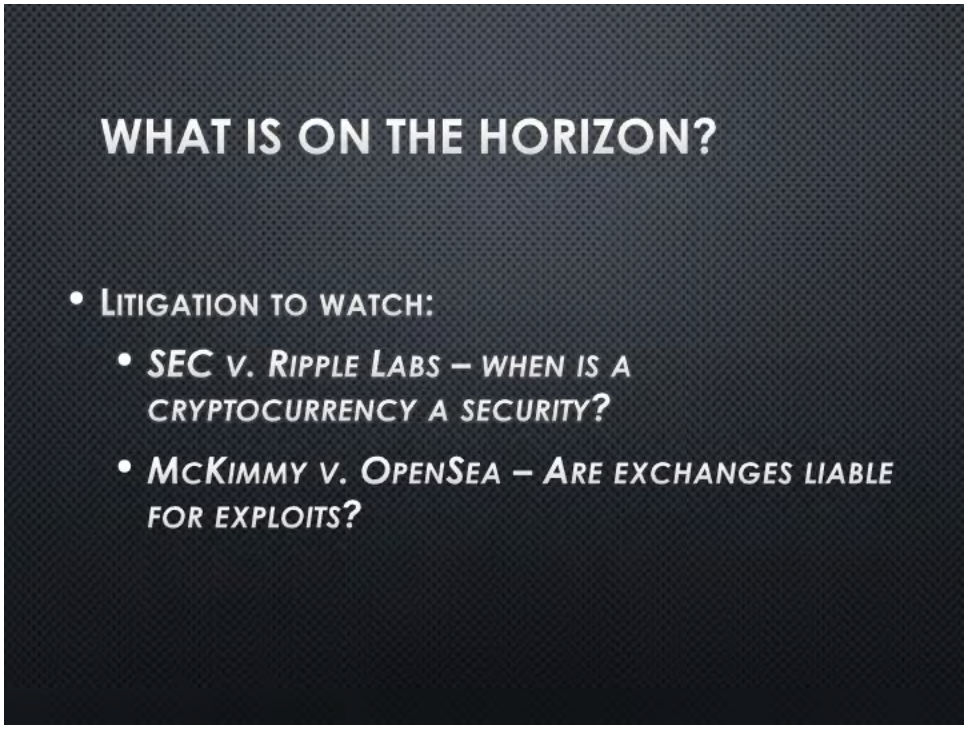
LEGAL ISSUES WITH CRYPTO: OWNERSHIP RIGHTS

- WHAT "BASKET OF RIGHTS" DOES AN NFT OWNER HAVE?
- WHAT RIGHTS DOES AN OWNER OF LAND IN THE METAVERSE HAVE?
- WHAT IS THE PROPER FORUM FOR ADJUDICATION OF THESE RIGHTS?

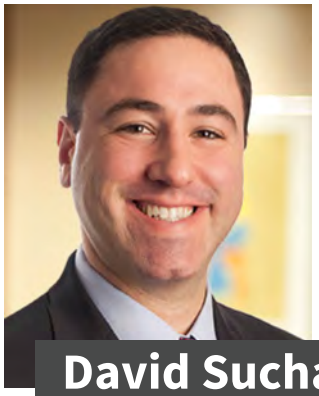

LEGAL ISSUES WITH CRYPTO:
SMART CONTRACTS
• SELF-EXECUTING AGREEMENTS PLACED ON THE BLOCKCHAIN
• WHO IS RESPONSIBLE FOR ERRORS IN THE CODE?
• CAN A COURT INTERPRET AMBIGUOUS TERMS?
• WHAT COURTS HAVE JURISDICTION?


LEGAL ISSUES WITH CRYPTO:
DAOS AS LEGAL ENTITIES
• HOW ARE DAOS TREATED UNDER EXISTING CORPORATE LAW?
• OFFICIALLY RECOGNIZED BY WYOMING
• WHERE ARE DAOS OBLIGATED TO PAY TAXES?
• CAN DAOS HOLD TITLE TO PROPERTY?
• WHO IS LEGALLY RESPONSIBLE FOR ACTS OF THE DAO?
• JURISDICTIONAL ISSUES
• GOVERNANCE AND TREASURY ISSUES


WHAT IS ON THE HORIZON?
• Regulatory issues:
• Which rules, which agency? SEC, CFTC, other?
• March 9, 2022 executive order
• Potential European union and other int'l regulation
• Continued ESG pressure


WHAT IS ON THE HORIZON?
• Litigation to watch:
• SEC v. Ripple Labs – when is a cryptocurrency a security?
• McKimmy v. OpenSea – Are exchanges liable for exploits?


KEY TAKEAWAYS
• CRYPTO IS HERE TO STAY
• REGULATORY ENVIRONMENT WILL CONTINUE TO PLAY CATCH-UP
• CRYPTO USE CASES WILL MULTIPLY AS BUSINESSES INTEGRATE CRYPTO INTO THEIR OFFERINGS
• THE DAO AND METAVERSE ECOSYSTEMS WILL CONTINUE TO MATURE AS THEY ATTRACT MORE USERS
• NOVEL LEGAL ISSUES WILL REQUIRE RESOLUTION



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David Suchar

Partner | Maslon (Minneapolis, MN)

David Suchar, a skilled trial attorney and former federal prosecutor, regularly represents clients in construction and insurance coverage disputes, government and internal investigations, and a variety of commercial litigation. Who's Who Legal has consistently ranked David as one of the top three under-45 construction lawyers in the United States (2019-22), describing him in their annual "Future Leaders" guide as "an impressive trial lawyer whose practice spans the spectrum of construction matters from insurance to payment claims." Chambers USA published client commentary describing David's strengths as "mastery of insurance, understanding the construction industry, exceptional writing skills and aggressive negotiation." He has been ranked by a variety of other attorney rating organizations, including The Best Lawyers in America® (2022) and Super Lawyers® (2021). David worked closely with Maslon Partner Steve Schleicher representing the state of Minnesota in its prosecution of former Minneapolis police officer Derek Chauvin for the murder of George Floyd, helping to coordinate the state's cross-examination on use-of-force issues.

David has developed a niche national practice representing commercial policyholders in insurance coverage disputes, including on many of the largest construction projects and claims across the United States. Recent matters include the LaGuardia Airport Central Terminal Reconstruction Project (NYC); Las Vegas Raiders (Allegiant) Stadium; Second Avenue Subway (NYC); claims on Millennium Tower, Transbay Transit Center, and Salesforce Tower (San Francisco) (winning summary adjudication on insurance case for the duty to defend on $12 million in legal fees); the Florida International University bridge collapse (Miami); and the NSA's Utah Data Center. He frequently presents at conferences across the country on construction and insurance coverage issues, drawing from his experience on the Steering Committee for the ABA Forum on Construction Law's Division 7 (Insurance, Surety & Liens) and as contributing editor of The Construction Lawyer, the flagship ABA construction publication. Beginning in 2022, David will host the ABA's Construction Law Today podcast series, after appearing as a guest for its two-part podcast on Insurance Coverage Issues in Construction Litigation. In addition, he was lead co-author for the insurance chapter in the ABA's decennial Construction Defects book (2021) and authored several insurance chapters in the ABA's Construction Checklists book (2022).

Practice Areas

- Business Litigation
- Construction & Real Estate Litigation
- Government & Internal Investigations
- Insurance Coverage Litigation
- Intellectual Property Litigation

Honors

- Recognized on Minnesota Super Lawyers® list, 2020-2021Recognized in Chambers USA: America's Leading Lawyers for Business, Construction, Minnesota, 2018-2021
- Who's Who Legal: Construction - Future Leaders, 2019-2022
- Selected for inclusion in The Best Lawyers in America®, 2021-2022
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2014-2016

Education

- Georgetown University Law Center - J.D., cum laude, 2002
- DePaul University - B.A., with high honor, 1998

How Innovation and Investments in Transportation and Infrastructure are Shaping Litigation

Tony Lathrop
Moore & Van Allen (Charlotte, NC)

Driving the Docket - How Innovation and Investments in Transportation and Infrastructure are Shaping Litigation
Tony Lathrop

We are witnessing the rapid transformation of the transportation sector, driven by several forces, including technological innovation, the increasing pressure on governments to modernize transportation infrastructure, and the resulting historical levels of investment in infrastructure nationwide. The future of transportation comes with the attendant legal challenges and policy considerations, and litigation undoubtedly will help chart a new course through the legal landscape of the transportation industry. Cases will probe the constructs governing liability and insurance for automated and shared vehicles, notions of privacy and mobile data security, the boundaries of the traditional employment relationship, intellectual property and securities issues, and disputes regarding right of way and property access, among other issues. A bird's eye view of where the technology is headed will aid in understanding the legal issues that have hit dockets already and those that are expected to give rise to litigation in the years to come.

What Does Disruption Look Like?

Talk of the technological disruption of the transportation industry immediately evokes imagery of electric, connected, and autonomous vehicles on the streets of the smart cities of the future. This certainly will be a major component of the picture, but there will be more. In addition to these advances in vehicle design, ridesharing services, personal micro-mobility options (e.g. ebikes and scooters), high-speed rail, and various types of drones are transforming the way people and goods are moved. Electric, Connected & Autonomous Vehicles. Given the legal landscape as of November 2021, plug-in hybrid and battery electric vehicles are projected to grow from under 3% of light-duty vehicles on the roads in 2021 to 13% in 2050.[1] The market share of plug-in hybrid electric vehicles is anticipated to grow rapidly from 2021-2024, but it is expected that battery electric vehicles will begin to overtake EV market share as batteries become more affordable.[2]

Connected vehicles have the capacity to enhance the safety and efficiency of transportation systems by using wireless networks and vehicle sensors to communicate with other vehicles, surrounding infrastructure (e.g. work zones, toll booths, school zones, etc.), traffic control devices, and even individuals' personal devices.[3] Connected vehicles and infrastructure continuously share real-time data to better control traffic, mobility, and safety. The global market for connected vehicles is projected to grow at a compound annual growth rate of more than 18%, reaching $191.83 billion by 2028.[4]

Autonomous vehicles are the technology that once made science fiction movies seem far-fetched. Automation is often described with reference to the "levels" defined by SAE International, which have been adopted by the U.S. Department of Transportation: Level 0 – No Driving Automation, Level 1 – Driver Assistance, Level 2 – Partial Driving Automation, Level 3 – Conditional Driving Automation, Level 4 – High Driving Automation,

1 U.S. Energy Information Administration, Annual Energy Outlook 2022 Narrative at 5 (Mar. 3, 2022) https://www.eia.gov/outlooks/aeo/pdf/AEO2022_Narrative.pdf.

2 Id.

3 U.S. Department of Transportation, What Public Officials Need to Know About Connected Vehicles https://www.its.dot.gov/factsheets/pdf/JPO_PublicOfficials.pdf.

4 Connected Cars Market to Hit USD 191.83 Billion at CAGR of 18.1% by 2028, Fortune Business Insights (Nov. 2, 2021) https://www.globenewswire.com/news-release/2021/11/02/2325045/0/en/Connected-Cars-Market-to-Hit-USD-191-83-Billion-at-CAGR-of-18-1-by-2028-Market-Projection-By-Technology-Major-key-players-Vehicle-Growth-Revenue-CAGR-Regional-Analysis-Industry-For.html.

and Level 5 – Full Driving Automation.[5] Early projections claimed that Level 5 fully autonomous vehicles would be available by 2025, but now fully autonomous vehicles are not expected to be viable on the road on a large scale before 2030.[6] Recent projections are that by 2030, 60% of new cars will operate with Level 2 automation features and 5% of the market will be automated at Level 3 and Level 4.[7]

Ridesharing & Micro-Mobility Options. Ridesharing has gained momentum since its origins a little over a decade ago. Uber, the leading ridesharing application, reportedly had 118 million users in 2021 and offered 6.3 billion trips.[8] The global ridesharing market has been projected to grow at a compound annual growth rate of more than 19% between 2021-2026, increasing from $43.2 billion to $127.71 billion by 2026.[9] Electric micro-mobility options are also gaining popularity. Projections for the proliferation of micro-mobility options have estimated that by 2023 there will be 300 million ebikes in use worldwide,[10] and the global electric scooter market will see more than 10% compounded annual growth, reaching $31 billion by 2028.[11]

Maglev Technology – High Speed Rail & Hyperloop. Increasingly faster train technologies are being developed, with the expectation that magnetic levitation bullet trains that travel up to 375 mph may be available as a commuting option in Japan within a few years.[12] Magnetic levitation hyperloops that could transport humans or cargo at speeds upwards of 600 mph are also in development, with the first successful test of human transport in the Virgin Hyperloop having taken place in November 2020.[13] Although the reality of moving humans in a hyperloop may be more distant now that the Virgin Hyperloop project reportedly has shifted focus to potential cargo transport.[14]

Drones. Drones or unmanned aerial systems (UAS) are playing a role in revolutionizing the movement of goods and people. As of late 2021, there were reportedly about 870,000 drones registered in the U.S., which was said to be quadruple the number of commercial and private planes.[15] Drones are being used more extensively in other countries to deliver goods, like medicine, food, and other items, but they are expected to pick up momentum in the U.S. as regulations governing their use expand.[16] "It only feels weird and sci-fi in the United States….In other countries, this is normal."[17] The development of drones capable of transporting one or more individuals also is underway. "Paramedics with jetpacks, border police in flying cars and city workers commuting by drone all sound like science fiction - but the concepts are part of [an] advanced air mobility (AAM) market that is expected to be worth as much as $17 billion by 2025."[18]

The Commitment to Modernizing Transportation Infrastructure

Each of these innovations will drive the need for supporting infrastructure. This will include EV charging solutions (e.g. charging stations and in-road charging capabilities), smart city infrastructure, high-speed broadband internet access, protected access to roadways, rail infrastructure, landing structures for UASs,[19] etc. Investments at the

5 See National Highway Traffic Safety Administration, Federal Automated Vehicles Policy (Sept. 2016) https://www.hsdl.org/?view&did=795644; SAE International, Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles J3016_202104, (Issued Jan. 16, 2014, Current Revision Apr. 30, 2021) https://www.sae.org/standards/content/j3016_201401/.

6 Neil Winton, Computer Driven Autos Still Years Away Despite Massive Investment, Forbes (Feb. 27, 2022) https://www.forbes.com/sites/neilwinton/2022/02/27/computer-driven-autos-still-years-away-despite-massive-investment/?sh=701d47a218cc.

7 Id.

8 Monsoor Iqbal, Uber Revenue and Usage Statistics (2022), Business of Apps (Feb. 17, 2022) https://www.businessofapps.com/data/uber-statistics/.

9 Global Ride Sharing Market Size In 2022: Growth by Forthcoming Developments, Industry Scope, Opportunity, Business Strategy and COVID-19 Market Scenario, MarketWatch (Feb. 15, 2022) https://www.marketwatch.com/press-release/global-ride-sharing-market-size-in-2022-growth-by-forthcoming-developments-industry-scope-opportunity-business-strategy-and-covid-19-market-scenario-report-by-industry-research-biz-2022-02-15.

10 E-Bike Facts & Statistics for 2022 https://www.ebicycles.com/ebike-facts-statistics/#:~:text=In%202019%2C%20the%20electric%20bicycle,88.36%25%20of%20the%20worldwide%20market

11 Electric Scooter Market Size [2022-2028] To Reach USD 31.04 Billion at a CAGR of 10.7%, Fortune Business Insights (Feb. 8, 2022) https://www.globenewswire.com/news-release/2022/02/08/2380537/0/en/Electric-Scooter-Market-Size-2022-2028-To-Reach-USD-31-04-Billion-at-a-CAGR-of-10-7.html.

12 The Japanese Maglev: World's fastest bullet train, Japan Rail Pass Travel Blog, (Jan. 21, 2022) https://www.jrailpass.com/blog/maglev-bullet-train.

13 Michelle Yan Huang, Elon Musk's hyperloop concept could become the fastest way to travel, Insider (Dec. 2020, updated Jul 22, 2021) https://www.businessinsider.com/how-the-hyperloop-could-be-the-fastest-way-to-travel-2020-12.

14 See Mike Nolting, Hyperloop changes course, competes for federal grant money, MetroNews (Feb. 27, 2022) https://wvmetronews.com/2022/02/27/hyperloop-changes-course-competes-for-federal-grant-money/.

15 Joann Muller, Managing traffic in the skies is becoming a lot harder, Axios (Sept. 1, 2021) https://www.axios.com/air-traffic-drones-airplanes-skies-crowded-11208585-265c-461a-bb7b-e673b11160ca.html.

16 Joann Muller, Home medicine delivery by drone set to grow in 2022, Axios (Feb. 1, 2022) https://www.axios.com/home-medicine-drone-delivery-2022-86bacbbb-0c41-481c-bed7-7e094306aa0d.html.

17 Id.

18 Jane Wardell, Jetpacks, flying cars and taxi drones: transport's future is in the skies, Reuters (Dec. 9, 2021) https://www.reuters.com/markets/commodities/jetpacks-flying-cars-taxi-drones-transports-future-is-skies-2021-12-03/.

19 On March 2, 2022, the FAA issued draft interim guidance "support[ing] the design and operation of facilities that electric vertical takeoff and landing (VTOL) aircraft will use for initial operations." See Federal Aviation Administration, Urban Air Mobility and Advanced Air Mobility (Last Modified Mar. 3, 2022) https://www.faa.gov/uas/advanced_operations/urban_air_mobil-

federal and state levels will be critical in realizing the potential that the technology holds.

On November 15, 2021, President Biden signed into law the $1.2 trillion Infrastructure Investment and Jobs Act (IIJA) as a bipartisan effort to position the country to not only compete, but to excel on the global stage in the future.[20] The IIJA includes substantial funding for public transit, as well as port, waterway, and airport infrastructure which are critical to supply chain and logistical management. $89.9 billion is slated for public transit funding over the next five years, including $39 billion of new investment for modernization. $17 billion will go to port infrastructure and waterways, and $25 billion is designated for airports. The public transit investment has been hailed as "the largest Federal investment in public transit in history."[21] The law also includes much needed investments in broadband infrastructure, roads and bridges, passenger rail, and electric vehicle charging infrastructure.

States also have committed to investing in transportation and infrastructure, as recently noted by Dr. Shawn Wilson, President of the American Association of State Highway and Transportation Officials (AASHTO):

> State DOTs are also on the cutting edge of technology and innovation….directly addressing some of the most important emerging issues in the transportation sector—such as connected and automated vehicles, electric vehicles, unmanned aerial systems, and shared mobility. State DOTs are also developing solutions to manage broadband deployment on their properties to facilitate the use of technology interactions between motor vehicles and infrastructure.[22]

With the push towards developing and successfully deploying connected, unmanned, electric transportation, there are new questions that need to be contemplated, old notions that need to be revisited, and conflicts to be resolved with a view through a changing lens.

What's On the Docket?

Below we highlight some of the interesting legal questions that disruption in the transportation industry has generated.

Personal Jurisdiction. Following the U.S. Supreme Court's 2021 decision in Ford Motor Co. v. Montana Eight Judicial Court, et al.,[23] global transportation companies have a clearer picture of when they will be subject to the jurisdiction of a state court in product liability actions. Ford was sued for product liability in two separate cases in Montana and Minnesota. Ford advertised and marketed the models of the vehicles that malfunctioned in Montana and Minnesota, but the cars at issue had not been sold by Ford in those states, nor had they been designed or manufactured there. Ford argued that its activity was not enough to subject it to the jurisdiction of the courts since the activity did not have a causal link to the plaintiffs' claims. The Supreme Court rejected Ford's argument, finding that there is specific jurisdiction where a company "cultivates a market for a product…and the product malfunctions there."[24] Not only did Ford advertise and market the cars in those states, it also fostered ongoing connections to car owners and encouraged resale of its cars there.

5G and Broadband Disputes. A few months ago, the contentious roll-out of AT&T and Verizon's 5G services put a spotlight on the fact that the promise of leading-edge technology is sometimes constrained by the need to maintain the mundane. An upgrade in internet and mobile data capabilities is always welcomed and many expectations are tied to expanding reliable access to broadband connections, especially in urban and rural areas. For example, reliable broadband access is key to the functioning of connected vehicle and smart city technologies. As AT&T and Verizon were preparing to deploy their C-band 5G services in major U.S. cities, the companies were met with concerns by major airlines that the 5G transmissions at/near airports would interfere with airplanes' ability to operate safely due to the proximity of the C-band spectrum used by airline altimeters and that to be used for the 5G services. The companies

ity/.

20 The White House, President Biden's Bipartisan Infrastructure Law https://www.whitehouse.gov/bipartisan-infrastructure-law/.

21 Id.

22 AASHTO, Comments to FHWA on "Build a Better America" Policy Memorandum, (Jan. 19, 2022) https://policy.transportation.org/wp-content/uploads/sites/59/2022/01/AASHTO-Comments-to-FHWA-on-IIJA-Policy-Memo-2022-01-19-FINAL.pdf.

23 141 S.Ct. 1017 (2021).

24 Id. at 1021-23.

had to navigate regulatory hurdles involving the Federal Aviation Administration, the Federal Communications Commission, and the U.S. Department of Transportation, threats of lawsuits by the airline association, and ultimately agreed to multiple delays and concessions regarding the scope of the roll-out.[25]

The expansion of broadband services also implicates right of way disputes. Questions raised include whether federal or state regulations govern a particular company's access to the public right of way, whether a particular company qualifies for free access to a public right of way as a public utility or whether a fair market value must be paid for access, what the proper procedures are for obtaining a permit to use the right of way for broadband services, to name a few. In a recent case presenting several of these issues, the United States District Court for the District of New Mexico issued a preliminary injunction ordering the New Mexico Department of Transportation to approve the plaintiff's applications for the installation of utility poles in the public right of way. Plaintiff planned to mount antennas to offer broadband wireless services in areas where there was little or no service. However, the NMDOT had denied the applications for several reasons, including that the company did not qualify as a utility and the state was in the process of promulgating rules governing telecom-broadband permitting and the company needed to submit a different form of application. In granting the preliminary injunction, the court found that the NMDOT had not offered sufficient evidence to support its denials and said it could concur with "the premise that access to wireless services is beneficial to the community at large, particularly" where there was "little or no fixed broadband service now available."[26]

Intellectual Property Disputes. The drive to innovate leads to the proliferation of familiar kinds of intellectual property disputes – patent infringement, trade secret protection, trademark infringement, etc. In the transportation space, innovation has given rise to matters presenting interesting questions, as well as leading-edge technologies. For example, patent infringement cases have been filed featuring technologies like "Virtual Bus Stop" technology, which is designed to be the digital infrastructure for public transportation systems,[27] light detection and ranging sensors (Lidar) used to facilitate autonomous driving capabilities in vehicles,[28] electric vehicle technology,[29] and ebike mobile lock designs with/without GPS components embedded in them.[30] Trademark infringement claims have challenged the use of similar marks and established goodwill by companies operating within different mobility segments. For example, a foreign ebike company recently sued a U.S. scooter company for infringing its trademark, among other claims.[31]

With the pressures to break into new markets, and frequent movement of employees between companies, the protection of trade secrets related to transportation technology has been a large concern. Both civil and criminal claims of trade secret theft have been litigated,[32] and companies have sought to prevent their trade secrets from being disclosed to the public while moving through testing and pilot phases of developing technologies. A state court recently issued a preliminary injunction to prevent the Department of Motor Vehicles from releasing safety data provided in the permit application for Waymo, the autonomous driving company.[33] Waymo was seeking a permit to operate its autonomous vehicles on the road and did not want its trade secret information released pursuant to a public records request.

Privacy & Data Security in the Smart City. Smart transportation and smart city infrastructure hold great potential, but they rely upon the transmission, collection, and analysis of exorbitant volumes of

25 See Irina Ivanova, What consumers need to know about this week's AT&T-Verizon 5G rollout, CBS News (Jan. 19, 2022, updated Jan. 20, 2022) https://www.cbsnews.com/news/5g-rollout-verizon-att-consumers-need-know/; Jon Brodkin, FAA agrees not to seek any more 5G delays from AT&T and Verizon (Jan. 5, 2022) https://arstechnica.com/tech-policy/2022/01/faa-agrees-not-to-seek-any-more-5g-delays-from-att-and-verizon/.

26 NMSURF, Inc. v. State of New Mexico Dep't of Transportation, No. 1:21-cv-00057-KWR-JHR, 2021 U.S. Dist. LEXIS 120466 at *22 (D.N.M. Jun. 28, 2021).

27 Via, the TransitTech company, brings patent infringement lawsuit against RideCo, (May 3, 2021) https://ridewithvia.com/news/via-the-transittech-company-brings-patent-infringement-lawsuit-against-rideco/.

28 See e.g., Quanergy Systems, Inc. v. Velodyne Lidar USA, Inc., Nos. 20-2070 and 20-2072, (Fed. Cir. Feb. 4, 2022)

29 See e.g., Paice, LLC v. Volvo Car Corp., 2022 U.S. LEXIS 18846, (Feb. 2, 2022).

30 See Mobiloc, LLC v. Neutron Holdings, Inc., No. 2:20-CV-1570-BJR, 2021 U.S. Dist. LEXIS 157185 (W.D. Wa. Aug. 19, 2021).

31 Frogbikes Limited v. Frog Scooters Inc., No. 1:22-cv-00360, (N.D. Ga. 2022).

32 An autonomous vehicle trade secret theft dispute between Uber and Waymo arose out of a former employee, Anthony Levandowski, leaving Waymo and starting his own company that was later purchased by Uber. Levandowski pleaded guilty to criminal trade secret theft charges (later was pardoned) and the parties entered into settlements on the civil claims to resolve outstanding issues. The final settlement was reached in mid-February, 2022.

33 Waymo LLC v. California Department of Motor Vehicles, No. 2022-80003805 (Ca. Sup. Ct. Feb. 23, 2022).

data. Vehicles will be communicating with each other and surrounding infrastructure, generating a constant flow of data. They may be equipped to take stock of driver and passenger biometrics, location data, etc. Questions arise regarding who has the responsibility to house that data and ensure its security? Is there proper consent for the collection of personal or biometric data? What constitutional concerns are attendant to the collection of and access to this data?

Autonomous Vehicles, Electric Vehicles & Drones. As the level of automation in vehicles increases, the principles guiding liability determinations may shift to place more responsibility on vehicle and/or component manufacturers and less on the "driver" of the vehicle. Product liability will likely be a major component of the analysis with more automated vehicles, but other legal frameworks have been proposed as a starting point for analysis in these cases. Manufacturers will keep an eye toward minimizing or eliminating features that pose a high risk of accident. For instance, in February 2022, Tesla announced that it was going to recall nearly 54,000 vehicles that had a "roll through the stop sign" feature in the fully self-driving software, due to the risk of collision.[34] Individuals using self-driving technology do need to be aware that they will not necessarily be free of all liability. Los Angeles County recently issued the first felony charges in the U.S. against a driver whose car ran through a red light and fatally hit someone while the driver was using partially automated autopilot features.[35] And what will become of the liability analysis with automated and connected vehicles communicating with each other and infrastructure?

Electric and autonomous vehicles have given rise to interesting matters outside of IP and liability contexts. With the push to develop new technologies in these industries, securities fraud class actions have been filed claiming that tech companies have misrepresented the viability of their cutting-edge technology. For example, several class actions have been filed against EHang Holdings Ltd. by shareholders claiming that the company made material misrepresentations regarding its autonomous aerial vehicle platform and business.[36] And a securities class action also has been filed against QuantumScape Corp. claiming that the company misled investors regarding the progress and effectiveness of "solid-state batteries" to be used in electric vehicles.[37]

Electric vehicles also require charging infrastructure and disputes regarding local approaches to facilitating and subsidizing EV charging have arisen. For example, a dispute in Philadelphia recently was resolved in favor of the city after several years of litigation. As part of an EV program, plaintiffs had purchased EV charging stations and placed them on their property near parking spots that the city reserved for EVs 24 hours a day. The city subsequently changed the program and shortened the hours that the parking was reserved for EVs to only 12 hours of the day – 6:00 p.m.- 6:00 a.m. The plaintiffs made substantive due process and equal protection claims against the city, as well as unjust enrichment claims. The lower court dismissed the constitutional claims and granted summary judgment in favor of the city on the unjust enrichment claim and the Third Circuit Court of Appeals upheld the rulings.[38]

Drones present interesting legal challenges, including challenges regarding notions of privacy and trespass. For example, in Long Lake Twp. v. Maxon,[39] the township used a drone to take photographs of the defendant's property without permission or legal authorization for purposes of a zoning dispute. The defendant sought to suppress the photographic evidence and the trial court denied the motion to supress. The state court of appeals reversed and suppressed all pictures taken with the drone, recognizing that landowners maintain privacy above their land and flying a drone over someone's property without persmission is trespassing. The court further noted that if an objective legitimate purpose existed for flying the drone over someone's property, the state could have gotten a warrant or other legal authorization.

34 Johnathan Capriel, Tesla Ending 'Rolling Stop' Feature In 54,000 Self-Driving Cars, Law360 (Feb. 1, 2022) https://www.law360.com/transportation/articles/1460708/tesla-ending-rolling-stop-feature-in-54-000-self-driving-cars.

35 Ton Krisher and Stefanie Dazio, L.A. County felony charges are first in fatal crash involving Tesla's Autopilot, (Jan. 18, 2022) https://www.latimes.com/california/story/2022-01-18/felony-charges-are-first-in-fatal-crash-involving-teslas-autopilot.

36 See Amberber v. EHang Holdings, Ltd., 2022 U.S. Dist. LEXIS 24397 (S.D.N.Y. Feb. 20, 2022) (Appointing lead plaintiff and counsel).

37 See In re: QuantunScape Secs. Class Action Litig., 2022 U.S. Dist. LEXIS 7782 (N.D. Ca. Jan. 14, 2022) (Denying, in part, motion to dismiss).

38 Morlok v. City of Phila., No. 20-2973, 2022 U.S App. LEXIS 2382 (3d Cir. Jan. 26, 2022).

39 No. 349230, 2021 Mich. App. LEXIS 1819 (Mar. 18, 2021).

Ridesharing & Micro-mobility Disputes. Ridesharing companies created a pool of workers who have the flexibility to work outside of the traditional 9-5, but also lack many of the benefits offered by traditional employment. How to classify those workers – as independent contractors vs. employees – is an issue that has spurred and will continue to spur litigation and the promulgation of legislation. In December 2021, the National Labor Relations Board invited briefs on whether the agency should revisit its standard for determining independent contractor status for workers.[40] Companies like Uber and Lyft have won several cases holding that their workers do not qualify for the exemption from the Federal Arbitration Act (FAA) that is applicable to transportation workers who transport across state lines and, therefore, they must arbitrate their misclassification and other employment claims if required by contract.[41]

Escooters and ebikes have given rise to disputes, some of which are attributable to the ease with which individuals can maneuver on them on city streets. For example, a putative class recently sued several escooter companies and cities in California under the Americans with Disabilities Act, among others. Central to the claims was the allegation that the defendant companies deliberately and systematically exploited pedestrian rights of way (i.e., the curb ramps, sidewalks, crosswalks, pedestrian crossings and other walkways) for profit and in opposition to laws prohibiting scooter use on sidewalks and walkways.[42]

The Road Ahead

New transportation and infrastructure technologies will give rise to a broad range of legal challenges, some of which we have highlighted above. Let us also not forget that the historic commitments to modernize and repair existing infrastructure will generate legal disputes as well. For instance, who is responsible for coverage of the repair of old and damaged bridges?[43] We can expect this and other questions to continue to land on the docket for some time to come.

40 National Labor Relations Board, NLRB Invites Briefs Regarding Independent Contractor Standard, (Dec. 27, 2021) https://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-regarding-independent-contractor-standard.

41 See e.g., John Rogers et al. v. Lyft Inc., No. 20-15689, (9th Cir. Feb. 16, 2022).; Singh v. Uber Techs., Inc., Nos. 16-3044; 19-18371, 2021 U.S. Dist. LEXIS 225732 (D.N.J. Nov. 23, 2021).

42 Labowitz v. Bird Rides, Inc., No. CV 18-9329-MWF, 2020 U.S. Dist. LEXIS 84573 (C.D. Ca. Mar. 31, 2020).

43 Shawn Rice, Pittsburgh Bridge Collapse Is Liability Reminder For Insurance, Law360 (Feb. 2, 2022) https://www.law360.com/transportation/articles/1460269/pittsburgh-bridge-collapse-is-liability-reminder-for-insurance.

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Tony Lathrop is a seasoned corporate trial lawyer experienced in complex commercial litigation, transportation, land use, zoning/development, planning, and condemnation law. As a recognized leader within legal, transportation, and planning communities in North Carolina and nationwide, Tony brings valuable industry and governmental perspectives to client matters, which he approaches with an eye towards maximizing value and reducing future risk.

Tony utilizes his experience as a trial attorney and certified mediator to develop strategies seeking optimal trial results and other resolutions in high-stakes matters, and advises clients based on their business objectives and risk-reduction goals. Tony partners closely with his clients and offers valuable industry and governmental perspectives as a complement to his legal experience.

Capabilities

- Business Court Litigation
- Civil Litigation
- Commercial Litigation
- Commercial Real Estate
- Intellectual Property Disputes
- Litigation, Regulatory & White Collar
- Real Estate & Construction Disputes
- Technology
- Transportation, Infrastructure & Logistics

Representative Experience

- Representing and advising companies regarding COVID-19 related insurance claims involving business interruption, event cancellation and workers' compensation
- A breach of shipping contract matter involving freight shippers, carriers, and brokers
- Representing a national real estate company in connection with municipal easements and rights of way for government public works and transportation projects
- Representing a nonprofit development and finance company in a contested rezoning application for multifamily housing development
- Representing a national fiber optic networking cloud connectivity provider in multiple contract and tort litigation matters
- Successfully representing plaintiff-appellee in obtaining affirmation of the trial court's order finding that the plaintiff had properly pleaded and alleged a claim for piercing the corporate veil against the defendants, and in obtaining reversal of the N.C. Court of Appeals decision which dismissed the case against an individual defendant who was an officer of the corporate defendant. Saft America, Inc. v. Plainview Batteries, Inc.,659 S.E.2d 39 (N.C. App. 2008) and 673 S.E.2d 864 (N.C. 2009) (PER CURIAM)
- Vehicle and device products liability claims, defending international manufacturers of vehicles, aircraft, and medical devices, including catastrophic accident claims

Education

- J.D., University of North Carolina at Chapel Hill, 1988
- B.A., University of North Carolina at Chapel Hill, 1983

Outside Counsel Report Card - Best Practices and Pet Peeves

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A Recipe For Legal Project Management: Look To BBQ Champs
Anthony Rospert

Outside the courtroom, one of my hobbies is judging competition barbecue. As a master certified barbecue judge with the Kansas City Barbeque Society, I recently had the honor of judging the Sam's Club National BBQ Championship in Bentonville, Arkansas. Fifty of the top professional BBQ teams in the country competed for $150,000, the richest purse in competition BBQ. One thing I noticed was that the same small group of pitmasters always seems to excel — their teams are consistently in the money at any given competition no matter the geographic location or the mix of judges. The judging process is double-blind, so these pitmasters are not winning based on reputation. It made me wonder: What gives them an edge? What is driving their excellence in BBQ? Is it their sauce and spice rubs? Is it knowing how to select the choice cuts of meat? Do they have the best equipment?

While all of these factors are important, I believe the real reason is simple: The top pitmasters have developed a consistent, disciplined, comprehensive

and repeatable process in planning and executing their BBQ entries. Following a consistent process in approaching each and every competition results in top performance, higher scores and continuous improvement.

The same can be said about applying project management principles to working on legal matters. Intelligent lawyers recognize that using legal project management (LPM) tools and techniques to actively manage engagements helps optimize performance, reduce costs and improve predictability, enabling them to provide clients with superior service and value. Employing project management principles is the "secret sauce" that can help both lawyers and BBQ competitors achieve success.

Develop a Recipe for Success: Plan and Prepare

Advance planning and preparation for any project is necessary to provide direction, continuity and coordination. The top pitmasters use a formal planning process before each competition. They don't just show up the day of the competition, fire up their pits and start smoking their chicken, ribs, pork and brisket. A successful BBQ begins well in advance of the competition by outlining a detailed plan. Champion pitmasters work backward from the turn-in time for each of the four meat categories to develop a schedule setting forth specific tasks that need to be completed at given time intervals. These schedules list not only the tasks that must be performed, they also designate which team member is responsible for each task. Successful pitmasters do not just decide as they go; they drill down on the details of the plan to achieve the perfection that high-level competition demands. Many also use checklists and templates to ensure consistency and predictability. Because situations inevitably arise that require a change in the schedule (e.g., the pit temperature spikes or the meat temperature plateaus), the pitmaster's plan is flexible enough to accommodate changes and can be revised as needed.

Similarly, LPM requires that lawyers employ a formalized process in planning and executing an engagement. This includes developing a schedule that defines which member of the legal team will perform each task and provides a timeline for completing those tasks. Having a road map showing how a legal project will be executed and how the matter will run start to finish is essential to reaching a project's objectives and achieving the client's goals. A defined, detailed plan also provides the context for team members to understand expectations and outcomes. Engaging in a planning process at the outset of each matter allows lawyers to gain a competitive edge by having a strategic playbook to guide the legal team throughout the engagement.

In law or competition BBQ, having a plan in place avoids inconsistency and inefficiency and helps the team deliver a superior product in a timely fashion.

Trim the Fat: Create and Stick to a Budget

Pitmasters have to be cost-conscious and adhere to a defined budget. Participating in any BBQ competition requires a significant monetary investment to cover the entry fee, bulky specialized equipment and the means to transport it, and meat, spices, rubs and other supplies. Some teams purchase special meats from specialty butchers, which alone can increase costs by hundreds of dollars. However, with the exception of a few national competitions, the available prize money does not justify a win-at-all-costs approach. So the top pitmasters will work within a defined budget based on the available prize money at a given competition. For example, instead of cooking the typical two pork shoulders, two briskets, 12 to 16 pieces of chicken and three racks of ribs, the pitmaster may decide to cook half as much to reduce expenses. This not only helps manage costs, it requires a more thoughtful, measured cooking strategy, as there is less room for error in producing a quality entry. As part of a comprehensive, disciplined approach to managing legal projects, lawyers and their clients also develop budgets as a concrete way to help control costs, improve efficiency and provide the transparency and accountability clients need to better manage resources and expectations. A well-designed budget is more than a financial estimate; it sets priorities and reflects strategy. Using budgets helps lawyers manage legal matters more effectively so they can provide better client service, improve results and reduce costs. Important elements of any legal budget include a consistent format across types of matters, the ability to modify quickly and the ability

to reflect actual costs against budgeted amounts. Creating a budget enables the lawyer and client to make proactive strategic decisions about the matter and determine whether the costs justify a particular course of action.

Ultimately, the goal of the budgeting process for lawyers and pitmasters is the same — containing costs without sacrificing quality.

Tend the Fire: Monitor Progress

Creating a plan and budget is only half the job. Successful pitmasters are laser-focused on their goals, and they constantly monitor their progress to ensure that they are on track throughout the BBQ process. One key item that needs to be closely monitored during a BBQ competition is pit temperature. Indeed, fire management is a critical component — it is impossible to cook great BBQ with unstable temperatures. It is so crucial that most teams will have members sleep in shifts so the smoker can be tended and the temperature can be monitored throughout the night. The top pitmasters also rely on technology to monitor their smokers; many use a specially calibrated fan system that feeds the right amount of oxygen into the smoker to ensure a consistent pit temperature.

Likewise, to ensure proper execution, work plans and legal budgets must be monitored through the use of metrics and reporting. A best LPM practice is to implement a consistent, periodic reporting process that keeps the client and legal team informed on progress and keeps the matter on task. Technology tools, such as monitoring software, ensure efficiency and accuracy in measuring metrics including budget-to-actual spend, percentage of completion and cycle time for aspects of the project. Moreover, during the life of a case or transaction, situations often develop that suggest the need for revising the project plan, timeline or budget. When the lawyer is closely monitoring the matter, he or she can act quickly and proactively to collaborate with the client to identify the impact of the change on legal strategy, timeline and budget options. Together they can agree on the appropriate adjustments and revise the project tasks as needed to ensure the project is completed on time and in furtherance of the client's goals. The monitoring process also promotes open communication between lawyer and client, which facilitates predictability of costs and helps avoid unhappy surprises.

Tracking project-related metrics, including team performance and task duration, identifying potential problems and taking corrective actions are all keys to success, whether one is handling a legal matter or competing for BBQ bragging rights.

Perfect the Process: Conduct an After-Action Review

Every project yields information that will be useful in planning future projects. Pitmasters receive feedback following each competition in the form of a score sheet listing judges' scores for the appearance, taste and tenderness of the team's meat entries. In addition, judges sometimes provide the cooks with comment cards containing constructive feedback on improving the team's entries. For example, a judge may indicate that the chicken was too salty or that the ribs were slightly overcooked. Some teams use software to track feedback and results, taking into account common BBQ variables such as temperature and cook duration, the sauce/rub combination, or even the type of wood used or the weather at the time of the cook. The pitmaster then can use this information to perfect their process for the next big competition.

A completed case or transaction also provides useful information regarding the resources used and time required to complete the project, as well as its costs. The key is to gather information by conducting an after-action review to take advantage of prior efforts and results. At the end of an engagement, a lawyer should conduct post-mortems with the legal team and with the client to review successes and failures and suggest modifications to approach and process to improve performance on future engagements. For example, the team might consider using a different process or sequence for some discovery or due diligence tasks. The goal of this review is to evaluate performance and find areas needing improvement so the LPM process is constantly refined. Capturing the lessons learned through an after-action review ensures that efficient, repeatable processes are continually improved based on practical experience and the use of internal systems and tools.

Whether striving to stay ahead of the competition on the BBQ circuit or to achieve positive outcomes for clients, continuous improvement should always be a goal.

The Meat of the Matter

Historian, philosopher and author Will Durant, paraphrasing Aristotle, had it right when he said: "We are what we repeatedly do. Excellence, then, is not an act, but a habit." As I hope this article has illustrated, successful lawyers and champion pitmasters alike can employ project management principles to achieve their common goal of reaching a favorable outcome. The key — or "secret sauce" — is to consistently apply these basic fundamentals to each engagement and continually seek to refine the processes to achieve continuous improvement.

Budgeting for Litigation: Obtaining Efficiencies and Meeting Client Goals
Brian Lamb and Tony Rospert

"We must consult our means rather than our wishes," George Washington prudently observed. Although he was addressing wartime budgeting, his words resonate with today's corporate clients who are pressing their inside and outside litigation counsel to rein in litigation costs. Since 2009 clients have increasingly sought to reduce litigation costs by asking outside law firms to cut their rates. But cutting rates alone is not a sustainable strategy to achieve long-term savings when managing complex or recurring business disputes. That's why some forward-thinking clients are requiring more from outside law firms to control costs and deliver more value.

So what can outside lawyers do to control costs and deliver more value to clients? There are many tools in the toolbox, including legal project management (LPM), process improvement, alternative fee arrangements/value billing and flexible staffing models. Thompson Hine embraces all of these in its approach to innovative service delivery. LPM tools and methodologies drive greater predictability and client communication, ultimately maximizing value to clients. Streamlined and standardized processes yield more efficiency and additional cost savings. Value pricing arrangements, as an alternative to the traditional billable hour, can meet a client's need to cap risk or achieve predictability. And flexible staffing models allow the law firm to use the right lawyer at the right price for each task in the litigation, thereby containing costs without sacrificing quality.

Consider one other useful but underutilized tool for delivering more value: a customized litigation budget. Of all the crucial documents a trial lawyer will create during the life of a complex dispute – such as a well-drafted complaint, a comprehensive motion for summary judgment or flawless jury instructions – a sound litigation budget is arguably one of the most important. Outside counsel should view preparing a litigation budget not as a burden, but as an opportunity – an opportunity to collaborate with the client, to demonstrate a willingness to share risk, to minimize surprises and to maximize the chances bills will be paid without issue or delay. Moreover, a sound legal budget enhances communication and transparency regarding the ongoing progress of the matter, a goal shared by the client and the trial lawyer.

Litigation Budgeting: Thompson Hine's Standardized Approach

The challenge for a law firm is to build a culture that embraces budgeting as an opportunity, despite the uncertainties of litigation. At Thompson Hine, we have rallied around four key principles:

1. Standardize and simplify the budgeting process.
2. Give trial lawyers the right technology.
3. Take advantage of prior efforts and prior results.
4. Demonstrate commitment inside and outside the firm.

Using these principles, we have designed our own proprietary budgeting software that is available on every trial lawyer's computer. With this software, the trial lawyer can readily create a customized

budget with sufficient detail to enable the client to make informed choices about scope, staffing and resources.

Our proprietary budgeting program is the product of collaboration among trial lawyers, IT specialists and our Director of Legal Project Management. Its user-friendly interface includes a series of prompts, drop-down menus and suggested possibilities drawn from the collective experience of our entire litigation group. Similar to a tax preparation program, the budgeting software asks questions and prompts the attorney to consider various aspects of the litigation planning process. It allows the lawyer to adjust standard budget elements for maximum customization of the budget, while still drawing on the collective wisdom of the firm's past engagements. And it automatically performs all calculations, eliminating the potential for errors due to incorrect (or deleted!) spreadsheet formulas or manual miscalculations.

At its heart, the budgeting software prompts the lawyer to plan the anticipated work on the matter by reference to the standard ABA litigation task codes plus a proprietary set of firm-developed sub-task codes. Using high/low ranges to bracket the expected spend for each timekeeper and task, the program accounts for some of the uncertainty inherent in budgeting long-term future events. The software also accounts for the element of time: The lawyer estimates the start and end date of each task (or phase), giving the client a good picture of the expected timing of its legal expenditures in future periods.

Tracking Performance

After one creates a litigation budget, the job is only half complete. An important element of LPM is regular periodic reporting of actual billings versus budgeted billings throughout the life of the matter. Thompson Hine has invested in Budget Manager, a comprehensive software package that tracks budget-to-actual data. Whether the client requests it or not, our timekeepers code time entries for all matters; these codes correspond to the budgeted task codes, enabling Budget Manager to track budget-to-actual data in real time. We then can create reports that contain detailed budget-versus-actual statistics by timekeeper, phase and task, and share them with the client. If the unexpected happens, we are in a position to promptly advise our client and discuss options.

Takeaways

In light of escalating litigation costs and organizations' shrinking budgets for legal services, corporate clients are challenging their law firms to offer new and innovative ways to achieve their goals more economically. As part of a comprehensive, disciplined approach to managing legal projects, trial lawyers and their clients should embrace litigation budgeting as a positive, concrete way to help control costs, improve efficiency and provide the transparency and accountability clients need to better manage their resources and expectations, ultimately increasing the value clients receive for their legal spend.

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As a partner in the Business Litigation group, Tony helps clients overcome legal obstacles to protect their assets and manage litigation risk in pursuit of their strategic goals. He believes that a big part of his job is assessing risk for his clients to help them make the best possible decisions. Tony also views himself as a legal quarterback for in-house counsel who matches his clients' needs with Thompson Hine's resources to ensure success.

Tony has a passion for helping his clients succeed by treating them like his best friends by being loyal, well-connected and honest with them about the strengths and weaknesses of their legal positions. As a result, clients rely on him as a "go-to" litigator for their most significant matters.

Tony focuses his practice on complex business and corporate litigation involving financial services institutions, private equity firms, real estate development and management companies, commercial and contract disputes, indemnification issues, claims involving representations and warranties insurance (R&W insurance or RWI) and other types of transaction liability insurance, post-closing disputes in mergers and acquisitions, shareholder actions, business transactions, class actions, and directors and officers (D&O) litigation.

Litigation can be time-consuming and costly, so for many disputes it may be more effective to seek methods of resolution other than traditional court litigation. Although Tony has an impressive record of courtroom achievements, he seeks to optimize case outcomes while managing the costs, time and stress of a lawsuit by regularly using arbitration, mediation and other forms of alternative dispute resolution (ADR) as pragmatic ways to meet his clients' needs.

Outside the courtroom, Tony is a certified BBQ judge and judges 7-10 sanctioned competitions per year.

Practice Areas

- Business Litigation
- Securities & Shareholder Litigation
- Environmental

Distinctions

- Benchmark Litigation 40 & Under Litigation Hot List, 2019
- Crain's Cleveland Business Forty Under 40 Class of 2013
- Listed as an Ohio Super Lawyers® Rising Star in Business Litigation, 2009, 2010, 2013, 2016 and 2017

Education

- Vermont Law School, J.D., magna cum laude, senior editorial board, business manager, Vermont Law Review
- John Carroll University, B.A., magna cum laude, Outstanding Political Science Major

Using Recent Changes to Daubert and FRE 702 to Support Exclusion of Expert Testimony

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Winning the Argument: Pending Amendments to FRE 702 Clarify What Daubert Has Always Been
Derek Stikeleather

The bane of defense counsel is hearing the court dogmatically reject a winning Daubert challenge to an unreliable expert opinion with, "It goes to the weight of the evidence" or "It's a jury question." Too often, that's wrong.

Even though Daubert/FRE 702 sets a singular national standard for admissibility of expert testimony, its application varies significantly depending on the jurisdiction and even the judge. While Daubert/FRE 702's core principles are the same in every federal circuit, courts are split on whether to apply (1) a toothless version of Daubert, which treats the court's gatekeeping role as more of a crossing-guard role, directing all but the most outrageously unfounded expert opinions to the jury, or (2) a Daubert "with bite," which subjects expert opinions (or, at least, those that are challenged) to meaningful scrutiny under a preponderance of the evidence standard. Courts may compound their toothless error by relying on their own wayward jurisprudence, instead of the Rule itself.

Pending amendments to Federal Rule of Evidence 702 take direct aim at those jurisdictions replete with such "wrongly decided" decisions. The Advisory Committee on FRE 702 is proposing rule changes "to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a *preponderance of the evidence*." See Advisory Committee on Evidence Rules, April 30, 2021, at p. 105 (emphasis added). These clarifications of the proponent's evidentiary burden are not substantive changes. The Advisory Committee explains that the clarification is needed because "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility," and bluntly stated that these "rulings are an *incorrect application* of Rules 702 and 104(a)." 2021 FRE 702 Advisory Committee notes (emphasis added).

The emphasis that errant jurisdictions place on their own caselaw over the rule itself risks making the intended audience the last to apply the language clarifying the Rule. But if practitioners are equipped to head off a court's reliance on such permissive decisions, these clarifications may win out. Practitioners must learn the techniques and authorities to rely on to keep these jurisdictions focused on the rule and its proper application.

Practitioners should look out for the telltale signs of a potentially toothless Daubert application.

First, the Circuit. While watered-down Daubert authority can appear virtually anywhere, some Circuits are better known for it: the Fifth and Eighth. Opinions in the Fifth Circuit often recite a "general rule, [that] questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." United States v. Hodge, 933 F.3d 468, 478 (5th Cir. 2019). The Eighth Circuit often recites that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." See Katzenmeier v. Blackpowder Prods., 628 F.3d 948, 952 (8th Cir. 2010). These recitations are red flags for a reluctance to apply Rule 702.

Second, consider the language that the relevant judges have used in the past. Daubert has soundbites favoring almost any level of scrutiny from meaningless to rigorous. Courts often cast the Rule as favoring admissibility. But this can come in many forms:

- "Rejection of expert testimony is the exception, rather than the rule, and we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record." In re Scrap Metal Antitrust Litig., 527 F.3d 517, 530 (6th Cir. 2008) (cleaned up).
- "Rule 702 embraces a liberal policy of admissibility, pursuant to which it is preferable to admit any evidence that may assist the trier of fact." Knecht v. Jakks Pac., Inc., No. 4:17-CV-2267, 2021 U.S. Dist. LEXIS 158351, at *7-8 (M.D. Pa. Aug. 23, 2021) (cleaned up)

"But the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." Jaunich v. State Farm Life Ins. Co., No. 20-1567 (PAM/JFD), 2021 U.S. Dist. LEXIS 210369, at *10 (D. Minn. Nov. 1, 2021) (quotations omitted).

But even in those jurisdictions which appear to hew the line, be wary of unfaithful application adorned in faithful terminology. Consider Daubert's application in In re Glumetza Antitrust Litig. There, although the court stated that "the proponent of expert testimony bears the burden of demonstrating its admissibility," in its next breath, it stated that "the Daubert inquiry should be applied with a liberal thrust favoring admission." No. C 19-05822 WHA, 2021 U.S. Dist. LEXIS 161066, at *14-15 (N.D. Cal. Aug. 25, 2021). In other words, the proponent has the burden but gets to put a thumb on the scale.

Or consider Jaunich v. State Farm Life Ins. Co., where the court, despite recognizing its role as the "gatekeeper," nonetheless remarked that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." No. 20-1567 (PAM/JFD), 2021 U.S. Dist. LEXIS 210369, at *10 (D. Minn. Nov. 1, 2021).

To fight back against such approaches, shepardizing the improper application can pay dividends. Checking the source of a particularly permissive construction of expert testimony often leads to authority pre-dating Daubert. Pointing out this dubious heritage may push the court to re-orient itself to contemporary and proper Daubert standards.

The problem is often most apparent when courts state that the bases and sources of an expert's opinion go to weight, and not admissibility. Various iterations of the statement appear in hundreds of cases and are rooted in a pre-Daubert opinion, Viterbo v. Dow Chemical Co., 826 F.2d 420, 422 (5th Cir. 1987). See also Britt v. Walgreen Co., No. 1-19-CV-781-RP, 2021 U.S. Dist. LEXIS 220723, at *14 (W.D. Tex. Nov. 16, 2021) (citing Viterbo). Of course, it is difficult to imagine how a pre-Daubert caselaw follows the 1993 Daubert opinion (or subsequent Rule amendments that incorporate the Daubert trilogy).

Consider the Eighth Circuit Court of Appeals' 2021 opinion admitting expert testimony, which quoted its own 1995 precedent, i.e., post-Daubert, for the now-incorrect legal proposition that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." Masters v. City of Indep., 998 F.3d 827, 840 (8th Cir. 2021) (emphasis added) (quoting Hose v. Chi. Nw. Transp. Co., 70 F.3d 968, 974 (8th Cir. 1995)).

At first glance, it appears that Masters relies on a post-Daubert decision. But checking the 1995 Hose opinion, which post-dated (and presumably complied with) Daubert, reveals that it was quoting a 1988, i.e., pre-Daubert opinion for the same point. 70 F.3d at 974 (quoting Loudermill v. Dow Chem. Co., 863 F.2d 566, 570 (8th Cir. 1988)). Even worse, for the same point, the Loudermill court was relying on a 1969 opinion, i.e., pre-FRE 702. 863 F.2d at 570 (citing Twin City Plaza, Inc. v. Central Surety & Ins. Corp., 409 F.2d 1195, 1203 (8th Cir. 1969)). In this way, opinions are being handed down in 2021 as ostensibly compliant with Rule 702 and Daubert but are, in fact, reliant on evidentiary principles from the 1960s.

In the end, litigators cannot guarantee that any court will faithfully follow Daubert. But armed with these techniques and the text of the Rule 702 amendments and commentary, they can improve their client's chances to exclude unreliable expert opinions by getting a busy judge to reconsider some old habits.

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Derek Stikeleather

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

Derek Stikeleather is a partner with Goodell DeVries and Chair of the firm's Appellate Practice Group. He practices primarily in appellate advocacy and complex litigation, often in commercial disputes or defending product liability, medical malpractice, and class action claims. Derek led the appellate teams that helped overturn the two largest birth-injury verdicts in Maryland history ($55 MM and $229 MM). A dedicated writer, he has briefed and argued appeals on behalf of physicians and several prominent hospitals before the appellate courts of Maryland and the District of Columbia and in the United States Court of Appeals for the Fourth Circuit.

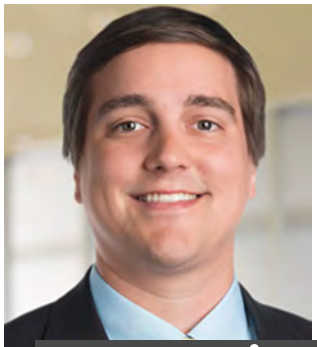
Derek was instrumental in two recent notable Maryland appellate victories. In 2020, he helped the Goodell DeVries team that persuaded the Maryland Court of Appeals to formally adopt the Daubert standard for expert testimony in all state-court civil and criminal proceedings and retire the Frye-Reed test. And, in 2021, through briefing and oral argument, Derek persuaded Maryland's Court of Special Appeals to overturn a $205 million final judgment — the largest birth-injury award in U.S. history — and order JNOV for the defendant hospital.

Practice Areas
- Appellate
- Medical Malpractice
- Product Liability
- Pharmaceutical and Medical Device Litigation
- Class Action Litigation

Publications and Seminars
- "What to Do After the Nuclear Verdict: Appeal Strategies," 2022 DRI Litigation Skills Seminar, The Defense Research Institute (DRI), February 2-4, 2022
- "Weighing Controlling and Persuasive Daubert Authorities for Maryland State Courts," Maryland Appellate Blog, January 3, 2022
- "Fourth Circuit Warns of Heightened Risk of Error in Products Liability Cases When Courts Treat Daubert Admissibility as Mere Question of Weight," DRI Daubert Online, December 3, 2021
- "Daubert Motions: Challenging Expert Opinions," Lorman Education Services CLE Webinar, August 31, 2021
- "The Future of Daubert in Maryland," Maryland Appellate Blog, June 23, 2021
- "Use of Artificial Intelligence and Other Emerging Technologies in Criminal Cases," Maryland State Bar Association Legal Summit and Annual Meeting, June 10, 2021
- "Modern Family Law: Who Gets the Frozen Pre-Embryos?" Maryland Appellate Blog, May 13, 2021
- "Fourth Circuit Proves a Negative in Finding an Asbestos Expert's Opinion Insufficient under Daubert," DRI Daubert Online, May 11, 2021
- "What Is a "Daubert issue" in Maryland?" Maryland Appellate Blog, March 30, 2021

Honors and Awards
- Maryland Super Lawyers - Appellate Law, 2017 - 2022

Education
- University of Maryland, School of Law - (J.D., 2004); Order of the Coif; Writing Fellow; Journal of Health Care Law & Policy – Notes and Comments Editor
- Johns Hopkins University - (M.L.A., 1998)
- University of Pennsylvania - (B.A., cum laude, 1993)



Tales from the Other Side: Lessons Learned as Plaintiff's Counsel

Ray Lewis
Deutsch Kerrigan (New Orleans, LA)

Tales From the Other Side
Ray Lewis and John Jerry Glas

The grass is always greener on the other side of the fence, or so we believed until we hopped the fence and tried a 2-week jury trial as counsel for the plaintiff. In March of 2021, we parachuted into a case only two months before trial. We were up against an excellent team of defense attorneys, and the case was going to be tried in their backyard. Neither of us had performed a voir dire as counsel for the plaintiff. Neither of us had given an opening statement or closing argument for the plaintiff. And neither of us had any experience designing a trial strategy to satisfy the plaintiff's burden of proof. We went in with our eyes open, knowing we had a LOT to learn about being good plaintiff attorneys. What we didn't know was how much we were about to learn about being good defense attorneys.

Lesson No. 1: Aggressive Motion Practice Can Backfire

Aggressive motion practice is a staple of defense strategy. For our entire careers, we have been fed a steady diet of stories about "relentless" partners who "drowned" plaintiff attorneys with paperwork and "broke their backs" with pre-trial motions. Clients loved our recommendation to engage in "aggressive motion practice," and we always included a laundry list of potential motions in our reports and strategy plans to the client. The logic was sound. Even if the motions were denied, we could force plaintiff's counsel to spend their time on briefing instead of trial preparation. And if we lost, at least we told the Judge about the case and persuaded the court we were in the right.

When we parachuted in as plaintiff's counsel, we knew we were outnumbered, and we fully expected defense counsel to slam us with pre-trial motions. They did not disappoint. During the last two months before trial, the defense filed: (a) a motion for summary judgment on liability; (b) more than 30 motions in limine, including a motion seeking to exclude Lost Profits, which would have entitled them to a directed verdict; (b) an exhibit list with 1,111 trial exhibits (with a 75-page table of contents); and (e) objections to testimony on almost every page of our only videotaped trial perpetuation deposition. But defense counsel saved the best for last, filing five (5) motions between 10:23 p.m. and 10:47 p.m. the night before the Pre-Trial Conference.

The tide turned during that Pre-Trial Conference. The court did not appreciate defense counsel's gamesmanship. The court did not enjoy making 27 separate rulings on motions in limine, including motions to prohibit us from mentioning that the defense was a "Norwegian company", and our client was a "family-owned company." Over the course of the marathon Pre-Trial Conference, it became clear the defense was moving to exclude comments we would never make and evidence we would never introduce. It was a completely unnecessary, time-consuming, and often insulting exercise. With their premature objections and motions, defense counsel was openly accusing us of not understanding the code of evidence.

We welcomed the opportunity to demonstrate our reasonableness and willingness to compromise. As defense counsel sent different associates to the podium to argue the motions each had been assigned, we smiled, stipulated to as many as possible, and picked our battles. When we stood and said, "Now, we do have a problem with this motion," we had the court's full attention. In effect,

our discretion created a rebuttable presumption that defense counsel had crossed a line.

By the end of that Pre-Trial Conference, it was clear that we were willing to let the defense try their case, but the defense was desperate to prevent us from trying ours. Which said something about them and their case. It was a valuable lesson.

Lesson No. 2: Rule 1006 Summaries Are Effective Weapons

When we parachuted into the case, we had plenty of documents, but no expert witnesses. Prior counsel had allowed the expert report deadline to pass, which meant that we had to find a way to satisfy our burden of proving lost profits without the benefit of a forensic economist or accountant to calculate those lost profits. The solution was Rule 1006 summaries. Federal Rule of Evidence 1006 provides:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Proving the plaintiff's claims without experts was a blessing. It opened our eyes. As defense counsel we had become too dependent on expert witnesses. We were using them as a crutch. We were letting them do the math. Instead of creating Rule 1006 summaries that the jury could use during deliberations, we were relying on the charts our experts (sometimes) included in their reports. We had forgotten that it is always better to put a Rule 1006 summary in the hands of the jury than to offer them a quick glimpse of an expert's chart. Below is one page from the Rule 1006 summary showing exactly how many barrels defendant had purchased from third party vendors, instead of our clients.

Statoil/Equinor Wells Fracked that did Not Use Lindale as the Water Provider – June 28, 2015-November 4, 2020

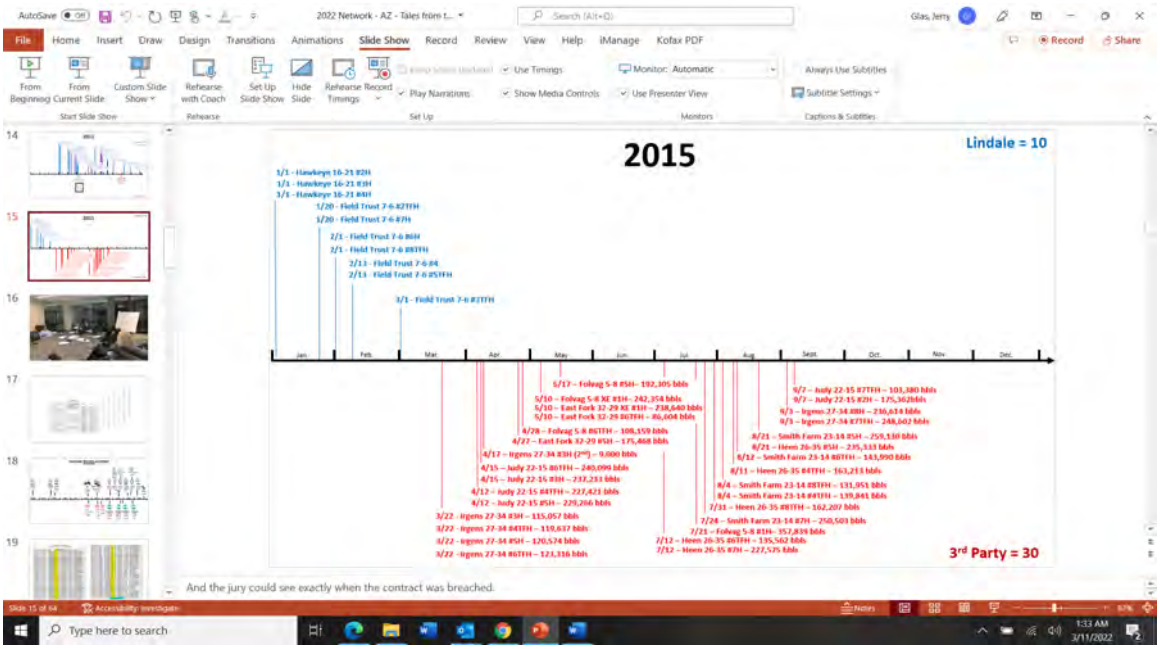
	Well Name	Start Date	Completion Date	Operator Name	Total Base Water Volume (gals)	Barrel Conversion	Source
65.	Sjol 5-8 XE #1TFH	9/29/2018	10/20/2018	Statoil Oil & Gas LP	9,270,001	220,714	FracFocus
66.	Mark 4-9 #4TFH	10/14/2018	10/22/2018	Statoil Oil & Gas LP	5,509,266	131,173	FracFocus
67.	Mark 4-9 #5H	10/14/2018	10/25/2018	Statoil Oil & Gas LP	9,416,744	224,208	FracFocus
68.	Sjol 5-8 #4TFH	10/22/2018	11/7/2018	Statoil Oil & Gas LP	8,382,007	199,572	FracFocus
69.	Sjol 5-8 #5H	10/22/2018	11/8/2018	Statoil Oil & Gas LP	9,167,268	218,268	FracFocus
70.	Sjol 5-8 #3TFH	10/22/2018	11/26/2018	Equinor Energy LP	9,189,404	218,795	FracFocus
71.	Sjol 5-8 #2H	11/12/2018	11/28/2018	Equinor Energy LP	9,067,185	215,885	FracFocus
72.	Sjol 5-8 XW #1TFH	11/12/2018	11/28/2018	Equinor Energy LP	9,389,282	223,554	FracFocus
73.	Mark 4-9 #8TFH	12/4/2018	12/9/2018	Equinor Energy LP	2,203,140	52,456	FracFocus
74.	Mark 4-9 #4TFH	12/6/2018	12/13/2018	Statoil Oil & Gas LP	8,757,777	208,519	FracFocus
75.	Mark 4-9 #3H	12/4/2018	12/14/2018	Statoil Oil & Gas LP	8,757,777	208,519	FracFocus
76.	Allison 23-14 XW #1TFH	4/1/2019	4/18/2019	Equinor Energy LP	6,925,716	164,898	FracFocus
77.	Allison 23-14 #2TFH	4/1/2019	4/19/2019	Equinor Energy LP	7,033,902	167,474	FracFocus
78.	Allison 23-14 #3H	4/1/2019	4/21/2019	Equinor Energy LP	9,601,578	228,609	FracFocus
79.	Allison 23-14 #4TFH	4/22/2019	5/9/2019	Equinor Energy LP	7,059,612	168,086	FracFocus
80.	Allison 23-14 #5H	4/23/2019	5/9/2019	Equinor Energy LP	9,772,141	232,670	FracFocus
81.	Allison 23-14 #6TFH	4/29/2019	5/9/2019	Equinor Energy LP	7,230,730	172,160	FracFocus
82.	Elmer Hovland 23-14 XE #1H	5/11/2019	5/27/2019	Equinor Energy LP	10,241,296	243,840	FracFocus
83.	Allison 23-14 #7H	5/11/2019	5/28/2019	Equinor Energy LP	10,483,284	249,602	FracFocus
84.	Allison 23-14 #8TFH	5/11/2019	5/28/2019	Equinor Energy LP	7,396,673	176,111	FracFocus
85.	Jarold 25-36 #7H	7/2/2019	7/9/2019	Equinor Energy LP	9,777,088	232,788	FracFocus
86.	Jarold 25-36 #8TFH	7/12/2019	7/10/2019	Equinor Energy LP	9,603,203	228,648	FracFocus
87.	Jarold 25-36 #2TFH	7/2/2019	7/14/2019	Equinor Energy LP	4,241,286	100,983	FracFocus
88.	Jarold 25-36 #5H	7/17/2019	8/1/2019	Equinor Energy LP	9,691,544	230,751	FracFocus
89.	Jarold 25-36 #6TFH	7/17/2019	8/1/2019	Equinor Energy LP	9,816,798	233,733	FracFocus
90.	Jarold 25-36 XW #1TFH	7/17/2019	8/1/2019	Equinor Energy LP	9,750,655	232,158	FracFocus
91.	Sam 30-31 #3H	10/18/2019	10/26/2019	Equinor Energy LP	8,520,172	202,861	FracFocus
92.	Sam 30-31 #6TFH	10/18/2019	10/26/2019	Equinor Energy LP	6,433,970	153,190	FracFocus
93.	Sam 30-31 #7TFH	10/27/2019	11/6/2019	Equinor Energy LP	6,334,499	150,821	FracFocus
94.	Sam 30-31 XE #1H	10/27/2019	11/6/2019	Equinor Energy LP	9,483,517	225,798	FracFocus
				Total GALs	*787,533,886*	*18,750,950*	

P0040 (LIN-REP 2944-2960, 6656); P0041 (LIN-REP 766-2960); P0042 (LIN-REP 2961-2990)

P0039a-000003

Page 3 of 3

For this trial, we also wanted: (a) to prove that the defendant complied with the exclusivity provision of the contract for years before oil prices crashed; and (b) to show the jury when defendant started violating the exclusivity provision of the contract. Once again, Rule 1006 was the solution. With no alternative, we were reminded that Rule 1006 summaries can be presented in the form of graphs and timelines, as long as defense counsel were provided with a reasonable opportunity to examine the documents on which the Rule 1006 summary was based.



The most valuable lesson we learned is that opposing counsel will never "stipulate" to the chart in your expert's report. But, if done right and carefully prepared, opposing counsel cannot challenge the accuracy and content of a Rule 1006 summary. Here, defense counsel (eventually) had to stipulate to our Rule 1006 summary-chart regarding defendant's purchases of water from third party vendors and our Rule 1006 summary-timeline showing the frac jobs defendant did give to our client (in blue) and did not give to our client (in red).

Lesson No. 3: Let the court voir dire on bias & prejudice

Questions about bias can bias the questioned. Whenever possible, trial lawyers should move the court to ask those questions designed to discover bias and prejudice. By having the court voir dire on bias and prejudice, trial lawyers can design voir dire questions that tell jurors the "real issue" in the case and send the message that your client wants jurors who care about that issue.

Executed properly, the "we want people who care about this issue" voir dire theme can: (a) persuade jurors your client cares about that issue; (b) suggest your opponent does not care about that issue; and (c) imply that jurors who care about that issue will ultimately find for your client.

Here, we (jointly) moved the court to conduct voir dire on bias and prejudice, submitting the specific questions that both plaintiff and defense wanted asked. That motion allowed us to dedicate our entire voir dire to send the message that our client was taking this matter to trial "because written contracts should be enforced!"

Toward that end, we designed a voir dire that: (a) started with a series of questions emphasizing the importance of enforcing "written contracts," thereby suggesting the defendant was trying to "wiggle out" of a written contract); and (b) ended with a series of questions that began with the phrase "if the court asked you to determine the intent of the parties," thereby suggesting that the intent of the parties would determine the outcome of the trial. Here are some of the questions we asked:

- We want jurors who believe written contracts should be enforced:
- Do you think that written contracts should be enforced?
- Does anyone think that written contracts should not be enforced?
- Has anyone had to painstakingly write a contract?
- Has anyone experienced what it is like to have someone break a written contract with you?
- Has anyone ever had to research how to enforce

a written contract?
- Has anyone ever intentionally broken a written contract?
- Does anyone think that people who break written contracts should not be held accountable?
- Does anyone think that our community would be better off if we started ignoring written contracts?

The intent of the parties will determine the outcome of this trial:

- If the court asked you to determine the intent of the parties, could you consider and weigh the contractual language those parties chose to include in the contract?
- If the court asked you to determine the intent of the parties, could you consider and weigh the contractual language those parties chose to omit from the contract?
- If the court asked you to determine the intent of the parties, could you consider and weigh how those parties acted immediately before they signed the contract?
- If the court asked you to determine the intent of the parties, could you consider and weigh how those parties acted immediately after they signed the contract?
- If the court asked you to determine the intent of the parties, could you consider and weigh the testimony of the people who signed the contract?

Taking the bait, defense counsel started his voir dire by trying to reassure the jury that the defendant (a giant, world-wide energy company) also believed in enforcing written contracts, but the seed had been sewn. As soon as opposing counsel started asking questions about contractual limitations ("what if a contract doesn't specifically say…"), he tacitly confirmed that his client was the party trying to "get out of" the written contract. At the end of the trial, the jury found that the world-wide energy company had breached the written contract and awarded more than $27 million to our client. The verdict reminded us that voir dire questions can be more important than voir dire answers.

Lesson No. 4: Give the jurors a verdict range and a chance to compromise.

Prior to trial, the court excluded several of our client's claims, but allowed our client to bring two separate claims for two separate breaches of the same contract. By the end of the two-week trial, we had proven our primary claim, but we had concerns about whether an appellate court would affirm any award for our secondary claim.

With the client's permission, we decided to give the decision-makers on the jury (what we call Lions) a realistic range for the primary claim and only "half-heartedly" sell the secondary claim. During closing argument, we gave a realistic range of $27,144,404.50 (if diesel cost $4/gallon) to $27,943,268.50 (if diesel cost $2/gallon) for the primary claim. Then, we admitted that we did not know "the specific amount owed" on the secondary claim and "told" the jury they could award "up to $7,791,033.60." In response, opposing counsel "told" them to award nothing.

The Lions refused to do what defense counsel "told" them to do. Instead, they found the defendant breached the exclusivity provision (our primary claim), accepted our realistic range, and awarded (to the penny) the bottom of that range, awarding our client $27,144,404.50. The jury proceeded to find that the defendant breached the other contractual provision (our secondary claim) but awarded nothing for that breach. When we visited with jurors afterwards, they were quick to explain that they could not give us anything for our secondary claim because we failed to prove a specific amount, but "we gave you the big claim!" Their verdict was "fair" because they did not give us everything we wanted. It was another valuable lesson. Jurors have become experts in everything and suspicious of everyone. They do not trust lawyers or their hand-picked experts. They will NOT be manipulated, and they do NOT want to be "told" anything. If you have a great case, keep your opinion to yourself. They have seen enough courtroom dramas to know that the "slam dunk" trial always ends with a surprise, and the obvious answer is never correct. Tell jurors something is "clear," and they will assume it is not. Tell them the case is a "no brainer," and they will resolve to find what you missed. Tell them to

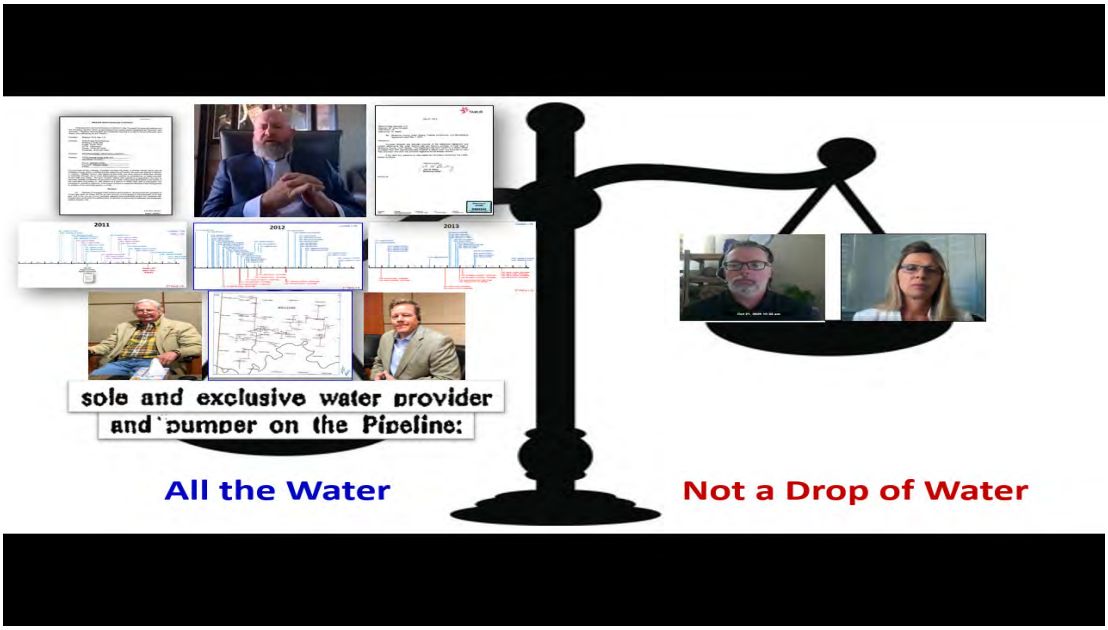
award a specific number, and they will avoid that number like the bubonic plague. They are NOT your puppets. They will reach their own decisions, thank you very much.

Lesson No. 5: Show jurors the scales.

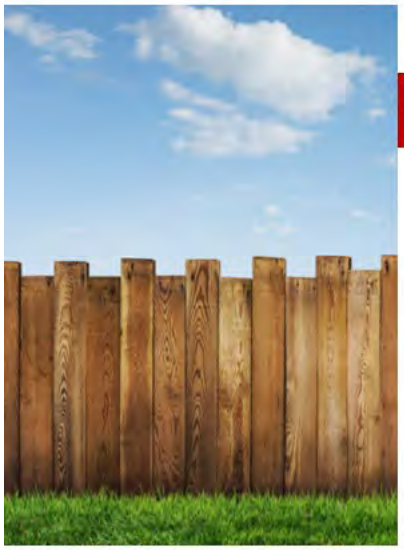
During closing argument, we showed the jury the "Scales of Justice" with perfectly balanced scales and told the jury was being confronted with two very different interpretations of the same contract. We emphasized that jurors had to decide whether plaintiff was correct, and the exclusivity provision required the defendant to purchase "All the Water" from our client; or the defense was correct, and the contract did not require defendant to purchase "A Drop of Water."

We warned jurors "up front' that the court would not permit the jurors to call for any of our demonstrative exhibits "so this will be the only chance I get to walk through the evidence on both sides of the scale." When jurors realized that the Scales of Justice would not be in the deliberation room, they took notes and paid closer attention.

Then, we methodically added evidence that belonged -- witnesses, exhibits, timelines, and even individual sentences (like the exclusivity provision in the contract) -- to "our side" of the scale. Thus, instead of "telling" jurors, that we had met our burden of "proving by a preponderance of the evidence," we showed them that we had (overwhelmingly) tipped the scale.



The use of the "Scales of Justice" was extremely effective and has become our preferred method of reviewing the evidence on the ultimate issue. Nothing has proven as effective as visually "stacking" the physical and testimonial evidence on each side of the scale. By stacking the weights, you can visually and clearly convey what the jury should decide without actually "telling" the jury how to vote. After all, the secret to closing argument is Lion-taming, not Lion-telling.

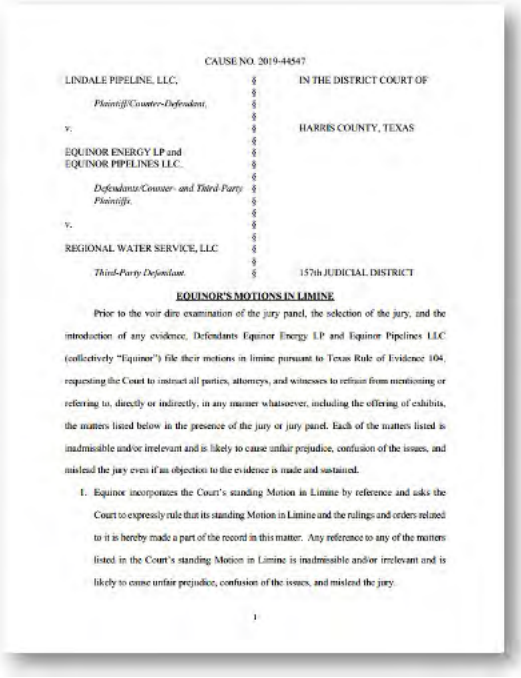


LESSONS LEARNED

- Aggressive Motion Practice can backfire

5 Motions In Limine Filed
Night Before Pre-Trial Conference
10:23 p.m. – 10:47 p.m.

1. **Exclude Evidence of Lindale's Lost Profits (10:23 p.m.)**
2. **Exclude Mitch Brown's Testimony Regarding the Meaning of the Pipeline Agreement (10:30 p.m.)**
3. **Exclude Evidence of Oral Promises (10:38 p.m.)**
4. **Exclude Amounts of Water Never Invoiced (10:43 p.m.)**
5. **Exclude Evidence of Unrelated Business Activities (10:47 p.m.)**



CAUSE NO. 2019-44547

LINDALE PIPELINE, LLC,	§	IN THE DISTRICT COURT OF
Plaintiff/Counter-Defendant,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
EQUINOR ENERGY LP and EQUINOR PIPELINES LLC,	§	
	§	
Defendants/Counter- and Third-Party Plaintiffs.	§	
	§	
	§	
v.	§	
	§	
REGIONAL WATER SERVICE, LLC	§	
	§	
Third-Party Defendant.	§	157th JUDICIAL DISTRICT

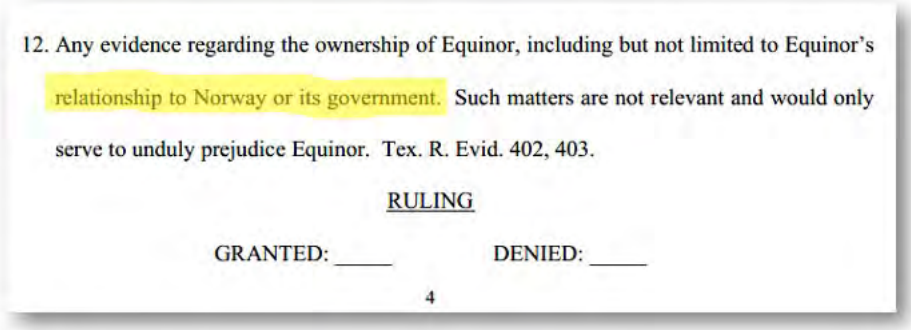
EQUINOR'S MOTIONS IN LIMINE

Prior to the voir dire examination of the jury panel, the selection of the jury, and the introduction of any evidence, Defendants Equinor Energy LP and Equinor Pipelines LLC (collectively "Equinor") file their motions in limine pursuant to Texas Rule of Evidence 104, requesting the Court to instruct all parties, attorneys, and witnesses to refrain from mentioning or referring to, directly or indirectly, in any manner whatsoever, including the offering of exhibits, the matters listed below in the presence of the jury or jury panel. Each of the matters listed is inadmissible and/or irrelevant and is likely to cause unfair prejudice, confusion of the issues, and mislead the jury even if an objection to the evidence is made and sustained.

1. Equinor incorporates the Court's standing Motion in Limine by reference and asks the Court to expressly rule that its standing Motion in Limine and the rulings and orders related to it is hereby made a part of the record in this matter. Any reference to any of the matters listed in the Court's standing Motion in Limine is inadmissible and/or irrelevant and is likely to cause unfair prejudice, confusion of the issues, and mislead the jury.

1

27 Motions in Limine



12. Any evidence regarding the ownership of Equinor, including but not limited to Equinor's relationship to Norway or its government. Such matters are not relevant and would only serve to unduly prejudice Equinor. Tex. R. Evid. 402, 403.

RULING

GRANTED: _____ DENIED: _____

4

13. Any reference to Lindale as a family owned business or the respective sizes of any of the companies involved in the subject matter of the Litigation, including but not limited to Equinor, Lindale, RWS, Bull Moose Pipeline, LLC, 640energy, Trenton Water Depot, LLC or any other company. Such matters are not relevant and would only serve to unduly prejudice Equinor. Tex. R. Evid. 402, 403.

RULING

GRANTED: _____ DENIED: _____

14. Any reference to any alleged statement that revenues from the contract at issue would permit Dale Behan, Linda Behan, or anyone else to retire. Such matters are not relevant and would only serve to unduly prejudice Equinor. Tex. R. Evid. 402, 403.

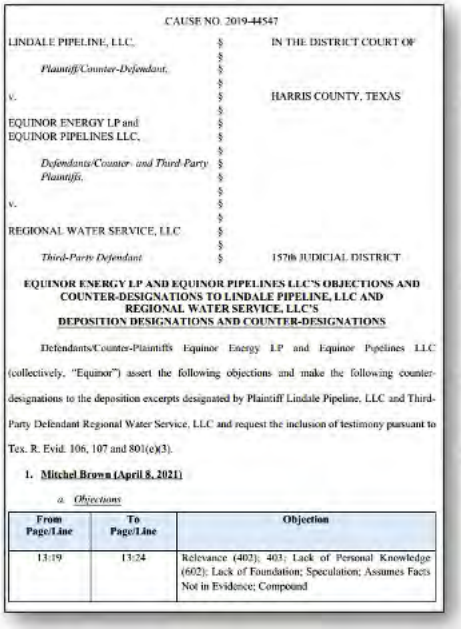
RULING

GRANTED: _____ DENIED: _____

25. Any argument or inference as to the reasons why Equinor changed its name. Such argument or inference is purely speculative, has no relevance to this proceeding, and would serve only to unduly prejudice Equinor. Tex. R. Evid. 402, 403, & 601.

RULING

GRANTED: _____ DENIED: _____



CAUSE NO. 2019-44547

LINDALE PIPELINE, LLC, *Plaintiff/Counter-Defendant,*	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
EQUINOR ENERGY LP and EQUINOR PIPELINES LLC, *Defendants/Counter- and Third-Party Plaintiffs,*	§	
v.	§	
REGIONAL WATER SERVICE, LLC *Third-Party Defendant*	§	157th JUDICIAL DISTRICT

EQUINOR ENERGY LP AND EQUINOR PIPELINES LLC'S OBJECTIONS AND COUNTER-DESIGNATIONS TO LINDALE PIPELINE, LLC AND REGIONAL WATER SERVICE, LLC'S DEPOSITION DESIGNATIONS AND COUNTER-DESIGNATIONS

Defendants/Counter-Plaintiffs Equinor Energy LP and Equinor Pipelines LLC (collectively, "Equinor") assert the following objections and make the following counter-designations to the deposition excerpts designated by Plaintiff Lindale Pipeline, LLC and Third-Party Defendant Regional Water Service, LLC and request the inclusion of testimony pursuant to Tex. R. Evid. 106, 107 and 801(e)(3).

1. **Mitchel Brown (April 8, 2021)**

a. *Objections*

From Page/Line	To Page/Line	Objection
13:19	13:24	Relevance (402); 403; Lack of Personal Knowledge (602); Lack of Foundation; Speculation; Assumes Facts Not in Evidence; Compound

- **11 Witnesses to Testify by Deposition in their Case in Chief**
- **They Designated 80%.**
- **We Designated 8%.**
- **Objected to All of Our 8% of the Testimony**

LESSONS LEARNED

- Aggressive Motion Practice can backfire
- 1006 Summaries can replace experts

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

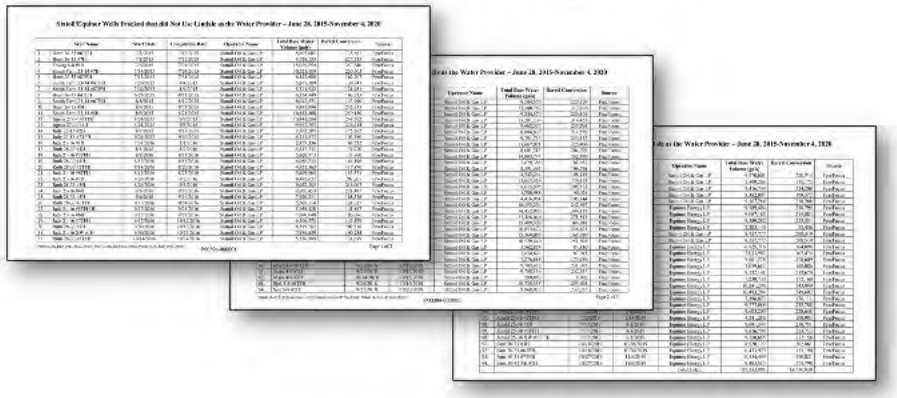
Notes

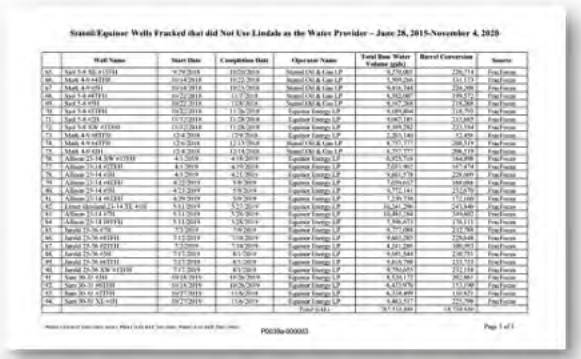
(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1946; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore §1230.

Rule 1006 Summary
Proving 94 Wells & 18,750,950 Barrels
Frac'd by 3rd Parties

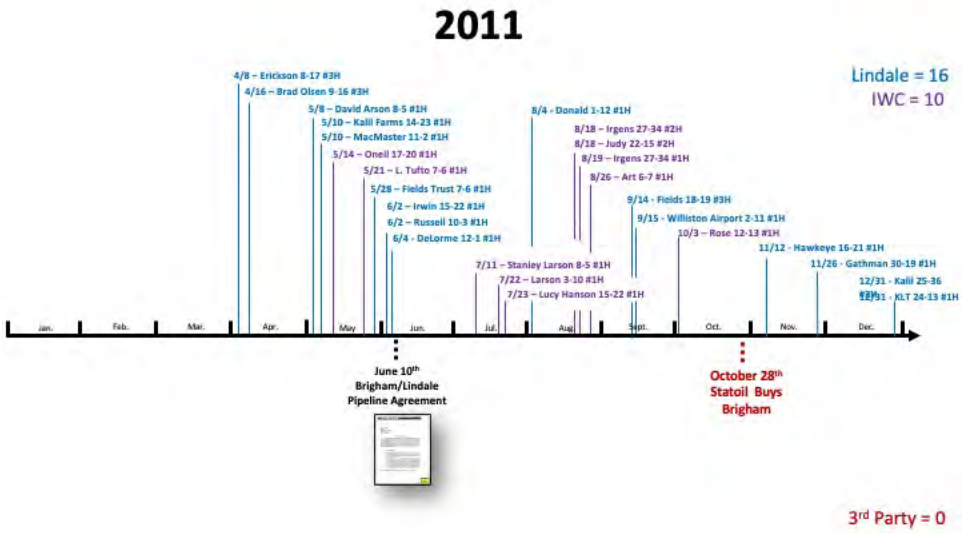


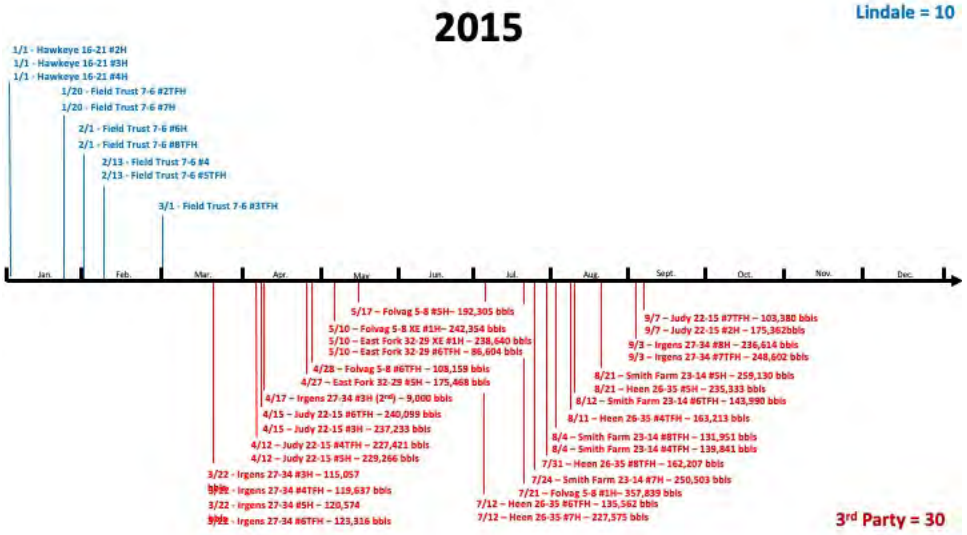


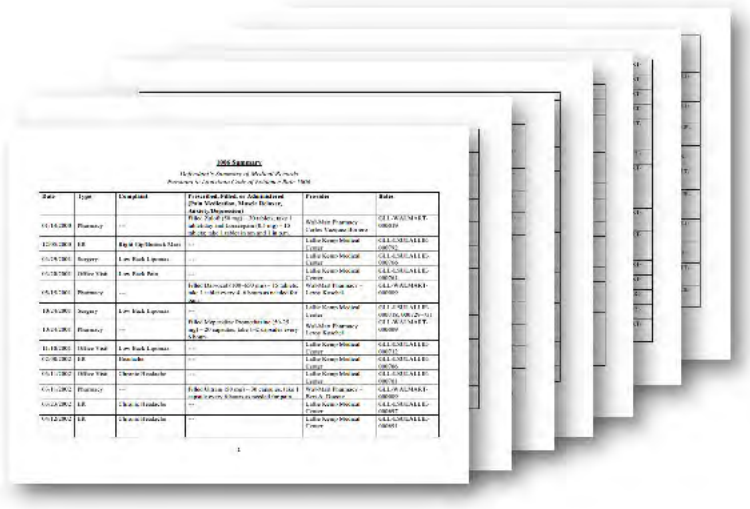
Stanolind/Equinor Wells Fracked that did Not Use Lindale as the Water Provider – June 28, 2015-November 4, 2020

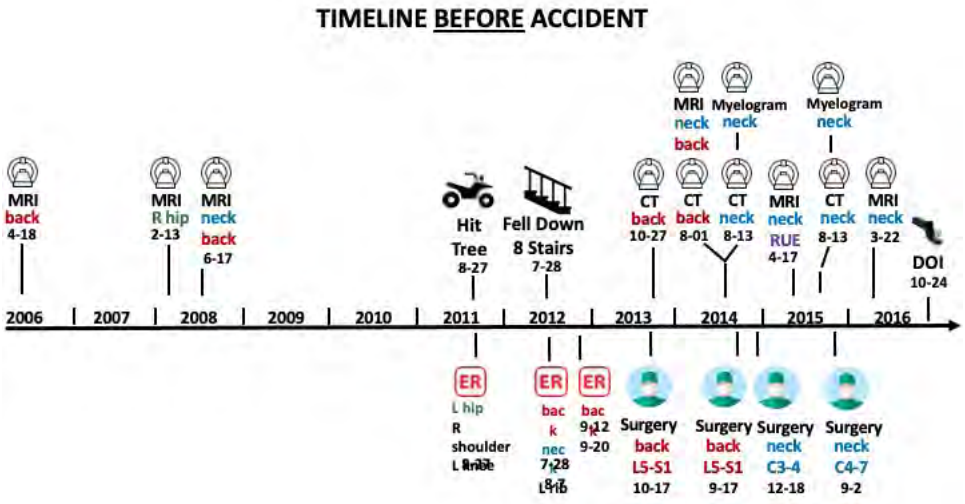
	Well Name	Start Date	Completion Date	Operator Name	Total Base Water Volume (gals)	Barrel Conversion	Source
65	Sped 5-8 9H #1TFH	9/29/2018	10/20/2018	Stanolind Oil & Gas LP	8,750,082	208,334	FracFocus
66	Mark 4-9 #4TFH	10/14/2018	10/22/2018	Stanolind Oil & Gas LP	9,309,294	221,173	FracFocus
67	Mark 4-9 #5TFH	10/14/2018	10/27/2018	Stanolind Oil & Gas LP	9,816,345	233,699	FracFocus
68	Sped 5-8 #4TFH	10/22/2018	11/7/2018	Stanolind Oil & Gas LP	9,362,907	222,927	FracFocus
69	Sped 5-8 #5H	10/22/2018	11/7/2018	Stanolind Oil & Gas LP	9,297,204	221,362	FracFocus
70	Sped 5-8 #3TFH	10/22/2018	11/26/2018	Equinor Energy LP	9,189,864	218,793	FracFocus
71	Sped 5-8 #2H	10/27/2018	11/26/2018	Equinor Energy LP	9,067,185	215,885	FracFocus
72	Sped 5-8 8W #1TFH	10/27/2018	11/26/2018	Equinor Energy LP	9,189,762	218,804	FracFocus
73	Mark 4-9 #8TFH	12/4/2018	12/9/2018	Equinor Energy LP	2,203,140	52,456	FracFocus
74	Mark 4-9 #4TFH	12/6/2018	12/17/2018	Stanolind Oil & Gas LP	8,757,777	208,519	FracFocus
75	Mark 4-9 #3H	12/4/2018	12/14/2018	Stanolind Oil & Gas LP	8,797,977	209,475	FracFocus
76	Allison 25-34 3W #1TFH	4/1/2019	4/18/2019	Equinor Energy LP	8,955,528	164,098	FracFocus
77	Allison 25-34 #3TFH	4/1/2019	4/19/2019	Equinor Energy LP	7,031,965	167,474	FracFocus
78	Allison 25-34 #2H	4/1/2019	4/12/2019	Equinor Energy LP	9,661,278	230,030	FracFocus
79	Allison 25-34 #4TFH	4/12/2019	5/8/2019	Equinor Energy LP	7,056,617	168,014	FracFocus
80	Allison 25-34 #5H	4/12/2019	5/8/2019	Equinor Energy LP	9,757,141	232,313	FracFocus
81	Allison 25-34 #6TFH	4/29/2019	5/9/2019	Equinor Energy LP	7,136,756	169,923	FracFocus
82	Lloyd Simpson 25-34 XE #1H	5/1/2019	5/12/2019	Equinor Energy LP	10,241,796	243,848	FracFocus
83	Allison 25-34 #7H	5/11/2019	5/20/2019	Equinor Energy LP	10,381,764	247,185	FracFocus
84	Allison 25-34 8WFH	5/11/2019	5/28/2019	Equinor Energy LP	7,906,473	188,213	FracFocus
85	Harold 25-36 #7H	7/2/2019	7/9/2019	Equinor Energy LP	8,797,084	209,454	FracFocus
86	Harold 25-36 #8TFH	7/12/2019	7/18/2019	Equinor Energy LP	9,663,285	230,078	FracFocus
87	Harold 25-36 #2TFH	7/2/2019	7/18/2019	Equinor Energy LP	8,241,289	196,221	FracFocus
88	Harold 25-36 #9H	7/12/2019	8/1/2019	Equinor Energy LP	9,661,344	230,251	FracFocus
89	Harold 25-36 #5TFH	7/2/2019	8/1/2019	Equinor Energy LP	9,818,798	233,733	FracFocus
90	Harold 25-36 XW #1TFH	7/12/2019	8/1/2019	Equinor Energy LP	9,770,655	232,158	FracFocus
91	Sam 30-31 #8H	10/16/2019	10/26/2019	Equinor Energy LP	9,530,177	292,869	FracFocus
92	Sam 30-31 #6TFH	10/18/2019	10/26/2019	Equinor Energy LP	6,433,970	153,190	FracFocus
93	Sam 30-31 #7TFH	10/27/2019	11/6/2019	Equinor Energy LP	6,334,499	150,821	FracFocus
94	Sam 30-31 XE #1H	10/27/2019	11/6/2019	Equinor Energy LP	9,483,517	225,798	FracFocus
				Total GALs	787,533,866	18,750,950	

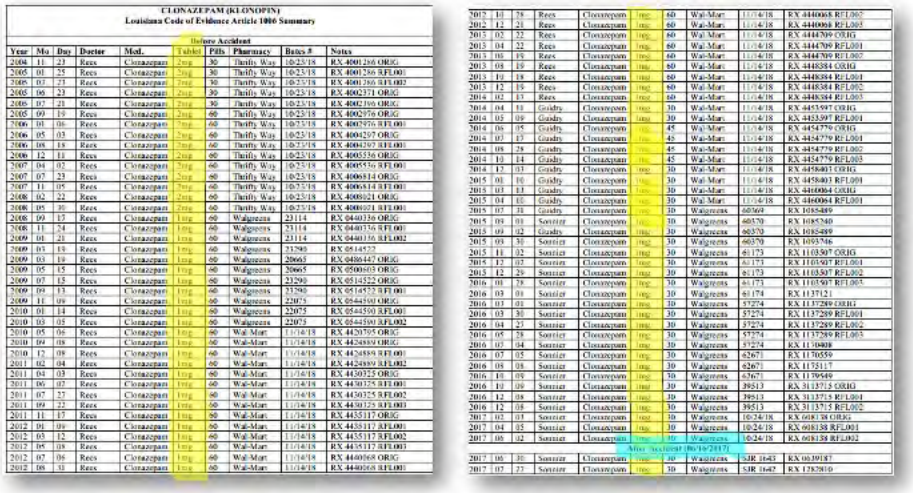
P0040 (LIN-REP 2944-2960; 6656); P0041 (LIN-REP 766-2960); P0042 (LIN-REP 2961-2990) P0039a-000003 Page 3 of 3


2011
Lindale = 16
IWC = 10
4/8 – Erickson 8-17 #3H
4/16 – Brad Olsen 9-16 #3H
5/8 – David Arson 8-5 #1H
5/10 – Kalil Farms 14-23 #1H
5/10 – MacMaster 11-2 #1H
5/14 – Oneil 17-20 #1H
5/21 – L. Tufto 7-6 #1H
5/28 – Fields Trust 7-6 #1H
6/2 – Irwin 15-22 #1H
6/2 – Russell 10-3 #1H
6/4 - DeLorme 12-1 #1H
7/11 – Stanley Larson 8-5 #1H
7/22 – Larson 3-10 #1H
7/23 – Lucy Hanson 15-22 #1H
8/4 - Donald 1-12 #1H
8/18 – Irgens 27-34 #2H
8/18 – Judy 22-15 #2H
8/19 – Irgens 27-34 #1H
8/26 – Art 6-7 #1H
9/14 - Fields 18-19 #3H
9/15 - Williston Airport 2-11 #1H
10/3 – Rose 12-13 #1H
11/12 - Hawkeye 16-21 #1H
11/26 - Gathman 30-19 #1H
12/31 - Kalil 25-36
12/31 - KLT 24-13 #1H
Jan.
Feb.
Mar.
Apr.
May
Jun.
Jul.
Aug.
Sept.
Oct.
Nov.
Dec.
June 10th Brigham/Lindale Pipeline Agreement
October 28th Statoil Buys Brigham
3rd Party = 0


2015
Lindale = 10
1/1 - Hawkeye 16-21 #2H
1/1 - Hawkeye 16-21 #3H
1/1 - Hawkeye 16-21 #4H
1/20 - Field Trust 7-6 #2TFH
1/20 - Field Trust 7-6 #7H
2/1 - Field Trust 7-6 #6H
2/1 - Field Trust 7-6 #8TFH
2/13 - Field Trust 7-6 #4
2/13 - Field Trust 7-6 #5TFH
3/1 - Field Trust 7-6 #3TFH
Jan.
Feb.
Mar.
Apr.
May
Jun.
Jul.
Aug.
Sept.
Oct.
Nov.
Dec.
5/17 – Folvag 5-8 #5H– 192,305 bbls
5/10 – Folvag 5-8 XE #1H– 242,354 bbls
5/10 – East Fork 32-29 XE #1H – 238,640 bbls
5/10 – East Fork 32-29 #6TFH – 86,604 bbls
4/28 – Folvag 5-8 #6TFH – 108,159 bbls
4/27 – East Fork 32-29 #5H – 175,468 bbls
4/17 – Irgens 27-34 #3H (2nd) – 9,000 bbls
4/15 – Judy 22-15 #6TFH – 240,099 bbls
4/15 – Judy 22-15 #3H – 237,233 bbls
4/12 – Judy 22-15 #4TFH – 227,421 bbls
4/12 – Judy 22-15 #5H – 229,266 bbls
3/22 - Irgens 27-34 #3H – 115,057
3/22 - Irgens 27-34 #4TFH – 119,637 bbls
3/22 - Irgens 27-34 #5H – 120,574
3/22 - Irgens 27-34 #6TFH – 123,316 bbls
9/7 – Judy 22-15 #7TFH – 103,380 bbls
9/7 – Judy 22-15 #2H – 175,362bbls
9/3 – Irgens 27-34 #8H – 236,614 bbls
9/3 – Irgens 27-34 #7TFH – 248,602 bbls
8/21 – Smith Farm 23-14 #5H – 259,130 bbls
8/21 – Heen 26-35 #5H – 235,333 bbls
8/12 – Smith Farm 23-14 #6TFH – 143,990 bbls
8/11 – Heen 26-35 #4TFH – 163,213 bbls
8/4 – Smith Farm 23-14 #8TFH – 131,951 bbls
8/4 – Smith Farm 23-14 #4TFH – 139,841 bbls
7/31 – Heen 26-35 #8TFH – 162,207 bbls
7/24 – Smith Farm 23-14 #7H – 250,503 bbls
7/21 – Folvag 5-8 #1H– 357,839 bbls
7/12 – Heen 26-35 #6TFH – 135,562 bbls
7/12 – Heen 26-35 #7H – 227,575 bbls
3rd Party = 30




TIMELINE BEFORE ACCIDENT
MRI back 4-18
MRI R hip 2-13
MRI neck back 6-17
Hit Tree 8-27
Fell Down 8 Stairs 7-28
CT back 10-27
CT back 8-01
MRI neck back
CT neck 8-13
Myelogram neck
MRI neck RUE 4-17
CT neck 8-13
Myelogram neck
MRI neck 3-22
DOI 10-24
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
ER L hip R shoulder
ER back neck 7-28
ER back 9-20
Surgery back L5-S1 10-17
Surgery back L5-S1 9-17
Surgery neck C3-4 12-18
Surgery neck C4-7 9-2



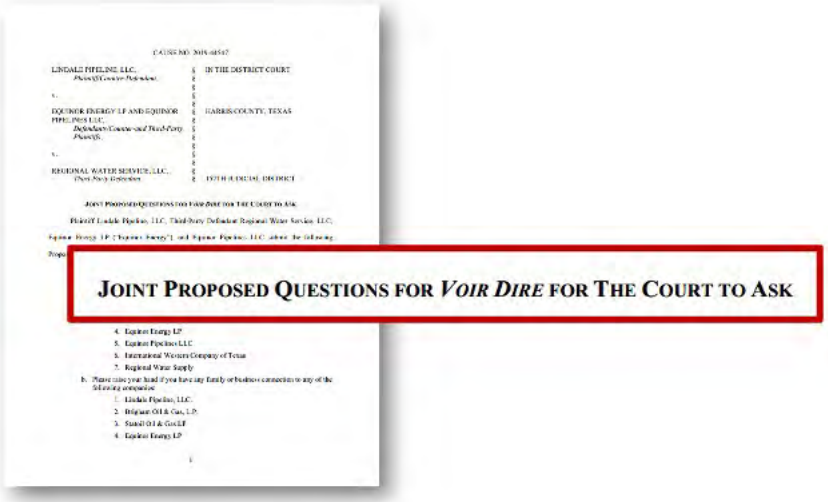
CLONAZEPAM (KLONOPIN)
Louisiana Code of Evidence Article 1006 Summary

Before Accident

Year	Mo	Day	Doctor	Med.	Tablet	Pills	Pharmacy	Rules #	Notes
2004	11	23	Rees	Clonazepam	2mg	30	Thrifty Way	10/23/18	RX 4001266 ORIG
2005	01	25	Rees	Clonazepam	2mg	30	Thrifty Way	10/23/18	RX 4001266 RFL001
2005	03	23	Rees	Clonazepam	2mg	30	Thrifty Way	10/23/18	RX 4001266 RFL002
2005	06	23	Rees	Clonazepam	2mg	30	Thrifty Way	10/23/18	RX 4002371 ORIG
2005	07	21	Rees	Clonazepam	2mg	30	Thrifty Way	10/23/18	RX 4002396 ORIG
2005	09	19	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4002976 ORIG
2006	01	06	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4002976 RFL001
2006	05	03	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4004297 ORIG
2006	08	18	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4004297 RFL001
2006	12	11	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4005536 ORIG
2007	04	02	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4005536 RFL001
2007	07	23	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4006814 ORIG
2007	11	05	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4006814 RFL001
2008	02	22	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4008021 ORIG
2008	05	30	Rees	Clonazepam	2mg	60	Thrifty Way	10/23/18	RX 4008021 RFL001
2008	09	17	Rees	Clonazepam	1mg	60	Walgreens	23114	RX 0440336 ORIG
2008	11	24	Rees	Clonazepam	1mg	60	Walgreens	23114	RX 0440336 RFL001
2009	01	21	Rees	Clonazepam	1mg	60	Walgreens	23114	RX 0440336 RFL002
2009	03	19	Rees	Clonazepam	1mg	60	Walgreens	21795	RX 0514522
2009	03	19	Rees	Clonazepam	1mg	60	Walgreens	20665	RX 0480447 ORIG
2009	05	15	Rees	Clonazepam	1mg	60	Walgreens	20665	RX 0500503 ORIG
2009	07	15	Rees	Clonazepam	1mg	60	Walgreens	21795	RX 0514522 ORIG
2009	09	13	Rees	Clonazepam	1mg	60	Walgreens	21795	RX 0514522 RFL001
2009	11	09	Rees	Clonazepam	1mg	60	Walgreens	22075	RX 0544500 ORIG
2010	01	14	Rees	Clonazepam	1mg	60	Walgreens	22075	RX 0544500 RFL001
2010	03	05	Rees	Clonazepam	1mg	60	Walgreens	22075	RX 0544500 RFL002
2010	05	06	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4420795 ORIG
2010	09	08	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4424889 ORIG
2010	12	09	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4424889 RFL001
2011	02	04	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4424889 RFL002
2011	04	03	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4430325 ORIG
2011	06	02	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4430325 RFL001
2011	07	27	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4430325 RFL002
2011	09	22	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4430325 RFL003
2011	11	17	Rees	Clonazepam	1mg	90	Wal-Mart	11/14/18	RX 4435317 ORIG
2012	01	09	Rees	Clonazepam	1mg	90	Wal-Mart	11/14/18	RX 4435317 RFL001
2012	03	12	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4435317 RFL002
2012	05	08	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4435317 RFL003
2012	07	06	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4440368 ORIG
2012	08	31	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4440368 RFL001
2012	10	28	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4440068 RFL002
2012	12	23	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4440068 RFL003
2013	02	22	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4444709 ORIG
2013	04	22	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4444709 RFL001
2013	08	19	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4444709 RFL002
2013	08	19	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4448384 ORIG
2013	10	18	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4448384 RFL001
2013	12	19	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4448384 RFL002
2014	02	13	Rees	Clonazepam	1mg	60	Wal-Mart	11/14/18	RX 4448384 RFL003
2014	04	11	Guidry	Clonazepam	1mg	30	Wal-Mart	11/14/18	RX 4453597 ORIG
2014	05	09	Guidry	Clonazepam	1mg	30	Wal-Mart	11/14/18	RX 4423397 RFL001
2014	06	05	Guidry	Clonazepam	1mg	45	Wal-Mart	11/14/18	RX 4454779 ORIG
2014	07	03	Guidry	Clonazepam	1mg	45	Wal-Mart	11/14/18	RX 4454779 RFL001
2014	08	28	Guidry	Clonazepam	1mg	45	Wal-Mart	11/14/18	RX 4454779 RFL002
2014	10	14	Guidry	Clonazepam	1mg	45	Wal-Mart	11/14/18	RX 4454779 RFL003
2014	12	03	Guidry	Clonazepam	1mg	30	Wal-Mart	11/14/18	RX 4458401 ORIG
2015	02	10	Guidry	Clonazepam	1mg	30	Wal-Mart	11/14/18	RX 4458401 RFL001
2015	03	13	Guidry	Clonazepam	1mg	30	Wal-Mart	11/14/18	RX 4460064 ORIG
2015	04	03	Guidry	Clonazepam	1mg	30	Wal-Mart	11/14/18	RX 4460064 RFL001
2015	07	31	Guidry	Clonazepam	1mg	30	Walgreens	60369	RX 1085489
2015	09	01	Sonrier	Clonazepam	1mg	30	Walgreens	60370	RX 1085340
2015	09	02	Guidry	Clonazepam	1mg	30	Walgreens	60370	RX 1085489
2015	03	30	Sonrier	Clonazepam	1mg	30	Walgreens	60370	RX 1093746
2015	11	02	Sonrier	Clonazepam	1mg	30	Walgreens	61173	RX 1103507 ORIG
2015	12	02	Sonrier	Clonazepam	1mg	30	Walgreens	61173	RX 1103507 RFL001
2016	12	29	Sonrier	Clonazepam	1mg	30	Walgreens	61173	RX 1103507 RFL002
2016	01	28	Sonrier	Clonazepam	1mg	30	Walgreens	61173	RX 1103507 RFL003
2016	03	01	Sonrier	Clonazepam	1mg	30	Walgreens	61174	RX 1137121
2016	03	01	Sonrier	Clonazepam	1mg	30	Walgreens	57274	RX 1137289 ORIG
2016	03	30	Sonrier	Clonazepam	1mg	30	Walgreens	57274	RX 1137289 RFL001
2016	04	27	Sonrier	Clonazepam	1mg	30	Walgreens	57274	RX 1137289 RFL002
2016	05	28	Sonrier	Clonazepam	1mg	30	Walgreens	57274	RX 1137289 RFL003
2016	07	04	Sonrier	Clonazepam	1mg	30	Walgreens	57274	RX 1137289
2016	07	05	Sonrier	Clonazepam	1mg	30	Walgreens	62671	RX 1170559
2016	08	08	Sonrier	Clonazepam	1mg	30	Walgreens	62671	RX 1175117
2016	10	09	Sonrier	Clonazepam	1mg	30	Walgreens	62671	RX 1179549
2016	11	09	Sonrier	Clonazepam	1mg	30	Walgreens	39513	RX 3133715 ORIG
2016	12	08	Sonrier	Clonazepam	1mg	30	Walgreens	39513	RX 3133715 RFL001
2016	12	08	Sonrier	Clonazepam	1mg	30	Walgreens	39513	RX 3133715 RFL002
2017	02	03	Sonrier	Clonazepam	1mg	30	Walgreens	10/24/18	RX 608138 ORIG
2017	04	05	Sonrier	Clonazepam	1mg	30	Walgreens	10/24/18	RX 608138 RFL001
2017	06	02	Sonrier	Clonazepam	1mg	30	Walgreens	10/24/18	RX 608138 RFL002
After Accident (06/16/2017)									
2017	06	30	Sonrier	Clonazepam	1mg	30	Walgreens	SJR 1643	RX 0639187
2017	07	27	Sonrier	Clonazepam	1mg	30	Walgreens	SJR 1642	RX 1782910

LESSONS LEARNED

- Aggressive Motion Practice can backfire
- 1006 Summaries can be cornerstones
- Let the court voir dire on bias



CAUSE NO. 2021-68567

LINDALE PIPELINE, LLC, *Plaintiff/Counter-Defendant,*	§	IN THE DISTRICT COURT
v.	§	
EQUINOR ENERGY LP AND EQUINOR PIPELINES, LLC, *Defendants/Counter-and Third-Party Plaintiffs,*	§	HARRIS COUNTY, TEXAS
v.	§	
REGIONAL WATER SERVICE, LLC, *Third-Party Defendant*	§	157TH JUDICIAL DISTRICT

JOINT PROPOSED QUESTIONS TO BE ASKED FOR THE COURT TO ASK

Plaintiff Lindale Pipeline, LLC, Third-Party Defendant Regional Water Service, LLC,

JOINT PROPOSED QUESTIONS FOR *VOIR DIRE* FOR THE COURT TO ASK

4. Equinor Energy LP
5. Equinor Pipelines LLC
6. International Western Company of Texas
7. Regional Water Supply

b. Please raise your hand if you have any family or business connection to any of the following companies:

1. Lindale Pipeline, LLC;
2. Helgiant Oil & Gas, LP;
3. Statoil Oil & Gas LP
4. Equinor Energy LP

We want jurors who believe written contracts should be enforced:

- Does anyone think that written contracts should not be enforced?
- Has anyone had to painstakingly write a contract?
- Has anyone experienced what it is like to have someone break a written contract with you?
- Has anyone ever had to research how to enforce a written contract?
- Has anyone ever intentionally broken a written contract?
- Does anyone think people who break written contracts should not be held accountable?
- Does anyone think our community would be better off if we ignored written contracts?

The intent of the parties determines outcome of the trial:

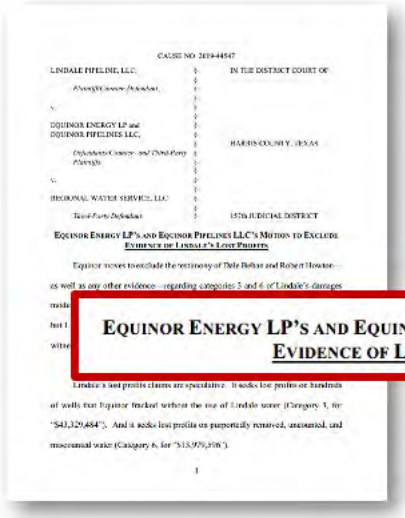
If the court asked you to determine the intent of the parties…

could you "consider and weigh":

- The contractual language those parties chose to **include** in the contract?
- The contractual language those parties chose to **omit** from the contract?
- How those parties acted immediately **before** they signed the contract?
- How those parties acted immediately **after** they signed the contract?
- The testimony of the **people who signed** the contract?

LESSONS LEARNED

- Aggressive Motion Practice can backfire
- 1006 Summaries can be cornerstones
- Let the court voir dire on bias
- Never telegraph your best punch



CAUSE NO. 2019-44547

LINDALE PIPELINE, LLC, *Plaintiff/Counter-Defendant*, v. EQUINOR ENERGY LP and EQUINOR PIPELINES LLC, *Defendants/Counter- and Third-Party Plaintiffs*, v. REGIONAL WATER SERVICE, LLC, *Third-Party Defendant* — IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS — 157th JUDICIAL DISTRICT

EQUINOR ENERGY LP'S AND EQUINOR PIPELINES LLC'S MOTION TO EXCLUDE EVIDENCE OF LINDALE'S LOST PROFITS

Equinor moves to exclude the testimony of Dale Bohan and Robert Howton as well as any other evidence regarding categories 5 and 6 of Lindale's damages made but l with

Lindale's lost profits claims are speculative. It seeks lost profits on hundreds of wells that Equinor fracked without the use of Lindale water (Category 5, for "$43,329,684"). And it seeks lost profits on purportedly recovered, uncounted, and miscounted water (Category 6, for "$15,979,956").

1

EQUINOR ENERGY LP'S AND EQUINOR PIPELINES LLC'S MOTION TO EXCLUDE EVIDENCE OF LINDALE'S LOST PROFITS

LESSONS LEARNED

- Aggressive Motion Practice can backfire
- 1006 Summaries can be cornerstones
- Let the court voir dire on bias
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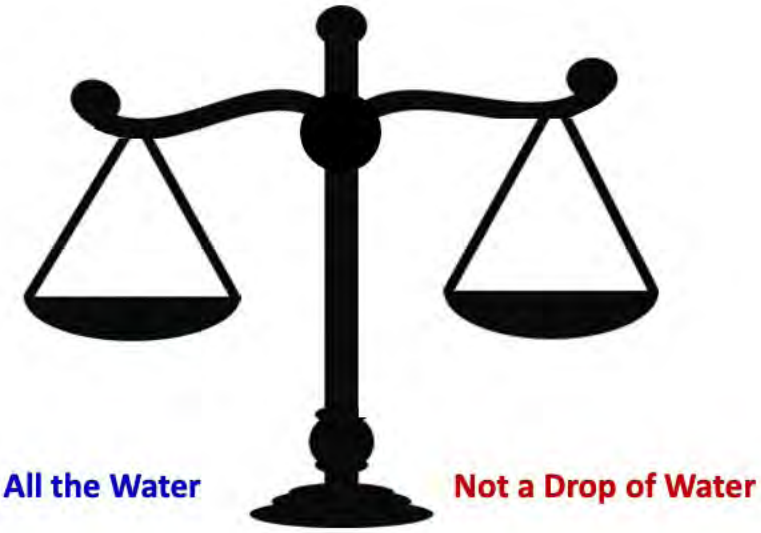
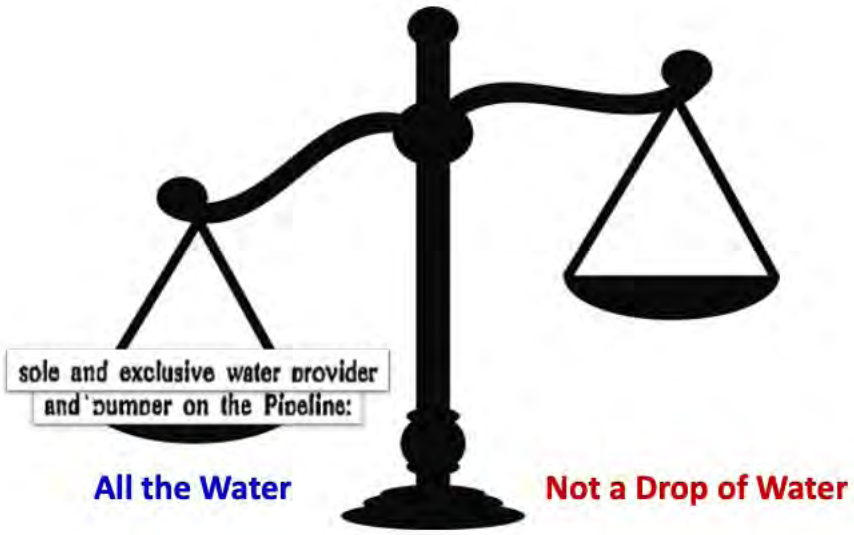
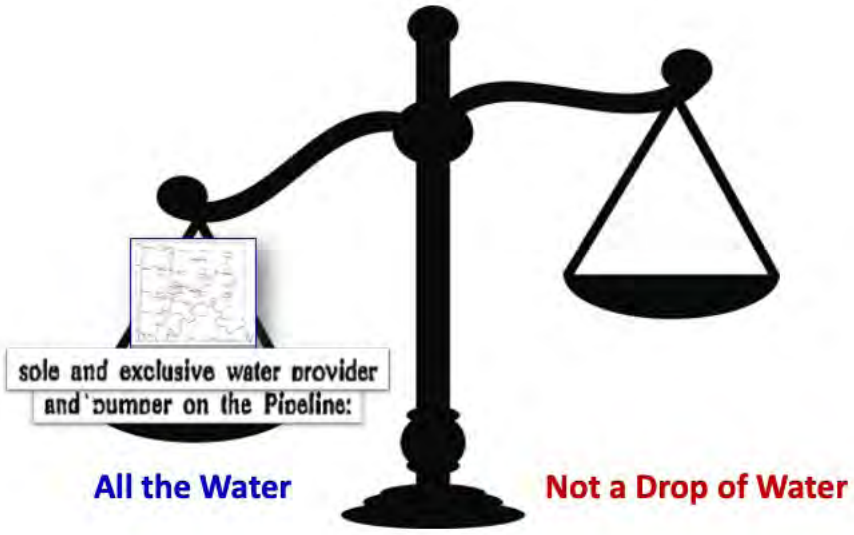
- Show the jury the scales




sole and exclusive water provider
and bumper on the Pipeline:
All the Water
Not a Drop of Water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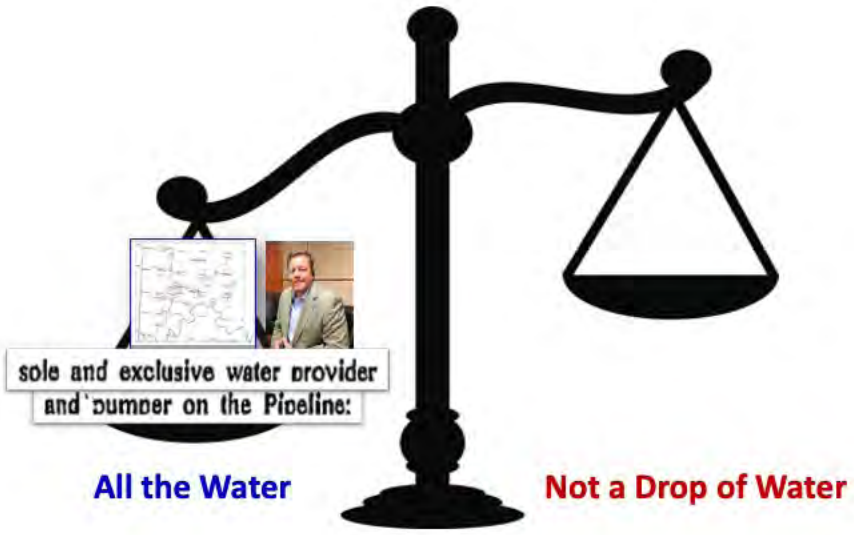
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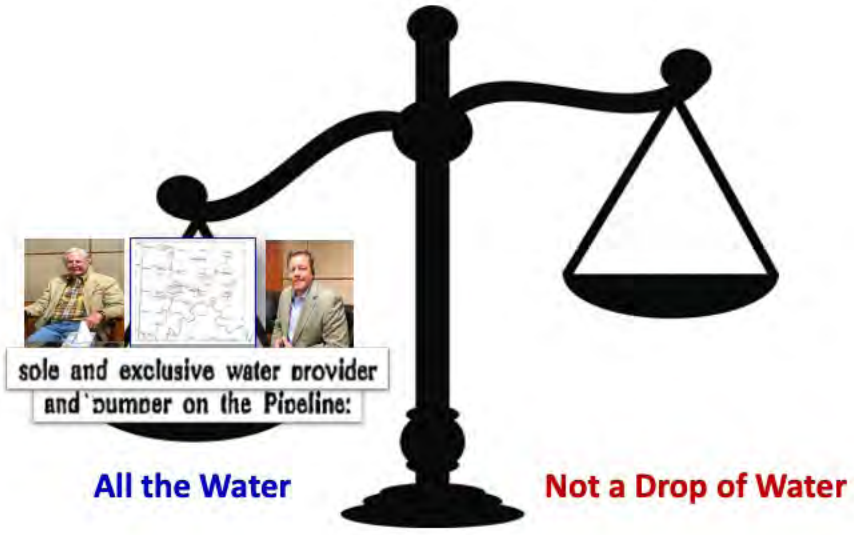
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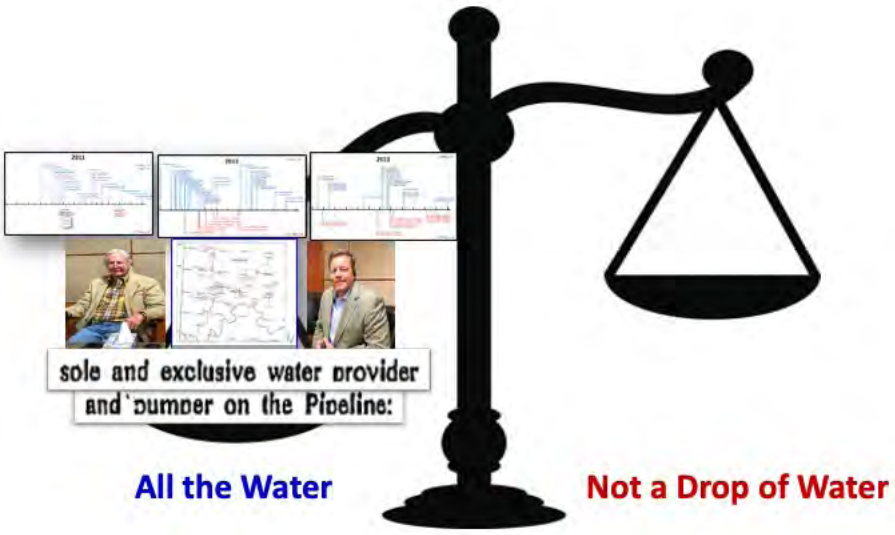
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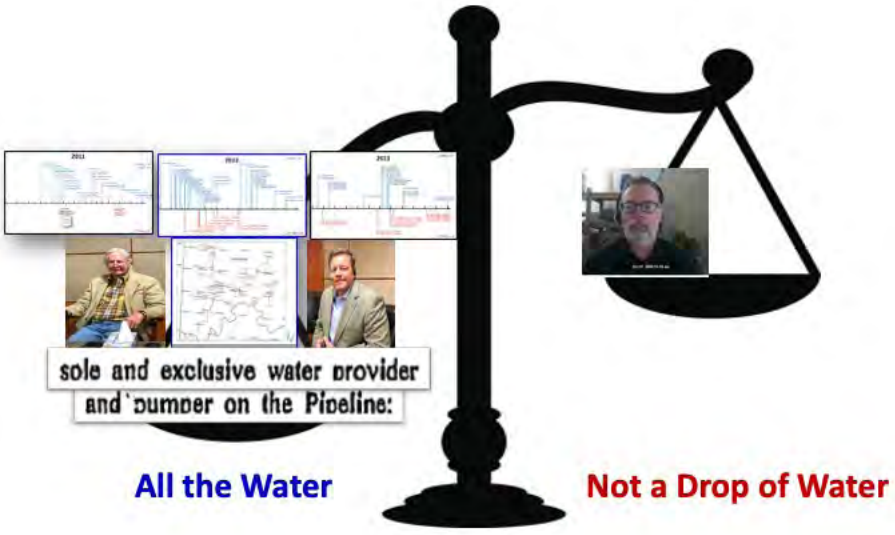
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All the Water
Not a Drop of Water

Russel Rankin

- First meeting with Dale and Chris in North Dakota
- Who approached who about this agreement
- Meeting in Austin with Dale and his comptroller
- **ANY DISCUSSIONS** with Dale about Lindale building its own freshwater pipeline in Williams County
- **ANY DISCUSSIONS** about or prior to entering into this agreement
- **WHEN** and **WHERE** construction started on the freshwater Pipeline
- Location of the **WATER SOURCE** for the Pipeline
- **WHY** Brigham entered into an agreement with Lindale
- **WHY** the Maps were attached as Exhibit A to the contract and **WHERE** the Maps came from

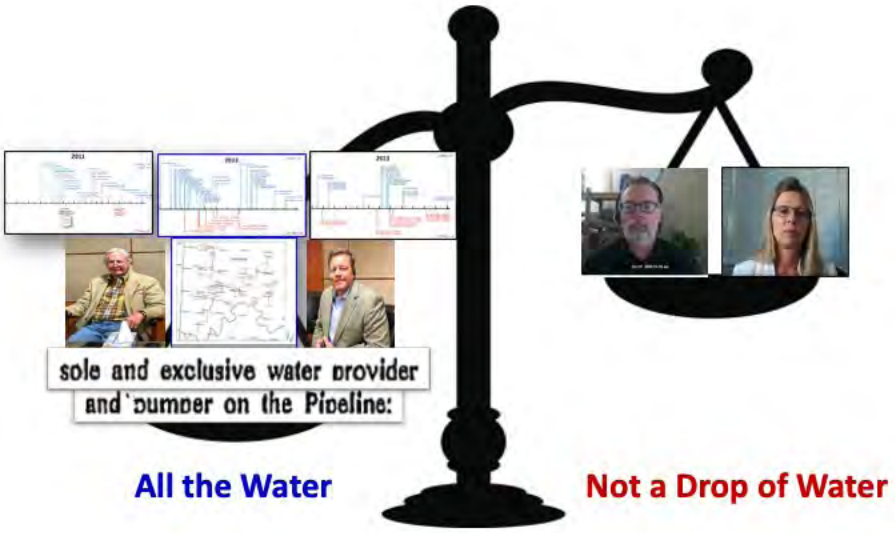
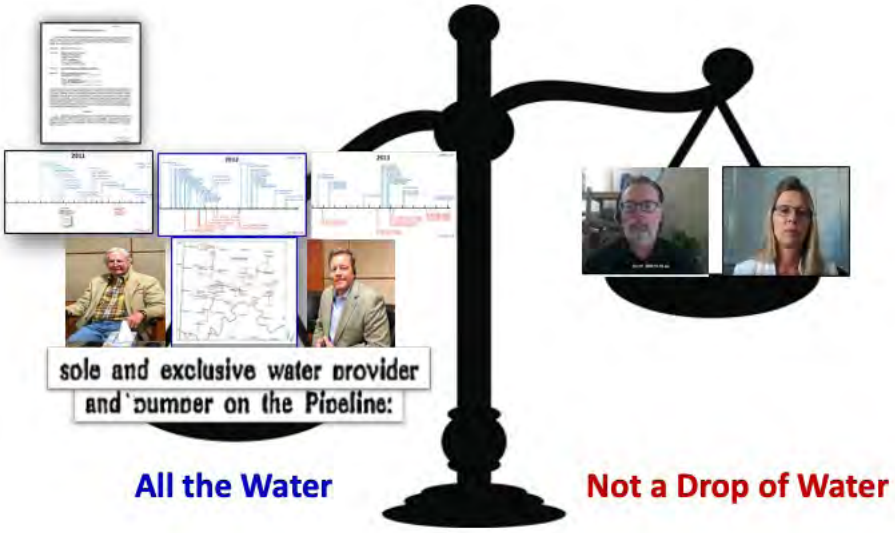
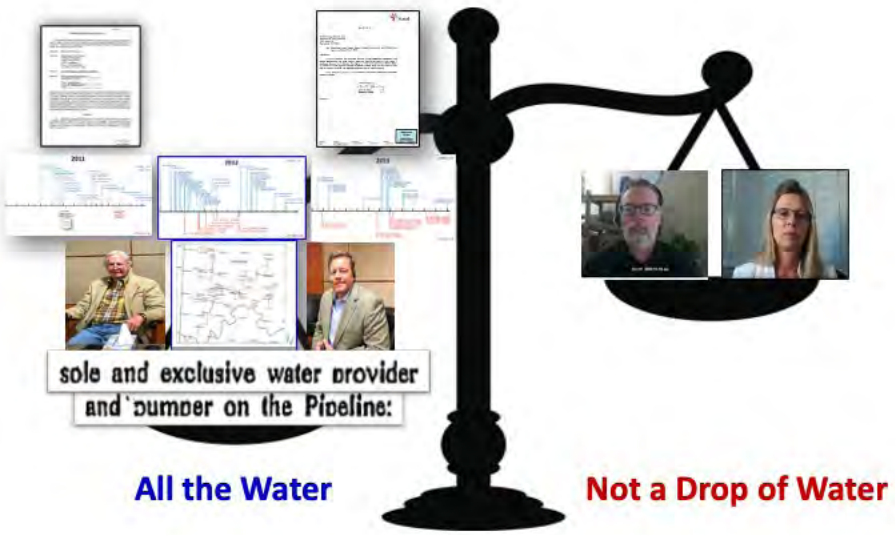


Table 2:

FOUR OPINIONS

		YES	NO
1.	Pipeline Agreement is limited to water delivered "through the pipeline."	✓	
2.	Wells and well pads are NOT included in the definition of Pipeline.	✓	
3.	On day Lindale finished investing $1.2 million & brought Brigham pipeline "online," Brigham was not obligated to purchase a drop of water from Lindale.	✓	
4.	Brigham's obligations are "almost nonexistent" under the contract.	✓	

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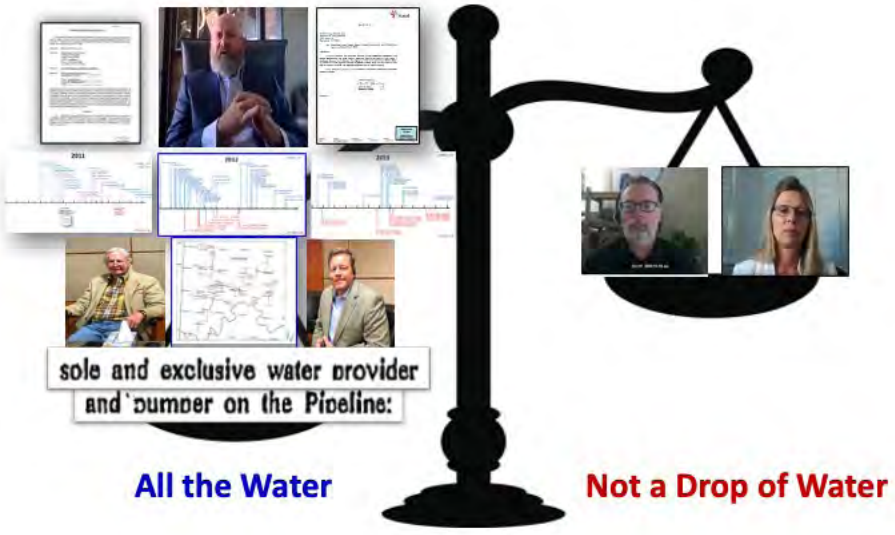
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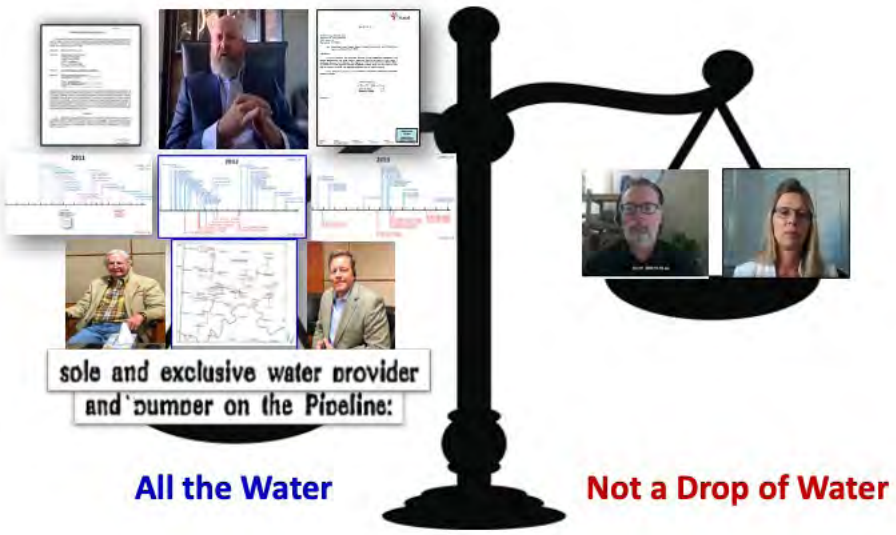


LESSONS LEARNED

- Aggressive Motion Practice can backfire
- 1006 Summaries can be cornerstones
- Let the court voir dire on bias
- Never telegraph your best punch
- Show the jury the scales
- Give the jury a range.

94 Frac Jobs

↓

18,750,950 Barrels

94 Frac Jobs

↓

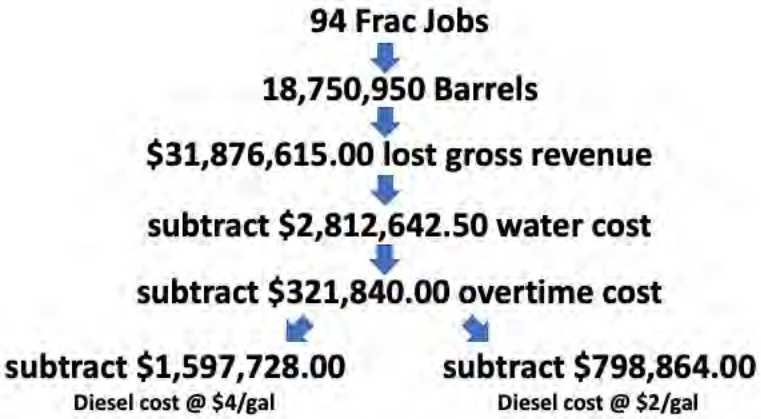
18,750,950 Barrels

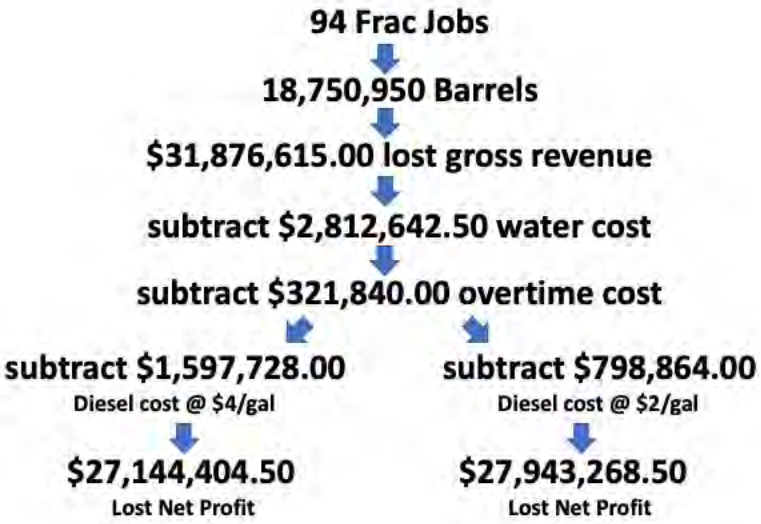
↓

$31,876,615.00 lost gross revenue


94 Frac Jobs
18,750,950 Barrels
$31,876,615.00 lost gross revenue
subtract $2,812,642.50 water cost


94 Frac Jobs
18,750,950 Barrels
$31,876,615.00 lost gross revenue
subtract $2,812,642.50 water cost
subtract $321,840.00 overtime cost


94 Frac Jobs
18,750,950 Barrels
$31,876,615.00 lost gross revenue
subtract $2,812,642.50 water cost
subtract $321,840.00 overtime cost
subtract $1,597,728.00
Diesel cost @ $4/gal
subtract $798,864.00
Diesel cost @ $2/gal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Diesel cost @ $4/gal
$27,144,404.50
Lost Net Profit
subtract $798,864.00
Diesel cost @ $2/gal
$27,943,268.50
Lost Net Profit

If you answered "Yes" to Question 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION 3

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Lindale for its damages, if any, that resulted from the failure to comply found by you in Question 1 that occurred on or after June 28, 2015?

Consider the following element of damages, if any, and none other.

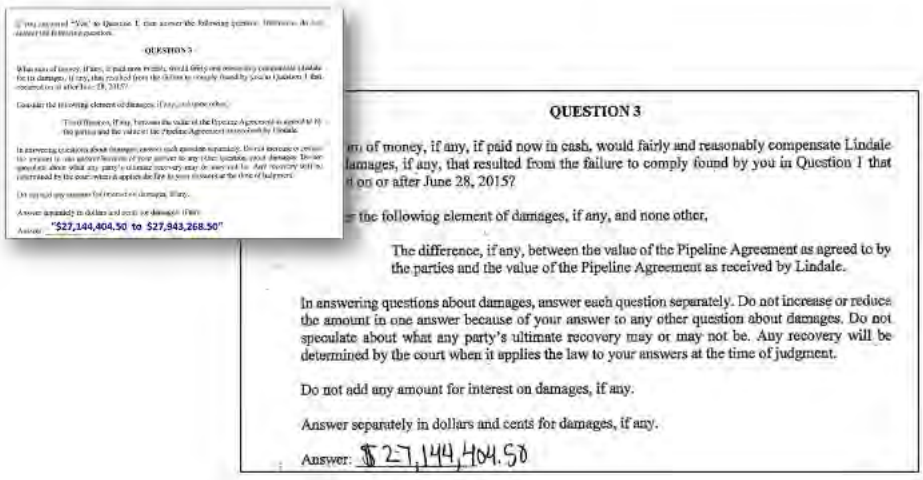
> The difference, if any, between the value of the Pipeline Agreement as agreed to by the parties and the value of the Pipeline Agreement as received by Lindale.

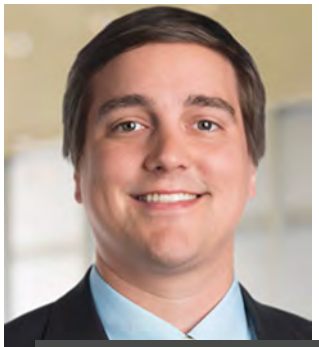
In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

Answer: **"$27,144,404.50 to $27,943,268.50"**





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Ray Lewis

Partner | Deutsch Kerrigan (New Orleans, LA)

Raymond C. Lewis knows that an attorney with courtroom experience is a valuable asset to a client and has developed the skills necessary to get through the unexpected hurdles of a courtroom.

His practice centers primarily in the areas of complex commercial and business litigation, insurance defense, and appellate work. He has successfully litigated complex commercial disputes for local and national clients involving multi-million dollar claims for breach of contract, product liability, oil and gas disputes, and transportation casualty. In his appellate practice, Ray has handled numerous appeals before the Louisiana Supreme Court, Circuit Courts of Appeals, and the U.S. Fifth Circuit, many resulting in published decisions favorable to his clients).

Ray has appeared multiple times as a “Ones to Watch” in the legal industry by New Orleans CityBusiness. He has also been voted to the Louisiana Super Lawyers List since 2014. He has written and lectured on trial and appellate practice and environmental law topics.

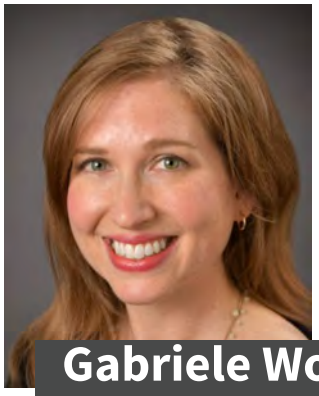
Practices
- Appellate Litigation
- Commercial Litigation
- Commercial Transportation
- Insurance Coverage
- Manufacturer’s Liability and Products Liability

Industries
- Transportation
- Insurance
- Manufacturing

Successes
- Robert Sensat v. R360 Environmental Solutions, et al., 31st Jud. Dist. Ct., Parish of Jefferson Davis, NO. C-24-13
- Matrimonial Regimes – Termination of Community
- Johnson v. Transwood Inc., Tuthill Corp., et al, No. 14-102 (M.D. LA)
- Solstice v. OBES, Inc., et al., U.S. EDLA No. 12-2417.
- Construction Defect - Salinger v. Diamond B Construction
- Premises Liability - Miles v. City of Kenner, et al.
- Insurance Coverage - Summary Judgement

Accolades
- Inside New Orleans Readers’ Favorite Elite Lawyer, 2021
- New Orleans Magazine “Top Lawyers” List, 2019
- Recognized in The Best Lawyers in America©
- New Orleans CityBusiness Ones to Watch: Law
- Louisiana Super Lawyers, Rising Stars List, 2014-2021

Education
- J.D., B.C.L., Louisiana State University, 2007
- B.A., Baylor University, 2004



Corporate Crime Time: Navigating the Department of Justice's Changes to Government Investigations

Gabriele Wohl
Bowles Rice (Charleston, WV)

Corporate Crime Time: Navigating the DOJ's Changes to Government Investigations
Gabriele Wohl

In October 2021, during her keynote address to the American Bar Association's 36th National Institute on White Collar Crime, United States Deputy Attorney General Lisa Monaco announced changes to the Department of Justice's ("DOJ") treatment and prosecution of corporate wrongdoing.

First, Deputy Monaco emphasized the DOJ's commitment to prosecuting individuals responsible for corporate criminal conduct. This commitment echoes a 2015 initiative launched by then-Deputy Attorney General Sally Yates. The "Yates Memo," as it came to be called, put a priority on individual accountability for corporate fraud. Deputy Yates recognized the challenges in following massive corporate wrongdoing up the ladder to specific individuals because corporate structures inherently insulate their leaders, (those with the most visibility and accountability to the company) from the specific acts and decisions that trigger a crime. Nevertheless, she urged the DOJ to set its sights on culpable individuals during corporate investigations to deter future misconduct, induce behavioral changes, and combat the public perception that wealthy companies and their leaders can escape the justice system.

Deputy Monaco also acknowledged the difficulties presented by prosecuting corporate criminal defendants, and urged Assistant United States Attorneys ("AUSAs") not be deterred by "the fear of losing." In other words, the DOJ stands ready to commit resources to prosecuting corporate crimes even when a risk analysis may advise against it.

Deputy Monaco set out three major policy changes to advance an agenda of creating a corporate compliance culture:

- First, to receive any cooperation credit in resolving a matter, a company must identify all individuals who were involved in the misconduct. This places a burden on the company facing DOJ scrutiny to thoroughly investigate and trace the misconduct to its roots and come forward with all non-privileged information about the leaders and employees that may have culpability or relevant knowledge of the bad acts.
- Second, when resolving matters with a corporation, the DOJ is directed to consider the corporation's entire history of misconduct. Typically, prior bad acts can only be considered against a defendant under certain circumstances, including if they are recent or similar to the conduct charged. Now, the DOJ must consider a company's entire "criminal, civil, and regulatory record" to evaluate whether the company fosters an overall culture of misconduct— regardless of whether the prior history relates to the specific wrongdoing at issue.
- Third and finally, Deputy Monaco announced a plan to increase the use of independent corporate monitors to resolve and settle allegations of corporate misconduct. This last policy change is the least defined, in that Deputy Monaco recognized that the use of monitors should be evaluated on a case-by-case basis, and the selection and administration of monitors will be circumstance dependent. However, this sends a clear message to AUSAs to consider independent monitors as a favored tool for resolving cases and ensuring compliance.

By prioritizing compliance, these policy changes

and commitments from the DOJ should lead to an increase in white collar investigations and prosecutions. As a result, companies will likely see an uptick in subpoenas, civil investigative demands, target letters and other tools that the government may use to inform a company that it is under scrutiny and obtain information to assist in its investigation.

Companies cannot change their compliance history but going forward there are steps they should take to avoid becoming targets of government investigations and litigation, and to ensure that they get full credit for cooperation if they do face prosecution.

Establish a Corporate Compliance and Response Program

The best way to address government scrutiny is to prevent it. The DOJ's position on evaluating compliance programs is settled policy and important when considering Deputy Monaco's push to prosecute white collar crime.

A compliance program is a set of policies and procedures designed to meet and monitor legal and internal requirements, detect non-compliance, and identify inefficiencies.

Companies should have a full understanding of their federal and state regulatory requirements as part of its compliance program. These can include general business regulations, as well as regulations specific to the area of business or whether the company is publicly traded. Aside from legal requirements, all companies have internal operational requirements, whether formal or informal, that are designed to help the company achieve its goals.

The benefits of creating and maintaining a strong compliance and response program are manifold. Most obviously, it works to prevent compliance issues or detect them early, saving the company from legal risks and reporting requirements that may arise from an incident of non-compliance or misconduct. It also sends a consistent top-down message that the company will not tolerate misconduct, that compliance will be monitored, that there are procedures in place to expose non-compliance, and that individuals will face consequences for their misconduct. Additionally, should the company come under government scrutiny for a legal violation, a well-designed and effective compliance and response program can result in credit to the company when it comes to charging decisions and resolutions when they can demonstrate a track record of commitment to compliance and lawfulness.

The DOJ publishes guidance for AUSAs to use when considering and evaluating the effectiveness of a company's compliance program. A program designed around the three fundamental questions from this guidance will help a company maximize all of benefits mentioned above.

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
3. Does the corporation's compliance program work in practice?

Design of Program

A compliance and response program should address the risks specific to the company. This requires an internal evaluation of all legal and internal requirements, market pressures, financial operations, and ethical considerations. The program should concentrate compliance resources in the areas with the highest risk of infractions or those that have a checkered history of non-compliance. To that end, the program should be reviewed and revised regularly as priorities change.

The design process of a compliance program should draw upon all relevant levels of the corporation. For example, if employees at the ground level of a company are tasked with compliance, their input into the policies and procedures of the program are essential to ensure feasibility and efficiency. Relatedly, the rollout of a compliance program must include employees at all levels of the company and the program requirements need to be accessible to all. Training should be tailored to groups of relevant employees as well as directors and officers, and, in some cases, contracting third parties and vendors.

While training may differ among the different roles and positions, the company's message about compliance and misconduct should be consistent.

Application of Program

The company needs to commit resources to training and making sure its compliance program runs efficiently and effectively. When AUSAs are evaluating the effectiveness of a compliance program, they are looking for realistic and understandable policies and procedures, clearly communicated expectations and training, and accessible program material, which includes leadership that is available for questions and guidance.

Aside from reducing risks, the other facet of a compliance program involves established reporting policies and procedures to respond to incidents of misconduct. There should be a mechanism in place for any employee to report violations anonymously or confidentially, and a documented procedure for handling, tracking, and analyzing these reports.

Once an incident of non-compliance or misconduct has been identified, there should be a response team quickly mobilized to stop the violation, minimize the damage, and investigate the cause.

Effectiveness of the Program

A compliance and response program is an evolving process that should be continually reviewed and refined. Indeed, an effective program must build in periodic risk assessments and measures for tracking incidents and complaints, evaluating data and outcomes, and updating policies and procedures.

To be considered effective, the steps of a compliance program must be well publicized, documented, and followed. All resources committed to a compliance program are wasted if the program is not communicated effectively to all relevant parties, or if there is no visible buy-in from all levels of management.

A well-designed and effective compliance and response program will undoubtedly produce false alarms and result in time spent on incidents that do not turn out to be substantial occurrences of misconduct. However, even the false alarms build credibility because they give the company the opportunity to document its follow-through and bolster its commitment to compliance. Methodically addressing incidents that arise through a strong compliance program will ultimately stop costly violations that will more than compensate for the resources expended in maintaining the program.

Using Outside Counsel to Respond to Government Investigations

Avoiding the attention of the government is always the best tactic, though not always feasible even with the highest measures of precaution. A company may face allegations or inquiries in the form of subpoenas, civil investigative demands, target letters, search warrants, or whistleblower complaints. It is important to quickly gather as much information about the scope and target of the inquiry, and then immediately conduct an internal investigation. Internal investigations into alleged wrongdoing can be as informal as reviewing records and talking to employees, but in some cases a more formal and thorough investigation conducted by outside counsel will be a valuable tool for assessing liability, demonstrating cooperation with the government's investigation, and negotiating a settlement.

Working with outside counsel in responding to government investigations is worth the added cost. A lawyer experienced in working with government agencies can contact the requesting agents immediately and try to gain an understanding of the purpose and background of the government's interest, and find out whether the company is a target of an investigation or if the government just believes it may have important information about a matter. This early communication can put the company in a good light right off the bat by affirming its intent to cooperate. Establishing this connection can also help narrow the scope of what the government is looking for, which will reduce the burden on the company.

After getting a clear understanding of what the government is looking for and why, outside counsel can help the company put in place a document hold on all records and communications that may

be relevant to the investigation. It is essential to maintain key records that might explain or absolve the company's actions, and to avoiding allegations of spoliation.

Cooperation Credit

Deputy Monaco's remarks about cooperation make it clear that to be eligible for any credit, a company must disclose to the government all individuals who were involved in or responsible for the conduct being investigated. This policy expands on a previous requirement that forced companies to disclose individuals who were "substantially" involved. Instead, the entire list of individuals, regardless of position and level of involvement, must be presented and the government will decide the level of culpability to assign to each person. Outside counsel can quickly work with company management to gather facts about individuals involved. Even though the government is interested in all individuals involved, regardless of how minor a role they had, that does not mean minor participants will necessarily be prosecuted—a distinction Deputy Monaco stated in her remarks. If the company can produce relevant information and witnesses, this will work in the company's favor in obtaining credit for its cooperation.

Protect Attorney-Client Privilege

One important reason to conduct an internal investigation using outside counsel is to shield the process and outcome of the investigation from disclosure using the protection of the attorney-client privilege. If a company conducts an investigation as part of its normal operating procedures, it could be forced to disclose its work product to the government, even if in-house counsel was involved. For the privilege to apply, the investigation must be conducted for the purpose of providing legal advice. Defining the scope and purpose of the investigation at the outset is critical to this analysis. This scope can include fact-finding but must primarily focus on the laws or regulations at the center of the inquiry and any provision of legal opinions and/or legal advice (rather than business advice). Another advantage of using outside counsel is that they can retain other experts—accountants and digital forensic specialists—and cloak those experts with the attorney-client privilege; an avenue not available if the company retains experts directly.

Conducting the Investigation

After defining the scope of the internal investigation, outside counsel will work closely with a designated management team on gathering and reviewing records, interviewing witnesses, identifying conflicts, and determining what needs to be disclosed to the government. In internal investigations, outside counsel typically represents the company, which means as the investigation reveals employees, officers, or directors who may have committed misconduct, these individuals are deemed adverse to the company and, thus, require separate representation.

If the investigation indicates that there was wrongdoing, the first step is to make sure the wrongdoing immediately ceases. Then, the company should make a documented effort to remediate the wrongdoing and revise the compliance program to ensure that the wrongdoing does not recur. In addition to making good business and legal sense, these actions will have a favorable impact if the government's investigation proceeds to litigation or settlement.

In some cases, the company will respond to the government's inquiry with records and witnesses assembled and reviewed by outside counsel and that will be the end of it. In other cases, however, this initial inquiry is just the first phase of a long investigation into civil or criminal violations. Outside counsel's internal investigation will likely run parallel to the government's investigation, and care must be taken to keep the investigation and any response to government requests separate. The goal of this parallel investigation is to stay one step ahead of the government and maintain an understanding of whether the facts support violations and which laws or regulations have been violated in anticipation of where the government is headed. This will help a company continually evaluate its options with respect to seeking a resolution and make informed decisions on the risks of litigating civil or criminal charges.

Preparing a Report

It may sound obvious that outside counsel, hired to conduct an internal investigation following and during a government inquiry, would document her process and findings for the company to review, present to its board, and take any necessary actions in response. It is not obvious. There are advantages and risks to preparing written summaries and reports, and those need to be discussed and weighed prior to memorializing any stage of an investigation.

Even though the attorney-client privilege should be carefully guarded during internal investigations, there is always a risk of waiver and the danger of exposing written documentation of an investigation into wrongdoing to an adverse party. Another risk is that as an investigation evolves, facts may emerge that render earlier findings misleading. Memorializing these unintentional inconsistencies can backfire if disclosed or if relied upon internally in the future. At the very least, all note-taking, documentation, periodic reports, and final reports should be drafted in such a way that minimizes harm if waiver cannot be avoided.

Moreover, in some rare cases the company may choose to waive privilege if it is determined that the benefit of disclosing outside counsel's witness interviews or report of her findings and recommendations to a government agency outweighs the potential harm of waiver. Although in recent years the DOJ has eased up on any expectation that a company waive its privilege to internal investigation, companies can sometimes secure greater cooperation credit or deter prosecution altogether by producing privileged materials. In some cases, a company may need to rely on the adequacy of its investigation into misconduct and its actions taken in response to the resulting legal recommendations. This arises when such reliance can be a defense to allegations that a company has not taken allegations of misconduct seriously. Finally, if an internal investigation reveals legal violations, a company may have an affirmative duty to disclose the results of the investigation to regulatory agencies at the state and federal levels.

The decision to waive privilege must be made very carefully in consideration of all the consequences, including the risk of making corporate investigation records public or subject to disclosure in future private litigation.

Conclusion

The DOJ has pledged its resources toward fighting corporate crime and increased its expectations that companies self-regulate and foster a culture of safety, ethics, and compliance. This new initiative launched by the DOJ will contain analysis of cooperation and history of misconduct when assessing corporate non-compliance. A strong compliance program will not only help prevent, detect, and stop wrongdoing, but it will count as credit toward a resolution with the government if the company faces legal repercussions. Importantly, the lack of such a program will likely have a negative impact.

A quick and thorough response to government inquiries is key to establishing cooperation. Employing outside counsel to conduct an internal investigation into substantive allegations of misconduct and assist with the government inquiry will add credibility to a company's response and help protect attorney-client privilege.

Corporate Crime Time

Navigating the DOJ's Changes to Government Investigations

Gabriele Wohl, Esq.

Bowles Rice

WHITE COLLAR CRIME INITIATIVE

- In October 2021, **Deputy Attorney General Lisa Monaco** announced changes to the DOJ's treatment and prosecution of wrongdoing.

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FEDERALLY FUNDED

- **Where is the government concentrating its resources?**
  - ✓Corporate crime enforcement efforts
  - ✓Pandemic-related fraud
  - ✓Staffing
  - ✓White Collar Crime

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KEY PRIORITY

- **Prosecuting individuals at the root of corporate misconduct**
  - *"The prospect of personal liability has an uncanny ability to focus the mind."*

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INCREASE IN PROSECUTIONS

- In FY21, the U.S. Attorneys' Offices charged **5,521 individuals with white collar crimes**
- That's a **10% increase** over the previous year.

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AREAS OF FOCUS

- **Health Care**
- **Pandemic-related Fraud**
  - *PPP Loans, CARES Act*
- **Antitrust**
- **Environmental**

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FALSE CLAIMS ACT

- Of the more than **$5.6 billion in settlements and judgments** reported by the DOJ this past fiscal year, **over $5 billion** relates to matters that involved the health care industry.

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PREVENTING VIOLATIONS

- A strong corporate compliance and response program **prevents, detects, and stops misconduct** and adds credibility to a company under government scrutiny.

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RESPONDING TO INQUIRIES

- **Tools of investigation include:**
  - ✓Civil Investigative Demand
  - ✓Grand Jury Subpoena
  - ✓Search Warrant
  - ✓Target Letter

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SEEKING OUTSIDE COUNSEL

- **Advantages of hiring outside counsel:**
  - ✓Neutral third party
  - ✓Good faith response
  - ✓Familiarity with the agency making requests

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INTERNAL INVESTIGATIONS

- **Conduct parallel internal investigation**
  - ✓Define scope
  - ✓Document retention/review
  - ✓Witness interviews
  - ✓Third-party experts
  - ✓Legal analysis

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INTERVIEWING EMPLOYEES

- *Upjohn* warnings
- Conflicts
- Common interest doctrine

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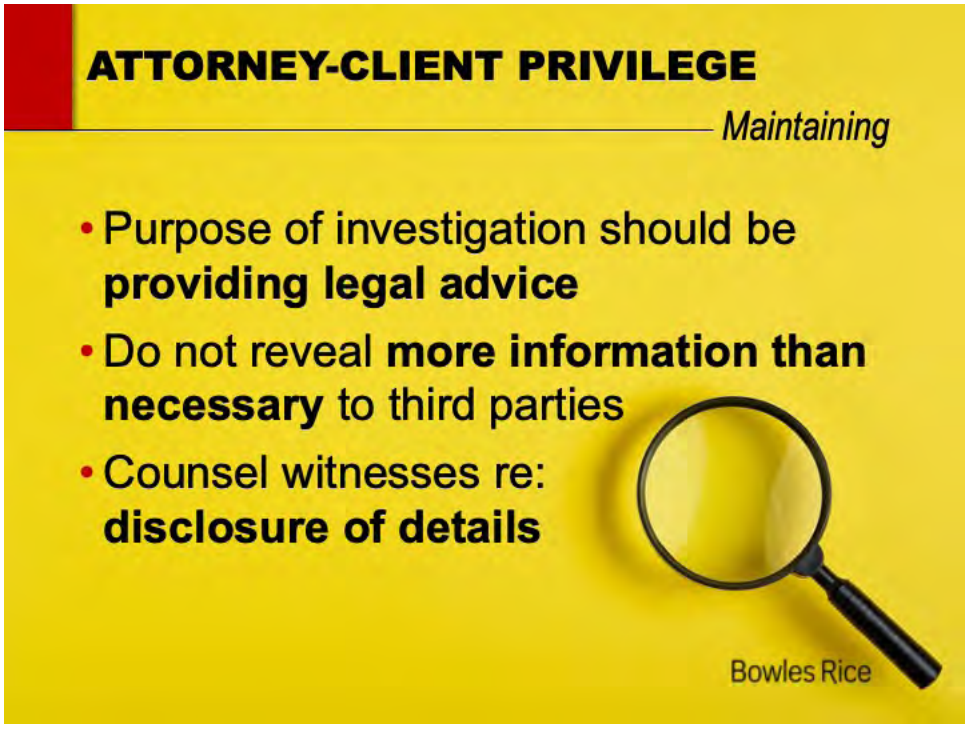
ATTORNEY-CLIENT PRIVILEGE
Maintaining
• Purpose of investigation should be **providing legal advice**
• Do not reveal **more information than necessary** to third parties
• Counsel witnesses re: **disclosure of details**
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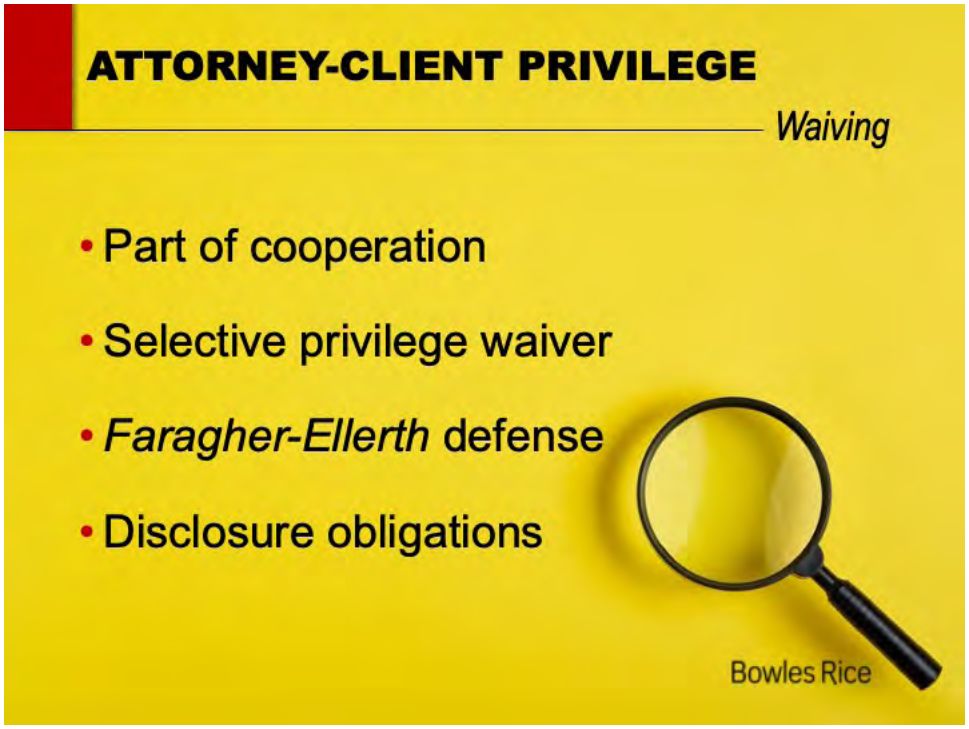
ATTORNEY-CLIENT PRIVILEGE
Waiving
• Part of cooperation
• Selective privilege waiver
• *Faragher-Ellerth* defense
• Disclosure obligations
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COOPERATION CREDIT

- Non-prosecution agreements (NPAs)
- Deferred prosecution agreements (DPAs)
- Lower sentences & fines
- Immunity

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NON-COOPERATION

- Obstruction of justice
- Additional crimes

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CRIMES & CRIMINAL PROCEDURE

- **18 U.S.C. § 1001** makes it a federal felony…to "knowingly and willfully falsify, conceal, or cover up any trick, scheme or device a material fact…

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CRIMES & CRIMINAL PROCEDURE

- …or make any materially false, fictitious, or fraudulent statement or representation" re: a federal law enforcement investigation.

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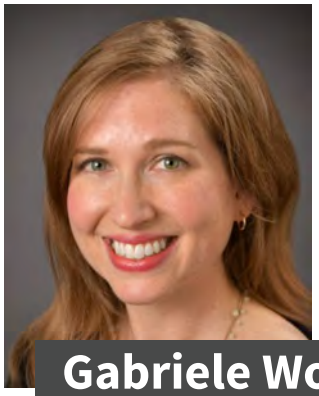

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Gabriele Wohl

Partner | Bowles Rice (Charleston, WV)

Gabriele Wohl is an experienced litigator who focuses her practice on business litigation and appeals, complex civil litigation and white collar defense. She practices from the firm's Charleston, West Virginia office.
Gabe is a member of the firm's Labor and Employment group. In this capacity, she has defended employers in deliberate intent claims; represented companies in contract disputes; co-authored articles on opioid addiction in the workplace and other work site issues; and presented to human resources professionals on workplace policies and procedures involving social media.

Before joining Bowles Rice, Gabe served as an Assistant United States Attorney for the Southern District of West Virginia. There, she gained first-chair experience in drug trafficking and public corruption trials and served as the office's District Elections Officer and Computer Hacking and Internet Prosecution Coordinator. At the U.S. Attorneys Office, she participated in complex white collar investigations and prosecutions involving a variety of federal offenses, including fraud, identity theft, worker safety violations and civil rights violations. She also provided civil rights training for the West Virginia State Police Academy.

From 2013 to 2014, Gabe served as Deputy General Counsel to former West Virginia Governor Earl Ray Tomblin, where she advised on legal and public policy matters, drafted legislation and assisted in emergency response efforts.

Practice Areas
- Business Litigation
- Higher Education
- Labor and Employment
- Litigation
- WE Mean Business: Women Executives and Entrepreneurs
- White Collar Defense and Investigations

Professional Highlights
- Leadership Council on Legal Diversity, Fellow (2021)
- Member of the Fourth Circuit Advisory Committee on Rules and Procedures
- Member of the Judicial Conference of the Fourth Circuit Court of Appeals
- Served as Deputy General Counsel to former West Virginia Governor Earl Ray Tomblin (2013-2014)

Honors
- Extra Mile Award, West Virginia Center for Children's Justice (2017)
- Award for Excellence, Council of Inspectors General on Integrity and Efficiency (2016)

Education
- J.D., West Virginia University College of Law (2009) - Editor-in-Chief, West Virginia Law Review; Order of the Coif
- B.A., Political Science, Wellesley College (2004)

Long COVID: The Pandemic's Lasting Effects on Supply-Chain Litigation

Moheeb Murray
Bush Seyferth (Troy, MI)

Long COVID: The Pandemic's Lasting Effects on Supply-Chain Litigation
Moheeb Murray

Much like the human body's immune, respiratory, circulatory, and other systems, today's supply chains are complex, interactive networks relying on each part of the system functioning healthily and with precision timing. And if part of the supply chain gets "infected," such that production or delivery is impacted, all of the other parts of the supply chain will be quickly infected too. The global supply chains first "caught" Covid-19 in late 2019 and early 2020. The "symptoms" started with government shut-down orders, massive numbers of employees either sick or afraid to come to work, and voluntary safety measures that slowed or stopped production lines. Then, after that initial shock to the system, came wildly fluctuating demand for many products, leaving companies scrambling to adjust their purchasing, production, and delivery schedules. Conflicts over legal rights and responsibilities throughout the supply chain ensued.

During the first wave of Covid-related disputes, when the harshest government lockdown orders and travel restrictions were in place, players up and down the supply chain focused on concepts relating to excusal of contractual performance under the common law and Uniform Commercial Code, such as of force majeure, impossibility of performance/frustration of purpose, and commercial impracticability. Contracting parties generally staked out their legal positions in formal, legalistic letters, but there ultimately proved to be limited appetite for litigation. Rather than spend money—and maybe more critically, time—parties tended to negotiate resolutions to solve immediate needs.

Now, the supply chain has entered the "long-Covid" phase where persistent—though indirect—Covid symptoms are negatively impacting supply-chain health. These symptoms include protests, material shortages, the Great Resignation, and inflation, all of which may be exacerbated by other geopolitical events, such as war in Ukraine. As a result, there is a bottom-up push increasing manufacturing and shipping cost throughout the supply chain. Suppliers, however, face a problem, because the excused-performance doctrines generally do not apply in these new circumstances. They are therefore increasingly using the leverage created by just-in-time inventory systems against buyers to force renegotiation of contract terms or face costly production interruptions. Buyers, to protect their production, often find little choice but to agree to new terms and pay under protest. But there will likely be a point at which costs to buyers at the top of the chain become unbearable, and they will start to sue to recoup the amounts paid under protest. If and when that happens, the litigation may start to cascade down the supply chain.

The following is a discussion of the legal frameworks applicable to the earlier and current phases of Covid-related disputes.

The Law of Excused-Performance Applicable to the Early Covid-19 Supply Chain Disputes

Force Majeure: Many of the early disputes during Covid-19 centered on whether an epidemic or pandemic constituted a "force majeure." But one cannot simply declare "force majeure" and stop performing. It is not a stand-alone concept that a party can rely upon to excuse its performance under a contract. It is a creature of the contract, meaning that the contract must contain a force majeure

provision for a party to be able to invoke it. "'Force majeure' is . . . not a fixed rule of law that regulates the content of all force majeure clauses, but instead is a term that describes a particular type of event, i.e., an 'Act of God' which may excuse performance under the contract."[1] The parties define what constitutes a force majeure and "the scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term."[2] Typical examples are war, riot, and natural disasters. But it can include whatever the parties decide.

A force majeure provision's applicability will then be determined according to ordinary contract principles. "[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure."[3] Generally, these provisions have two aspects: the first is the language defining what a force majeure is, and the second states what happens if a force-majeure (as defined in the contract) exists. Examples of definition language are:

> Example A: "In the event either party is unable to perform its obligations under the terms of this Agreement because of acts of God, strikes, equipment or transmission failure or damage reasonably beyond its control, or other causes reasonably beyond its control . . . " [source: https://www.lawinsider.com/clause/force-majeure]
>
> Example B: "Except with respect to payment obligations under this Agreement, no party shall be liable for, nor shall such party be considered in breach of this Agreement due to, any failure to perform its obligations under this Agreement as a result of a cause beyond its control, including any act of God or a public enemy or terrorist, act of any military, civil or regulatory authority, change in any law or regulation, fire, flood, earthquake, storm or other like event, disruption or outage of communications, power or other utility, labor problem, unavailability of supplies, or any other cause, whether similar or dissimilar to any of the foregoing, which could not have been prevented by such party with reasonable care (each, a "Force Majeure Event")." [source: https://www.lawinsider.com/clause/force-majeure]

The second part of a force majeure provision typically states what the obligations are if a defined force-majeure even occurs, though the contracts vary widely in the detail they provide about those obligations:

> Example A, cont.: ". . . such party shall not be liable for damages to the other for any damages resulting from such failure to perform or otherwise from such causes." https://www.lawinsider.com/clause/force-majeure]
>
> Example B, cont.: "The time for performance required of the affected party shall be extended by the period of such delay provided the party is exercising diligent efforts to overcome the cause of such delay. In the event of equipment breakdown or failure beyond its control, FRAC shall, at no additional expense to FMR Co or FIMM, take reasonable steps to minimize service interruptions and mitigate their effects but shall have no liability with respect thereto." [source: https://www.lawinsider.com/clause/force-majeure]

Many provisions will require the non-performing party to promptly notify the other parties to the contract of its inability to perform. Failure to comply with a notice requirement may result in a party losing the defense.[4] And procedurally, force majeure is ordinarily raised as an affirmative defense, and the non-performing party bears the burden of proving that force majeure applies.[5]

Because force majeure provisions arise out of contract law, they are interpreted based on the laws of the state in which they are applied. Generally speaking, states will interpret force majeure provisions narrowly. For example, under New York law, force majeure clauses are narrowly construed, and they will only apply if the clause specifically includes the event that prevents a party's performance.[6] Therefore, when relying upon a force majeure defense, it's important to understand how the provision will be viewed in that jurisdiction. For

1 Perlman v. Pioneer Ltd. Partnership, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990).

2 See e.g., Archeron Medical Supply, LLC v. Cook Medical Inc., 958 F.3d 637, 650 n. 6 (7th Cir. 2020) (quoting Specialty Foods of Indiana, Inc. v. City of South Bend, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013).

3 Sun Operating Ltd. Partnership v. Holt, 984 S.W.2d 277, 283 (Tex. App., Amarillo 1998).

4 See Rexnord Industries, LLC v. Bigge Power Constructors, 947 F. Supp. 2d 951, 959 (E.D. Wis. 2013) (finding that manufacturer of steel castings could not rely on force majeure provision in defense of breach where manufacturer could not prove compliance with three-day notice provision).

5 Gulf Oil Corp. v. F.E.R.C., 706 F.2d 444, 452 (3d Cir. 1983); Specialty Foods of Indiana, Inc. v. City of South Bend, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013); Aquila, Inc. v. C.W. Mining, 545 F.3d 1258, 1264 (10th Cir. 2008).

6 Kel Kim Corp. v. Central Mkts., 70 N.Y.2d 900, 902–03, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987).

instance, states have different views about whether a triggering event must have been "unforeseeable," or whether a non-performing party has exercised "due diligence" in attempting to perform.[7]

While force majeure defenses are generally only available if the contract contains a force majeure clause, at least one state has essentially codified the force majeure defense. California Civil Code Section 1511 provides that performance under a contract may be excused when it is prevented or delayed by "an irresistible, superhuman cause." Therefore, if a disputed contract is missing a force majeure provision, a party may be able to rely on the statute as a defense, under certain circumstances. Having a force majeure provision can provide some guidelines for a dispute, but it can also create problems since those provisions are often boilerplate and do not anticipate the parties' real needs. In particular, "catch all" provisions in in force majeure contracts can complicate the analysis and may increase the likelihood of litigation concerning whether the applicable event is truly a "force majeure." "When . . . the alleged force majeure event is not specifically listed—i.e., the party did not protect itself through an explicit provision—and the alleged force majeure event is alleged to fall within the general terms of the catch-all provision, it is unclear whether a party has contemplated and voluntarily assumed the risk. Thus, we find it appropriate to apply common-law notions of force majeure, including unforeseeability, to 'fill the gaps' in the force majeure clause."[8] By contrast, "when parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable."[9]

One example of a typical dispute would be where a supplier that relies on parts or raw materials from overseas is faced with a travel ban or government-imposed manufacturing shutdown due to Covid. The contract may have a "pandemic" provision in the force majeure clause, but is the non-performance truly due to the pandemic, or is it caused by some ancillary effect of the pandemic, such as a government shutdown? If the clause does not expressly include government shutdowns, the parties then disagree on whether there really is a force majeure under the contract, start staking out their legal positions, and threaten litigation if they cannot come to resolution. Another source of disputes is that, as noted above, courts in many jurisdictions hold that the force majeure event must be unforeseeable. Though the impact didn't approach the scale of Covid, there have been past, well-publicized epidemics such as SARS in 2003 and MERS in 2015 that affected supply chains. Therefore, a buyer might be able to effectively argue that non-performance due to COVID-19 was foreseeable and falls outside the force majeure clause, even under a catch-all provision.

In sum, the prevalence of boilerplate force majeure provisions, and uncertainties about how a court might interpret them, often motivated contracting parties to resolve their issues and avoid litigation.
Common law impossibility/Frustration of Purpose: For contracts without a force majeure provision and not involving sales of goods, excuse of performance is governed by the common law of impracticability/impossibility or a frustration of purpose.

The primary difference between frustration and impracticability/impossibility is that performance is still possible, but now makes no sense for one of the parties. "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the [contract] language or circumstances indicate the contrary."[10] The elements of frustration-of-purpose defense are: (1) the purpose that is frustrated must have been a principal purpose of that party in making the contract; (2) the object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense; and (3) the frustration must be

7 Compare, Gulf Oil Corporation v. Federal Energy Regulatory Commission, 706 F.2d 444, 453–54 (3d Cir.1983) ("[W]e conclude that in order to invoke the use of force majeure as an excuse under the warranty contract, Gulf as the nonperforming party must show that even though the events which delayed its performance were unforeseeable and infrequent that it had available at the time of their occurrence more than the maximum warranted quantity of gas") with Sabine Corporation v. ONG Western, Inc., 725 F.Supp. 1157, 1170 (W.D.Ok-la.1989) ("Plaintiff's argument that an event of force majeure must be unforeseeable must be rejected. Nowhere does the force majeure clause specify that an event or cause must be [ ] unforeseeable to be a force majeure event.") and Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, 729 F.2d 1530, 1540 (5th Cir. 1984) ("The California Supreme Court has read into contractual force majeure provisions both aspects of "reasonable control"—good faith in not causing the excusing event and diligence in taking reasonable steps to ensure performance.

8 TEC Olmos, LLC v. ConocoPhillips Company, 555 S.W.3d 176, 184 (Tex. App., Houston (1st Dist.) 2018)

9 Id.

10 Restatement (Second) of Contracts, § 265.

substantial.[11] It is not enough that the transaction has become less profitable for the affected party or even that she will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Further, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. "Foreseeability of the event is . . . a factor in that determination, but the mere fact that the event was foreseeable does not compel the conclusion that its non-occurrence was not such a basic assumption."[12]

In one of the few reported supply-chain-dispute decisions relating directly to Covid-19, the United States District Court for the Southern District of New York[13] analyzed impossibility and frustration-of-purpose defenses raised by a rail-car lessee that failed to make lease payments following the Covid-19 economic downturn.[14] The lessee's basis for its defenses was that "[t]he onset of the COVID-19 pandemic and the enaction of stringent regulations of many aspects of daily living in the United States caused more than a third of [its] business to disappear virtually overnight."[15] In its analysis, the court initially noted the general "judicial recognition that the purpose of contract law is to allocate risks." Then it held the lessor's defenses failed because the lessor (1) could not point to any specific government regulations that actually frustrated the contract's purpose, and could say only that they "impacted" the business and (2) showed only that the contract became economically difficult to perform. More specifically, the court held that the foundation of the contract—leasing rail cars exclusively to transport sand—was not destroyed by the pandemic-induced downturn. Though the market was down, there was still some market demand for the sand and thus a purpose for the railcar lease to transport it. Also, it was not impossible for the lessee to perform by paying for the lease, even if it had to do so at a loss. No outside force, such as a government regulation, precluded its performance. Accordingly, the Court granted summary disposition to the lessor.[16]

Like force majeure, because the bar for showing frustration of purpose is high and the outcome of each case is inherently very fact specific, the general trend was for parties to negotiate a resolution rather than engage in protracted litigation.

Commercial Impracticability for Contracts Involving the Sale of Goods: The Uniform Commercial Code governs contracts involving the sale of goods. And specifically, Section 2-615 covers "Excuse by Failure of Presupposed Conditions: Impracticability or Impossibility of Performance." Under this section, the party claiming impracticability to excuse performance under UCC 2-615 must show all of the following: (1) it did not assume the risk of an unknown contingency; (2) the nonoccurrence of the contingency must have been a basic assumption underlying the contract; and (3) the occurrence of that contingency must have made performance commercially impracticable.[17]

What constitutes "impracticability" of performance? Courts applying UCC 2-615 hold that a seller's performance is not impracticable merely because the transaction becomes less profitable or even unprofitable, even if to an extreme degree.[18] But in a situation where performance is truly impossible, then there's nothing anyone can do, and applicability of the doctrine is somewhat self-evident (E.g., a tornado completely destroys the one plant where a custom product is manufactured).

Considering that cost alone does not render performance impossible or impracticable, the question is to what degree can/must a supplier take actions to avoid a problem? Does a supplier have to incur the costs to expedite shipments? Or might it have to move production to a different location or build a bank of parts in anticipation of an event? There are also issues of what responsibility the supplier bears for the performance of its lower-tier suppliers. Generally, a supplier cannot rely on

11 Id.

12 Id.

13 CAI Rail, Inc. v. Badger Mining Corp., 2021 WL 705880 (S.D.N.Y. Feb. 22, 2021).

14 Id. at *7-9.

15 Id.

16 Id.

17 See, e.g., Leanin' Tree, Inc. v. Thiele Techs., Inc., 43 F. App'x 318, 322 (10th Cir. 2002).

18 Chainworks, Inc. v. Webco Indus., Inc., No. 1:05-CV-135, 2006 WL 461251, at *9 (W.D. Mich., February 24, 2006) (citing Roth Steel Prods v Sharon Steel Corp., 705 F.2d 134, 149 (6th Cir. 1983)); Hemlock Semiconductor Corp. v. Kyocera Corp., No. 15-CV-11236, 2016 WL 67596, at *4 (E.D. Mich., January 6, 2016) ("Regardless of the cause of the market shift, [Defendant's] allegations amount only to claims of 'economic unprofitableness,' which are insufficient to give rise to claims of impossibility or impracticability."); See e.g., Am. Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939, 942 (2d Cir. 1972) (32% price increase due to shipping costs not sufficient to invoke impracticability); Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1171 (W.D. Okla. 1989) (nearly twofold increase in cost of performance not sufficient); See also, Karl Wendt Farm Equip. Co. v. Int'l Harvester Co., 931 F.2d 1112, 1118 (6th Cir. 1991) (Non-UCC case, but no impracticability where company was losing $2 million a day due to changed market conditions))

subsupplier's failure to perform as a basis to claim impracticability. But there can be an exception if the buyer told the supplier to use the subsupplier as the exclusive source for a component and that subsupplier cannot perform. Another consideration when a supplier claims impracticability is that the supplier will still have a duty to allocate production in a "fair and reasonable manner" if they can produce some amount of common goods, but just cannot meet all customers' needs.[19] Of course, what is fair and reasonable is subject to debate and led to disputes.

As a practical matter, though, despite the fertile ground for litigation under the excused-performance principles above, the vast majority of supply-chain participants avoided litigation during the first two years of the pandemic. In most cases, the costs of litigation and uncertainty of maintaining production in the near term outweighed the benefits of litigation. So, many buyers either accepted a claim of excused performance, if justified by the contract terms or the UCC, or they negotiated a temporary resolution, often with a buyer accepting a price increase or change in other terms under a reservation of rights.[20] By reserving their rights in these early disputes, the buyers left open their option to sue later, but seldom did—at least not yet. Presumably, they opted to prioritize using cash on hand for operations instead of litigation expenses. But the tide may be shifting.

The Next Phase of Covid-Related Disputes

Now entering the pandemic's third year, many official government restrictions on production are decreasing or disappearing entirely. But like people with "long Covid," some symptoms of the early Covid infection persist while new symptoms appear, all of which continue to cause supply-chain disputes. The workforce still has not returned to pre-Covid levels. Many people are wanting to work from home or quitting their prior lines of work entirely as part of the Great Resignation, leaving many companies with continuing labor shortages. There have also been raw material or basic component shortages, such as the global microchip shortage, which are wreaking havoc across industries. On top of that, inflation, Covid-related protests blocking cities and vital transportation routes, and international conflict are making production and delivery increasingly more expensive.

Where civil unrest (whether Covid-related or not) directly prevents on-time deliveries, suppliers will likely continue pointing to force majeure clauses or impracticability as a basis to excuse their performance. And in those situations, depending on the circumstances, they may have a good basis for the defense, if the contract addresses war or civil unrest, or if those events directly make performance impossible. But for the reasons discussed above, their defense is substantially less strong when the difficulty of performing is really based on Covid-induced inflation for materials inputs, increased logistics costs, and rising wages. And this seems to be the foundation for most of the disputes in this long-Covid phase. Consequently, many suppliers are now trying to find arguments on which to base claims that they can renegotiate prices or other critical contract terms. Examples include arguments that a long-term requirements contract expired or that the agreed-upon price is invalid because the buyer unreasonably reduced its orders such that the supplier cannot recoup its capital investment costs incurred to produce or deliver the product.

The merits of these types of arguments inherently depends on the contract terms and the particular situation between the parties. But rather than fight about the merits of the parties' respective arguments up front, many suppliers simply declare their own interpretation of the facts and contract and then claim the contract is terminated or threaten to stop shipments unless the buyer agrees to renegotiated terms. These suppliers gamble on whether their customers will risk a production disruption—that in some industries can cost millions or tens of millions per day—during a drawn-out lawsuit or just agree to renegotiated terms. The suppliers reason they can take this gamble because a buyer can mitigate damages by just agreeing to new terms and suing later, which many courts hold precludes a buyer from obtaining at temporary restraining order or preliminary injunctive relief to force shipments while

19 UCC 2-615(b): "Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable."

20 UCC 1-308 ("A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest,' or the like are sufficient").

litigation is pending.

Injunctions are governed by Fed. R. Civ. P. 65 or state-court equivalents. In determining whether to grant injunctive relief, courts consider the following: (1) the plaintiff's likelihood of success on the merits of the action; (2) the irreparable harm to the plaintiff that could result if the court does not issue the injunction; (3) whether the interests of the public will be served; and (4) the possibility that the injunction would cause substantial harm to others.[21] "A showing of 'probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction'"[22] A party's harm is "irreparable" when it cannot be adequately compensated by money damages.[23] Therefore, since a buyer can pay an increased price and then sue the seller to recover damages from any wrongful price increase, the buyer's harm is not irreparable, and the buyer cannot obtain an injunction to force the seller to sell at the contract price.[24] The effect of this is that a buyer is often left with no choice but to pay under protest or with a reservation of rights.[25] Then, if the buyer cannot resolve the dispute with the supplier, the buyer could sue.

This seems to be where, going forward, Covid will spawn disputes and, eventually, litigation. In some cases, even where the buyer initially pays under protest, the parties will come to a long-term agreement about how their contractual relationship will move forward in terms of price and other issues. But in other cases, the increased prices paid under protest, especially for products with many components, will accumulate to a point that a buyer has to push back with a lawsuit to recover at least some of those increases. If and when then buyers at the top of the supply chain start suing, one should expect that suits down the chain will increase as well.

21 Eberspaecher N. Am., Inc. v. Van-Rob, Inc., 544 F. Supp. 2d 592, 603 (E.D. Mich. 2008).

22 Id. (citing Lucero v. Detroit Public Schools, 160 F.Supp.2d 767, 801 (E.D.Mich.2001) (quoting Reuters Ltd. v. United Press Int'l., Inc., 903 F.2d 904, 907 (2nd Cir.1990)); Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir.2000) ("[t]he absence of a substantial likelihood of irreparable injury ... standing alone[ ] make[s] preliminary injunctive relief improper.")).

23 Id.

24 Id.

25 See UCC 1-308(a)

Two Phases Of COVID

Phase 1

COVID-19: State and Local Shut-Down Orders and Exemptions for Critical Infrastructure

Thinking of Traveling in the U.S.? Check Which States Have Travel Restrictions

Enhanced safety protocols protect workers, ensure business continuity

Required Safety Guidelines for Reopening Michigan Companies

Phase 2

How COVID-19 Has Transformed Consumer Spending Habits

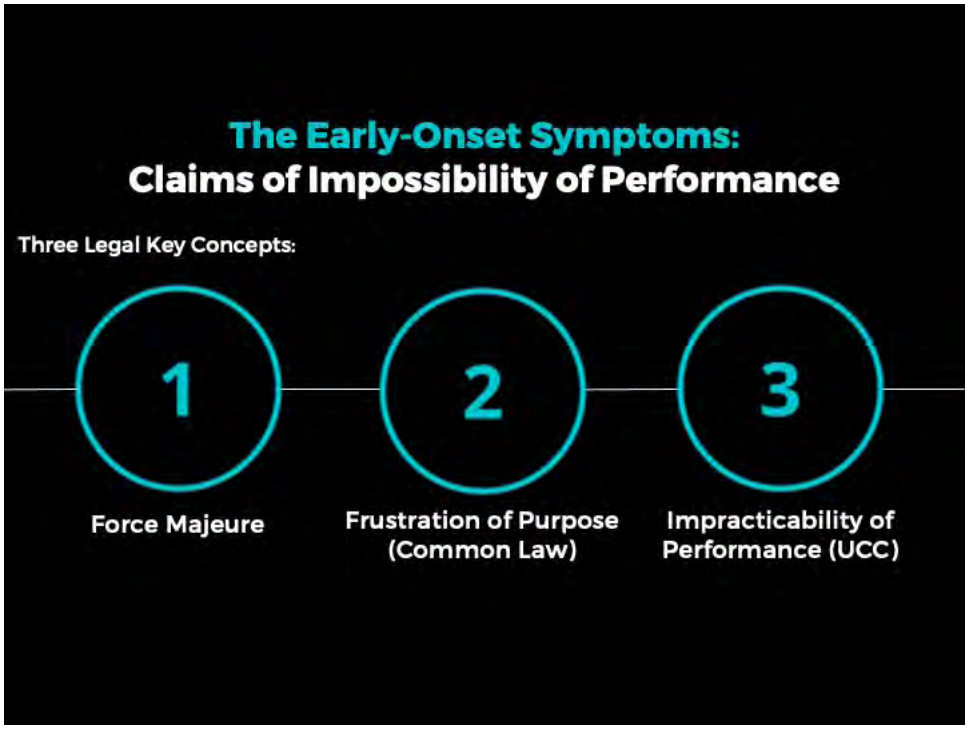
Have consumer spending habits changed for good as a result of the COVID-19 pandemic?

Inflation rises 7% over the past year, highest since 1982

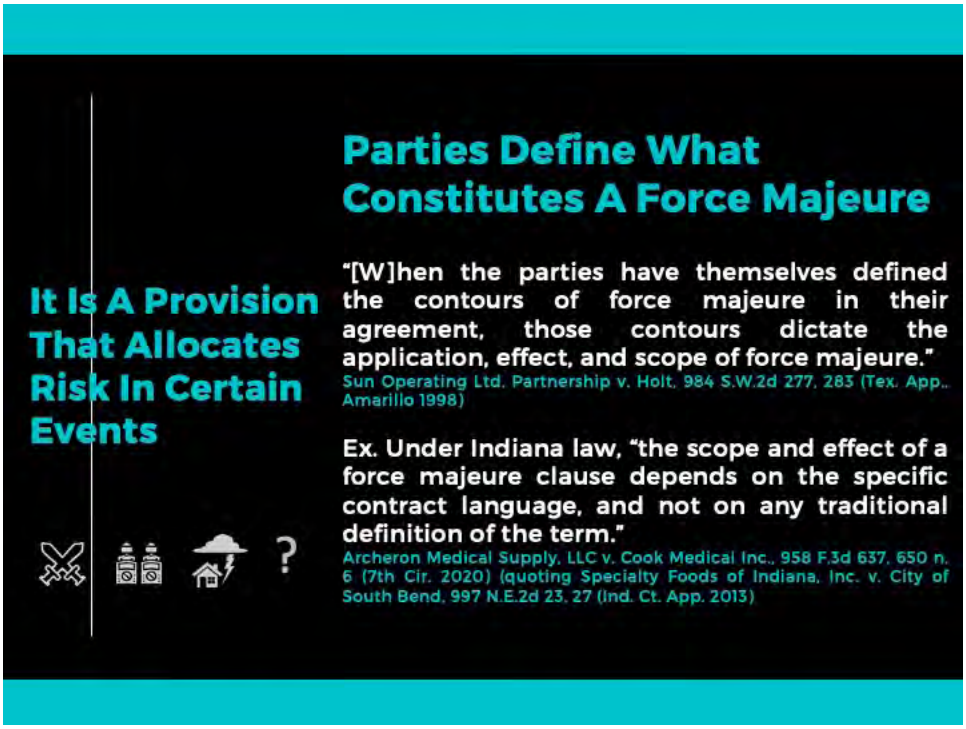
U.S.-Canada border crossing reopens after six-day blockade by 'Freedom Convoy' protesters

Quitting is just half the story: the truth behind the 'Great Resignation'


One recent survey of more than 600 supply chain professionals found that
97%
had experienced a supply chain disruption related to COVID-19.
Source: "Supply Chain and Procurement Leaders Anticipate Seismic Post-Pandemic Strategy Shifts as Executives Brace for Peak of Impact" https://www.businesswire.com/news/home/20200611005596/en/Supply-Chain-Procurement-Leaders-Anticipate-Seismic-Post-Pandemic


The Early-Onset Symptoms:
Claims of Impossibility of Performance
Three Legal Key Concepts:
1
Force Majeure
2
Frustration of Purpose (Common Law)
3
Impracticability of Performance (UCC)


What Is "Force Majeure," And When Does It Apply?


It Is A Provision That Allocates Risk In Certain Events
?
Parties Define What Constitutes A Force Majeure
"[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure."
Sun Operating Ltd. Partnership v. Holt, 984 S.W.2d 277, 283 (Tex. App.. Amarillo 1998)
Ex. Under Indiana law, "the scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term."
Archeron Medical Supply, LLC v. Cook Medical Inc., 958 F.3d 637, 650 n. 6 (7th Cir. 2020) (quoting Specialty Foods of Indiana, Inc. v. City of South Bend, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013)

Because force majeure provisions arise out of contract law, they are interpreted based on the laws of the state in which they are applied.

Ex. Under New York law, force majeure clauses are to be narrowly construed, and they will only apply if the clause specifically includes the event that prevents a party's performance.

Kel Kim Corp. v. Central Mkts., 70 N.Y.2d 900, 902-03, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987).

Force majeure provisions can provide guidance and protect against risk, but they can also create problems if they rely upon boilerplate language that does not contemplate the client's actual needs.

In particular, "catch all" provisions in force majeure contracts can complicate the analysis and may increase the likelihood of litigation concerning whether the applicable event is truly a "force majeure"

Contracts NOT Involving Sales Of Goods

Common law of impracticability/ impossibility or frustration of purpose

Frustration Of Purpose

Primary difference with impracticability/impossibility is that performance is still possible, but now makes no sense for one of the parties.

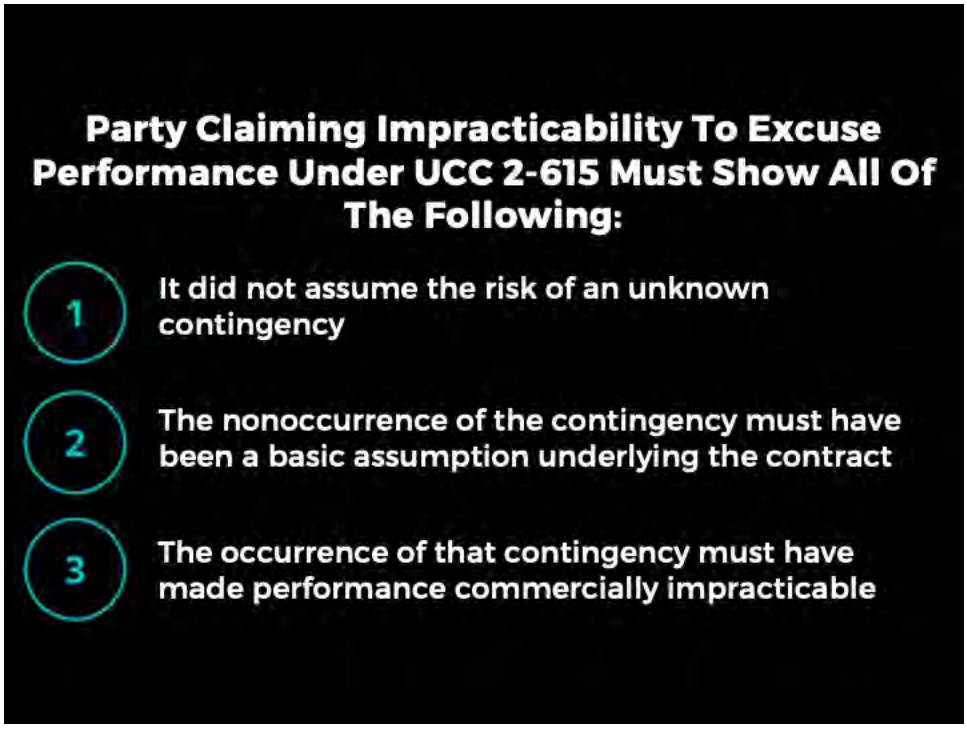
"Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances [of the contract] indicate the contrary." Restatement (Second) of Contracts, Section 265

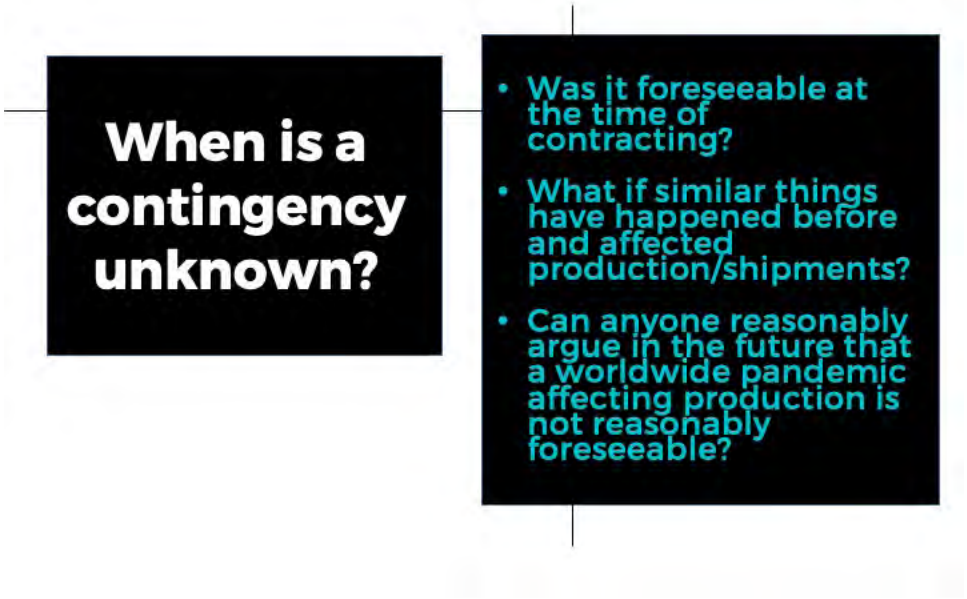
Frustration Of Purpose - Elements

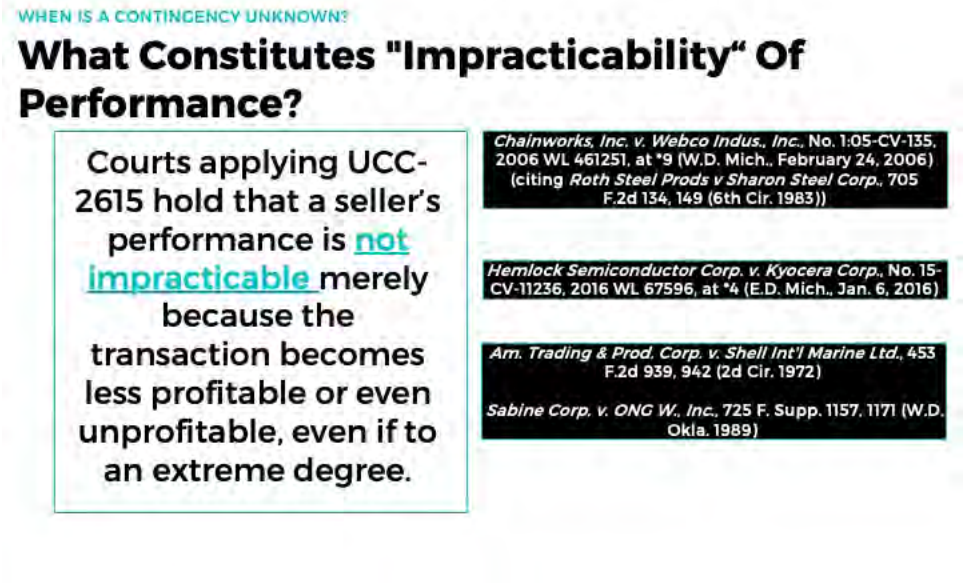
- The purpose that is frustrated must have been a principal purpose of that party in making the contract.
- The frustration must be substantial.
- The non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.

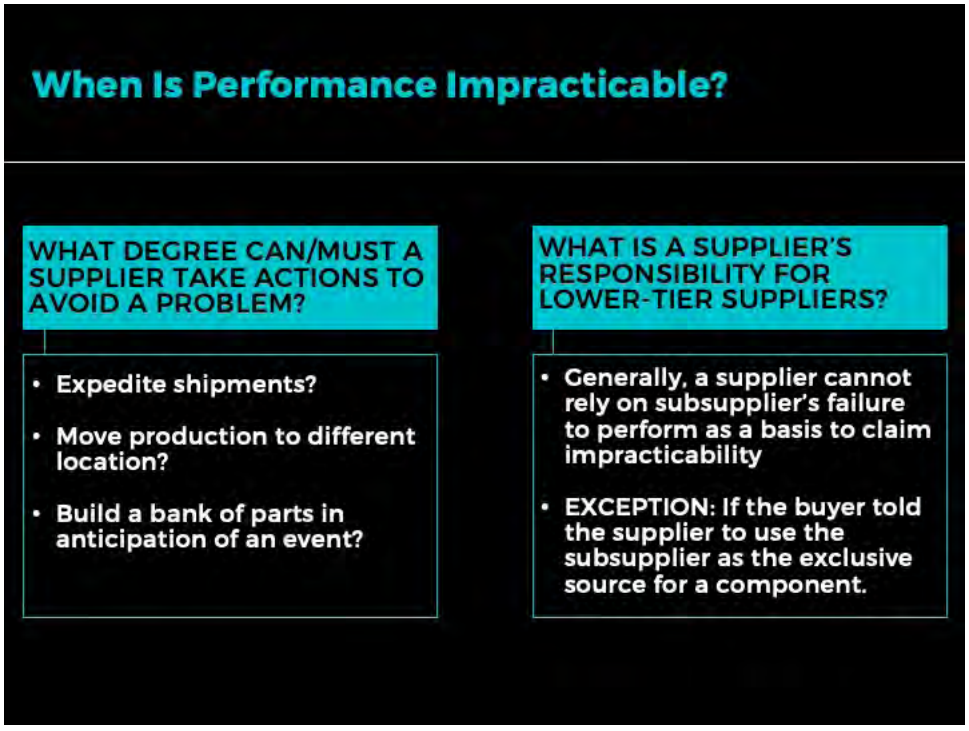
Contracts Involving The Sale Of Goods

Governed by UCC 2-615 (Excuse by Failure of Presupposed Conditions): Impracticability or Impossibility of Performance


Party Claiming Impracticability To Excuse Performance Under UCC 2-615 Must Show All Of The Following:
1
It did not assume the risk of an unknown contingency
2
The nonoccurrence of the contingency must have been a basic assumption underlying the contract
3
The occurrence of that contingency must have made performance commercially impracticable


When is a contingency unknown?
• Was it foreseeable at the time of contracting?
• What if similar things have happened before and affected production/shipments?
• Can anyone reasonably argue in the future that a worldwide pandemic affecting production is not reasonably foreseeable?


WHEN IS A CONTINGENCY UNKNOWN?
What Constitutes "Impracticability" Of Performance?
Courts applying UCC-2615 hold that a seller's performance is not impracticable merely because the transaction becomes less profitable or even unprofitable, even if to an extreme degree.
Chainworks, Inc. v. Webco Indus., Inc., No. 1:05-CV-135, 2006 WL 461251, at *9 (W.D. Mich., February 24, 2006) (citing Roth Steel Prods v Sharon Steel Corp., 705 F.2d 134, 149 (6th Cir. 1983))
Hemlock Semiconductor Corp. v. Kyocera Corp., No. 15-CV-11236, 2016 WL 67596, at *4 (E.D. Mich., Jan. 6, 2016)
Am. Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939, 942 (2d Cir. 1972)
Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1171 (W.D. Okla. 1989)


When Is Performance Impracticable?
WHAT DEGREE CAN/MUST A SUPPLIER TAKE ACTIONS TO AVOID A PROBLEM?
• Expedite shipments?
• Move production to different location?
• Build a bank of parts in anticipation of an event?
WHAT IS A SUPPLIER'S RESPONSIBILITY FOR LOWER-TIER SUPPLIERS?
• Generally, a supplier cannot rely on subsupplier's failure to perform as a basis to claim impracticability
• EXCEPTION: If the buyer told the supplier to use the subsupplier as the exclusive source for a component.

A Note About Business Interruption Claims

Contingent Business Interruption Insurance

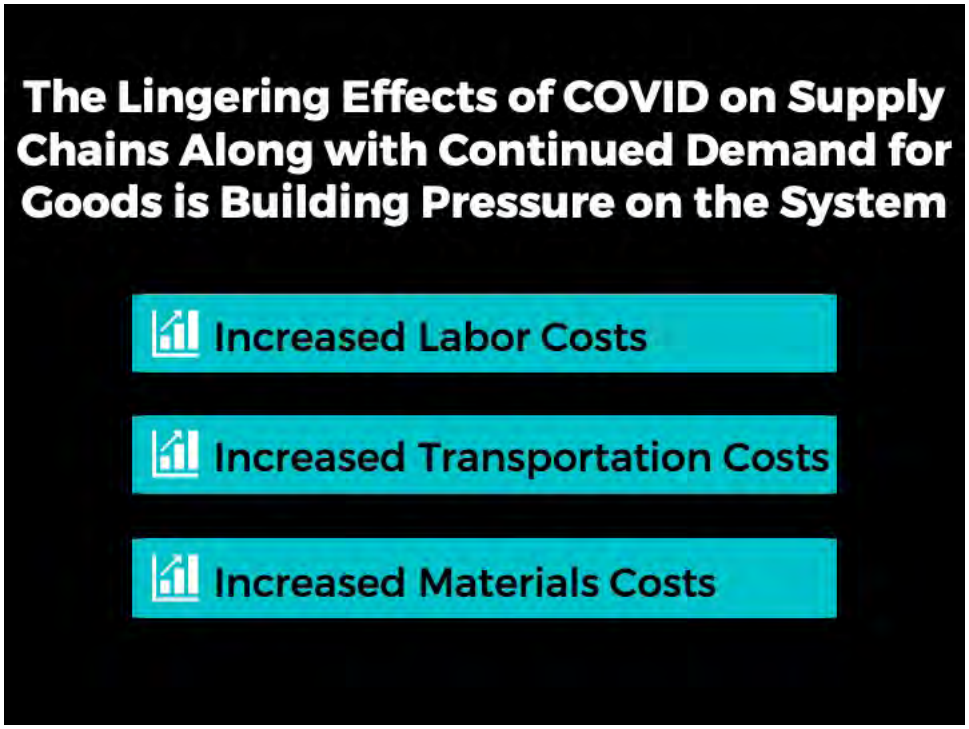
- Provides coverage for losses due to supplier's inability to supply due to defined events
- Typically, must be a "direct supplier" who can't deliver or "direct customer" who can't accept delivery

A Note About Business Interruption Claims

Vast majority of courts have held no coverage

- Like standard business interruption coverage, contingent coverage requires "direct physical loss or damage" to property
  - Mere inability to use property is insufficient
  - Cancelation of shifts, etc. is not "direct physical loss" to property
- *See, e.g., Olmstead Medical Ctr. v. Continental Cas. Co.*, 2022 WL 126336 (D. Minn. Jan. 13, 2022)


THE NEW VARIANT:
Threats To Stop Supply Absent Price Increases Or Contract Renegotiation
Supply chain snags continued to drive up prices in December.
The surge in coronavirus cases is idling workers at ports and trucking companies, while strong consumer demand continues to drive up the cost of shipping and energy.
In Short Supply: Everything From Chocolate to Headstone Stencils
COVID-19 pandemic, supply chain issues change car-buying experience, dealers say


The Lingering Effects of COVID on Supply Chains Along with Continued Demand for Goods is Building Pressure on the System
Increased Labor Costs
Increased Transportation Costs
Increased Materials Costs

Legal Options

SUE THE SUPPLIER AND SEEK INJUNCTIVE RELIEF?
(FED. R. CIV. P. 65)

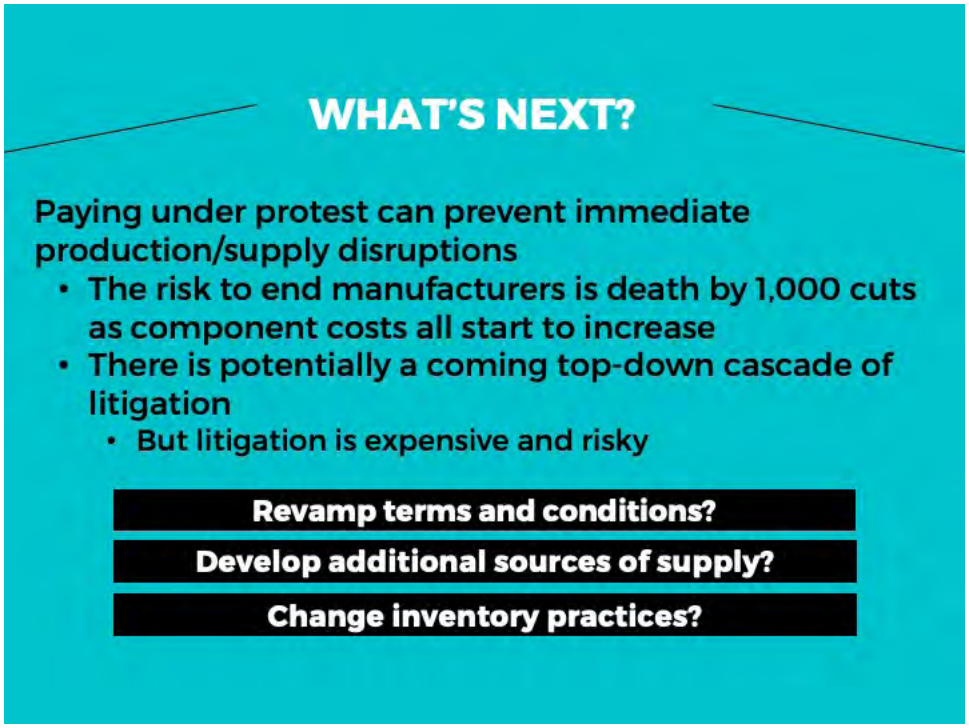
Challenges:

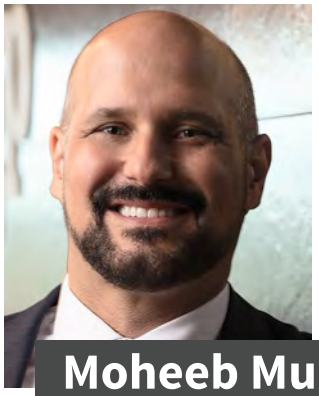
1. **Showing likelihood of success on the merits;**
2. **Showing irreparable harm**

Legal Options

PAY UNDER PROTEST WHILE RESERVING RIGHTS?

- **Expressly allowed under UCC 1-308.**
- **Provides time to negotiate a solution and avoids immediate catastrophic damage**
- **Sue later, if the parties can't come to a resolution**
  - **But beware of 4-year limitations period for UCC claims**
- **Non-UCC cases**
  - **Be mindful of "voluntary payment doctrine" applicability in your jurisdiction**


WHAT'S NEXT?
Paying under protest can prevent immediate production/supply disruptions
• The risk to end manufacturers is death by 1,000 cuts as component costs all start to increase
• There is potentially a coming top-down cascade of litigation
• But litigation is expensive and risky
Revamp terms and conditions?
Develop additional sources of supply?
Change inventory practices?



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Moheeb Murray

Member | Bush Seyferth (Troy, MI)

Moheeb Murray represents clients in complex commercial disputes, tort defense cases, insurance coverage matters, and construction litigation. He leads BSP's insurance coverage and construction litigation practice groups. In commercial litigation matters, his extensive experience includes complex breach of contract and breach of warranty claims, shareholder actions, and cases involving misappropriation of trade secrets and covenants not to compete. In his insurance coverage practice, Moheeb represents leading insurers in life, health, disability, ERISA, long-term care, annuity, P&C, commercial general liability, and auto-insurance no-fault matters.

He advises and represents clients from pre-litigation strategy through final verdict and on appeal. Moheeb has helped clients obtain favorable awards and outcomes at trial and in arbitrations involving claims of breach of contract, breach of warranty, construction, and design-professional malpractice. Moheeb is also a trained civil litigation mediator.

Related Services

- Business and Commercial
- Class Actions
- Construction Litigation & Counseling
- Insurance Litigation
- Product Liability
- Securities / Finance

Representative Matters

- Michigan statewide counsel for leading national do-it-yourself moving and vehicle-rental company for insurance coverage, tort liability, and commercial litigation matters.
- Counsel for automotive original equipment manufacturers against suppliers and vendors in supply-chain, warranty, and indemnity disputes.
- Lead counsel and also Michigan counsel working with national counsel for several leading life insurance and annuity companies in interpleader cases.
- Lead counsel for national insurance company in defense of accidental-death claims.

Honors and Awards

- DRI Lifetime Community Service Award (2019)
- Inclusion in The Best Lawyers in America©: Insurance Law (2018 – present)
- Oakland County Bar Association Distinguished Service Award, 2017
- Oakland County Executive's Elite 40 Under 40, 2015
- Michigan Super Lawyers, Rising Star, 2011-2015
- Michigan Super Lawyers, 2018 – Present
- Michigan Lawyers Weekly, Leader in the Law, 2014
- American Arab Professional of the Year Award in the Legal Category, 2013
- Martindale Hubbel® AV Peer Review Rating

Education

- University of Michigan Law School, J.D., cum laude, 2001
- University of Michigan Ross School of Business, B.B.A., with high distinction, 1997 - James B. Angell Scholar; William J. Branstrom Freshman Prize for academic excellence

Panel: Employment Litigation in the COVID Era

Lauren Fisher White

Christian & Barton (Richmond, VAI)

COVID-19 has presented tremendous challenges to American workforces. Employers have had to grapple with a barrage of religious accommodation requests, return to work concerns, and a patchwork of confusing and sometimes contradictory state laws on vaccination. Each of these issues will be addressed in turn.

Religious Accommodation Concerns Arising from Private Employer Vaccine Mandates

Lauren E. Fisher White

Title VII of the Civil Rights Act prohibits employers from discriminating against their employees because of their religion and requires employers to accommodate sincerely held religious beliefs so long as the accommodation would not exercise an "undue hardship" on the employer. For purposes of the religious exemption analysis, "undue hardship" is narrow—much narrower than the undue burden standard under the Americans with Disabilities Act—and exists when the employer is required to bear more than a de minimis cost.[1] Such costs are not quantified only in terms of dollars and cents (though the impact on health insurance costs can be considered), as an undue hardship may exist when the accommodation impairs workplace safety or causes coworkers to carry the employee's share of potentially hazardous or burdensome work.[2]

Pre-COVID, requests for religious accommodation were, for most employers, infrequent. Religious discrimination claims generally make up between 2% and 4% of all claims filed with the Equal Employment Opportunity Commission ("EEOC") and, as a result, religious discrimination litigation is rare.[3] Historically, some employment litigation has arisen with regard to religious objections to flu vaccine mandates in healthcare,[4] but most healthcare entities permitted employees who requested exemptions from mandatory flu vaccination—because of either a religious belief or a disability—to wear face masks during flu season.

When vaccines against COVID-19 became readily available, some private employers determined that masking alone would be insufficient. The EEOC published guidance in December of 2020 stating that (1) COVID-19 vaccine mandates were permissible under Title VII, and (2) employers mandating vaccination would be required to offer reasonable accommodations to those employees with sincerely held religious beliefs or disabilities that precluded vaccination.[5] Employers who implemented vaccine mandates saw a tremendous uptick in the number of religious accommodations sought.

Though generally courts advise that employers take a "light touch" when it comes to examining

1 See TWA v. Hardison, 432 U.S. 63, 84, 97 S. Ct. 2264, 2277 (1977).

2 See Section 12: Religious Discrimination, EEOC, available at: https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination

3 See Enforcement and Litigation Statistics, EEOC, available at: https://www.eeoc.gov/statistics/enforcement-and-litigation-statistics

4 See, e.g.Memorial Healthcare to Pay $74,418 to settle EEOC Religious Discrimination Lawsuit, EEOC, available at: https://www.eeoc.gov/newsroom/memorial-healthcare-pay-74418-settle-eeoc-religious-discrimination-lawsuit

5 See What You Should Know about COVID-19 and ADA, Rehabilitation Act, and Other EEO Laws, EEOC, available at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

the sincerity of religious beliefs and practices,[6] the flood of religious exemption requests related to the COVID-19 vaccines, along with inconsistencies between expressed beliefs and behavior, gave some employers good reason to consider whether the stated beliefs were actually sincere or whether they were based on something other than religious beliefs -- such as political beliefs or scientific misunderstandings.[7] Other employers took a different approach, readily granting religious exemptions from vaccination but then stating that providing any accommodation that would permit unvaccinated employees to remain at work would be an undue hardship. Employees around the country were forced to make what they believed was an impossible choice—maintaining their livelihood or receiving a COVID-19 vaccine that violated their religious beliefs—and brought legal action.

A Title VII plaintiff must satisfy certain administrative prerequisites before bringing at Title VII action: namely, filing a charge of discrimination and receiving a right-to-sue letter from the EEOC. However, some courts have determined that employees may also bring suit to maintain the status quo pending the action of the EEOC on the charge of discrimination.[8] A plaintiff seeking a preliminary injunction must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[9] The granting of a preliminary injunction is extraordinary relief and employees seeking preliminary injunctions in the mandatory vaccination context have rarely succeed in their efforts, but judicial analyses of these factors provides a window into the future of religious accommodation litigation.

Healthcare employers were some of the first to require vaccination, and with those private employer mandates came religious exemption requests. In November of 2021, 14 employees sued the Northshore University Health System after they sought and were denied religious exemptions from NorthShore's vaccinate mandate.[10] Each employee submitted a request for a religious exemption on the grounds that the available COVID-19 vaccines were developed using cell lines derived from aborted fetuses.[11] After each employee's request was denied, the employees appealed and their exemption request was granted—but then NorthShore determined that having an unvaccinated employee in the workplace would work an undue hardship on the employee and patient population.[12] The District Court granted a temporary injunction but ultimately denied the plaintiffs' requests for a preliminary injunction, finding that the choice between getting vaccinated and enduring unpaid leave did not constitute irreparable harm, as the loss of employment is quintessentially compensable harm in employment cases. However, in determining whether it would grant the preliminary injunction, the court decided that the plaintiffs had shown some likelihood of success on the merits. The Judge cast doubt upon NorthShore's undue hardship defense, given that "[e]ven accounting for the widespread availability of vaccines for hospital workers beginning in early 2021, almost a full year passed during which NorthShore apparently considered masking and testing to be sufficient to keep its patients, visitors, and employees safe."[13] Additionally, the court noted that, while unvaccinated employees would be terminated, the same unvaccinated person would be permitted to visit a NorthShore patient and, while NorthShore relied on the OSHA rule for justifying its policy, the OSHA rule allowed for the option of masking and testing. The many employers who made similar decisions under the gun of COVID-19 will face similar arguments when defending Title VII lawsuits based on failure to accommodate religion.

United Airlines was one of the first major companies not in the healthcare industry to introduce vaccine mandates. United's approach was formulaic: the company would review requests for accommodation on a case-by-case basis, and if the exception was granted and the employee's job was customer-facing, the employee would be offered the

6 See Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013) ("[C]laims of sincere religious belief in a particular practice have been accepted on little more than the plaintiff's credible assertions.").

7 See, e.g., Lauren Wamsley, Judging 'sincerely held' religious belief is tricky for employers mandating vaccines, NPR Morning Edition October 4, 2021, available at: https://www.npr.org/2021/10/04/1042577608/religious-exemptions-against-the-covid-19-vaccine-are-complicated-to-get

8 See Sambrano v. United Airlines, Inc., No. 21-11159, 2022 U.S. App. LEXIS 4347, at *11 (5th Cir. Feb. 17, 2022); but see dissenting opinion at *36-37.

9 Winter v. NRDC, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008)

10 Doe v. NorthShore Univ. Healthsystem, No. 21-cv-05683, 2021 U.S. Dist. LEXIS 228371 (N.D. Ill. Nov. 30, 2021)

11 Id. at *3.

12 Id. at *6.

13 Id. at *14.

"accommodation" of unpaid, indefinite leave.[14] United defended against injunction proceedings in multiple jurisdictions, including two trips to the Fifth Circuit Court of Appeals. Many of the United employees made the same "impossible choice" argument as the NorthShore employees: that the mandate attempted to coerce them to choose between pay and adhering to their religious convictions, which they alleged constitutes irreparable harm.[15] A District Court judge disagreed and denied the injunction in November of 2021, but on February 17, 2022, the majority of a three-judge Fifth Circuit panel agreed with the plaintiffs on the issue of irreparable harm and, in an unpublished decision, remanded the case to the District Judge so that he could consider the remaining preliminary injunction factors.[16] Two Fifth Circuit judges identified dual potential harms from United's mandate: first, the obvious potential harm associated with loss of income resulting from unpaid leave—a clearly reparable harm—and second, the irreparable harm flowing from United's ongoing attempt to coerce plaintiffs on unpaid leave into violating their religious convictions and returning to work.

According to the dissenting judge's opinion, though, neither of the plaintiffs who would be subjected to unpaid leave actually testified to facing a crisis of conscience related to this supposed coercion, though both testified about the effect the loss of income would have on their families. Here the majority's opinion (highlighted by the dissent) offers a roadmap for future employees seeking injunctions for an employer's failure to accommodate. The judge authoring the dissent also opined that the appeal should have been denied because the plaintiffs could not show success on the merits, as accommodating the plaintiffs would work an undue hardship on United: it would put their fellow flight attendants and pilots (who are required to work in close proximity to each other, for a period of days during which pilots are often unable to wear masks) at significant risk of illness.[17] Within weeks of the Fifth Circuit opinion, United, faced with the tremendous costs of paid, rather than unpaid, leave for its vaccinated employees, allowed unvaccinated workers to return to work.[18]

These preliminary injunction cases foreshadow the religious discrimination litigation on the horizon. For those employers that made a case-by-case determination as to each accommodation request and undue hardship analysis, risks of potential litigation could be low. But for those that made sweeping policy decisions to deny requests or broad generalizations about undue hardship, failure to accommodate litigation may be imminent.

14 Sambrano v. United Airlines, Inc., No. 4:21-1074, 2021 U.S. Dist. LEXIS 215285, at *5 (N.D. Tex. Nov. 8, 2021)

15 Id. at *11.

16 Sambrano v. United Airlines, Inc., No. 21-11159, 2022 U.S. App. LEXIS 4347 (5th Cir. Feb. 17, 2022).

17 Id. at *73.

18 See Alison Sider, United Airlines to Let Unvaccinated Workers Return, The Wall Street Journal, available at https://www.wsj.com/articles/united-airlines-to-let-unvaccinated-workers-return-11646869723.

Recognizing and Managing Employment Litigation Risks in the New, Pandemic-Shaped Workplace

Julie A. Moore

Without question, the COVID-19 pandemic has dramatically changed the American workplace. Shortly after the World Health Organization declared on March 11, 2020 that COVID-19 had reached pandemic status, many workplaces across the country closed, and millions of employees shifted from the traditional, 9am to 5pm, Monday to Friday workweek at a physical worksite to working from home at irregular hours and interfacing with colleagues via Zoom, Teams, and other virtual platforms (from the comfort of their couch wearing lounge attire.) Despite the prior availability of sufficient technology, the vast majority of the workforce infrequently or never engaged in remote work before the pandemic. Now, nearly 50% of workers are doing their job from home all or, at least, half of the time.

Had the pandemic lasted for a short duration, this change may very well have been only temporary. However, since the pandemic has continued to

exist for multiple years, many experts are predicting that the shift to remote work is a permanent and irreversible one as numerous employee surveys are revealing that increased flexibility – particularly, the ability to telework – is an essential, non-monetary benefit that workers are demanding and for which they are willing to leave their current job and search for alternative employment, even if it means taking a sizeable pay cut. Thus, employers have come to embrace or, at least, accept, the notion that permitting some degree of remote work is critical to recruitment and retention initiatives.

Embracing the New Normal: Employment Litigation Risks Associated with Fully Remote & Hybrid Work Arrangements

As discussed herein, with the "new normal" comes various litigation risks that touch upon nearly every aspect of employment law, ranging the spectrum from FLSA to ADA and everything in between.

Wage & Hour:

Perhaps the biggest employment law litigation risk associated with remote work is wage and hour violations. Prior to the onset of the pandemic, opportunities for remote work were generally reserved for exempt employees. However, COVID-related shutdowns required workplaces to adapt, and some employers began to permit non-exempt employees to work from home for the first time.

Under the Fair Labor Standards Act ("FLSA"), non-exempt employees are entitled to pay for all hours they actually work, even those not requested or permitted, including unauthorized overtime. Thus, accurate timekeeping is critical, which can be challenging in remote work arrangements, especially if work is performed at irregular intervals. Non-exempt employees must record their starting and stopping times at the beginning and end of each workday, as well as breaks taken in excess of twenty (20) minutes. Further, if such employees perform any work outside normal business hours (e.g., exchanging text messages and e-mails or working on projects during evenings or weekends), these hours also need to be logged. Failure to properly pay non-exempt employees can be difficult to defend, and violations can be quite costly, especially if they result in class action litigation. To avoid litigation, work hours should be clearly defined if non-exempt employees are permitted to engage in telework. Moreover, employers should clearly communicate in their handbook that off-the-clock work, underreporting of hours, unauthorized overtime, and falsifying time records are strictly prohibited. Further, managers should be trained on their responsibilities related to timekeeping and to be vigilant for potential wage and hour violations.

Although timekeeping is less of a concern for exempt workers due to the fact that they are paid on a salary basis and are not eligible for overtime under the FLSA, litigation issues can still arise if employees are gratuitously afforded fringe benefits that are tied to the hours they work. For example, some private employers have policies that bestow upon exempt workers extra paid time off if they work additional hours beyond a normal forty-hour workweek. In these situations, tracking hours is essential to minimizing risks under state wage payment and collection laws. Similarly, some employers have policies that allow employees to cash out unused PTO either during the course of employment or upon separation. Undoubtedly, PTO usage can be much more difficult to track if an employee is not reporting to a physical worksite each day. Failure to accurately track PTO usage by remote workers can lead to disputes that result in litigation under state wage payment and collection laws, which, like FLSA litigation, can lead to costly class actions.

Patchwork of State Laws: Tax Withholdings, Unemployment Compensation, Workers' Compensation, EEO/Civil Rights, Leave, Minimum Wage, etc.:

Approval to engage in telework on a full-time basis has prompted some workers to pick up and move – sometimes to a different state than where their former worksite was based. Some employees already lived in a different state than where their work site was physically located and commuted across state lines to work each day, but now, after being approved to engage in telework, perform all their work at home in the state of their residence. More than ever, staying informed of where teleworkers reside and are performing their work is critical for ensuring compliance with state laws related to tax

withholdings, unemployment compensation, and workers' compensation, as well as laws related to minimum wage, leave, civil rights, etc.

Unemployment compensation and workers' compensation are typically tied to the state in which work is performed. Accordingly, the state in which wages must be reported and unemployment tax is due might change as a result of remote work. Likewise, workers' compensation rules and coverage varies from state to state; thus, it is important for employers to confirm coverage for teleworkers, especially those who live and work out of state, with their carrier.

Some states have paid sick leave laws; others do not. Some states have a higher minimum wage than others. Some states have more different meal and rest break requirements than others. Some states, such as California, have laws that require employers to reimburse employees for any home office expenses. Some states have more expansive civil rights protections than others. Generally, the law of the state in which the employee is performing his/her work applies. Thus, when it comes to telework, remote employees are generally subject to the laws of the city and state where they reside, as opposed to the state where their employer's office is located, assuming they are performing their work at home.

Failing to afford remote employees the rights and benefits to which they are entitled can lead to unexpected compliance challenges and litigation. Thus, carefully analyzing which state's law will apply at the outset of a remote work arrangement is essential.

Sexual and Other Forms of Harassment:

While many harassment claims arise from traditional, in-person work settings based upon allegations of unwelcome physical contact or offensive verbal remarks made face-to-face, employers must not forget that the obligation to prevent and promptly correct harassment extends to remote work environments. Indeed, a hostile work environment can arise from cyberstalking via social media; cyberbullying via email, text, and chat/messaging apps; making offensive statements during virtual meetings held via Zoom, Teams, Skype, or other platforms; electronically transmitting offensive memes and jokes; and displaying inappropriate images/items in one's background during videoconference meetings. There is something about being behind a computer screen and a keyboard in the comfort on one's home that can cause lapses in professionalism that can lead to harassment claims.

To avoid litigation, employers should: (1) review their anti-harassment policy to ensure that it addresses unacceptable conduct expressed through electronic means of communication, and (2) train supervisors and managers to recognize forms of virtual/remote harassment so that instances are promptly reported to human resources. Indeed, well-trained supervisors are often the employer's first line of defense. On the other hand, an untrained manager who is present when harassing behavior occurs and fails to address it – either because she/he fails to recognize the behavior as harassing or does not appreciate his/her own obligations to report the behavior, can be viewed as condoning the conduct, and the failure to appropriately respond can be an omission that is attributed to the employer in terms of liability. Thus, supervisors need to be trained on the importance of ensuring that meetings held via Zoom are conducted with professionalism.

Discrimination, FMLA, and ADA:

Determining who is and is not approved to engage in remote work can lead to discrimination claims if not done with EEO laws in mind. Like all other decisions that concern terms and conditions of employment, decisions about telework should be based upon legitimate, non-discriminatory business reasons, and applied consistently to avoid claims of disparate treatment and/or disparate impact. Decisions about telework requests should focus primarily on the nature of the employee's job duties and whether those tasks can be performed remotely, or if in-person attendance is required. Moreover, an individual employee's performance history can also be relevant to deciding whether such employee is approved for telework. Declining a telework request because an employee is a subpar performer who requires close supervision is perfectly legitimate. On the other hand, decisions about telework requests that rely upon stereotypes – such as that

females with children will not be productive working from home as compared to their male peers, or that older workers are not tech savvy enough to navigate a virtual work environment – are certain to result in discrimination claims. Thus, it is critical that such decisions are appropriately vetted and made consistently across similarly situated employees.

Other potential litigation pitfalls relate to the Family and Medical Leave Act ("FMLA"). If a teleworking employee requests time off for an FMLA-qualifying reason, employers must recognize that telework is not a permissible substitute for leave under the Act. While nothing in the statute or regulations prohibits an employer from contacting an employee during leave with de minimis requests, such as questions about the location of documents/files, a password, or the status of a matter before the employee's leave commenced, requiring an employee to engage in substantive work during FMLA leave can give rise to an interference claim. Similarly, retaliation claims can arise if an employee's teleworking privileges are revoked after requesting or taking FMLA leave.

To avoid litigation, employers must also remember that their affirmative obligation to provide reasonable accommodations to employees with disabilities under the Americans with Disabilities Act ("ADA") extends to remote workers. Although there may be instances when working from home may lessen or eliminate a disabled employee's accommodation needs, there may be some needs that require accommodation regardless of whether work is performed in the office or at home. Employers must avoid treating disabled remote workers as though they are "on their own" when it comes to addressing accommodation needs that extend to their home office.

Back to the Old Normal: Employment Litigation Risks Associated with Returning to the Office

Disability Discrimination: Denial of Accommodation Requests to Telework:

On September 7, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) filed its first lawsuit alleging that an employer discriminated against a disabled employee by failing to permit her to work from home due to her increased risk of COVID-19 and by terminating her employment after the employee made such an accommodation request.

The EEOC filed suit in the U.S. District Court for the Northern District of Georgia (N.D. Ga., No. 1:21-CV-3708-SCJ-RDC) against ISS Facility Services, Inc. ("ISS"), a facility management services company, on behalf of a former employee, Ronisha Moncrief ("Moncrief"), who worked as a health and safety manager. Due to the COVID-19 pandemic, ISS required all of its employees to work from home four days per week from March 2020 to June 2020. In June 2020, when ISS required all employees to return to work, Moncrief requested an accommodation to work remotely two days per week as well as frequent breaks while working on-site due to her chronic obstructive lung disease and hypertension, which created a heightened risk if she contracted COVID-19. Although ISS allegedly allowed other similarly situated employees to continue working from home, it denied her accommodation request and subsequently terminated her employment.

In its Guidance,[19] the EEOC has been clear that the same familiar rules still apply to handling employee accommodation requests under the ADA:

- Any time an employee requests an accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation.
- If the employer can effectively address an employee's accommodation needs with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.
- Employers are never required to eliminate an essential function as an accommodation.
- The fact that an employer temporarily excused performance of one or more essential functions, does not mean that the employer permanently changed a job's essential functions.

However, the EEOC has added that, an employee's

19 https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

past telework experience can be relevant to considering a disability-related accommodation request for telework. In other words, if an employee engaged in telework at the employer's request during the COVID-19 pandemic, that period should be viewed as a "trial period" in determining whether or not this employee could satisfactorily perform all essential functions while working remotely.

Employers may have a more difficult time establishing that telework is not a reasonable accommodation if employees have successfully and productively been working from home during the COVID-19 pandemic. Employers may want to outline what essential functions were not being performed from home during the pandemic. If an accommodation request to telework is going to be denied, the employer should be prepared to explain why, if the employee was previously able to competently perform all essential functions from home during the pandemic.

Wage & Hour Class Actions: Mandatory Screenings:

Upon reopening, in order to control the spread of the virus, many employers began to require employees to undergo daily COVID-19 screenings upon entering the workplace. Common screening protocols included temperature checks, questions about any symptoms associated with COVID-19, as well as questions about recent travel, known exposure to COVID-19, and whether the employee was currently awaiting the results of a COVID-19 test. Often times, such screenings occur before the employee reaches the timeclock.

Class action lawsuits have been filed around the country alleging that the time that employees spend waiting in line and underdoing COVID-19 screenings is compensable time under the FLSA. Relying upon the U.S. Supreme Court's decision in Integrity Staffing Solutions v. Busk, 574 U.S. 27, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014), employers are defending such lawsuits by arguing that such screenings are not an "integral and indispensable" part of the employees' principal activities of their job, and that the time spent in screenings is de minimis. These suits are ongoing.

To conclude, the best defense against potential employment litigation risks associated with telework and returning to the office in the midst of the ongoing pandemic is being proactive. Conducting audits and risk assessments before litigation is commenced and making corrections, where necessary, could help to avoid litigation entirely or, or at least, contain the damage.

State Laws Change the Landscape of Employer COVID-19 Vaccine Mandates
Robert A. Shimberg

Federal, state and local orders early in the pandemic had a direct effect on employees in the private sector and their workplace, as categories of essential businesses and workers performing critical services were established throughout the country. A backdrop during that time in 2020 was the ongoing questions of when COVID-19 vaccines would be available and rolled out for those same essential workers and everyone else in the workforce.

Fast forward to the second half of 2021. State laws and Executive Orders were enacted governing the now available COVID-19 vaccines, but the subject matter was under what circumstances an employee may decline the vaccine, yet not be in jeopardy of losing their job to a business that issued a vaccine mandate. By that time businesses had become aware of the two recognized noted federal exemptions -- medical and sincerely held religious belief.

While the new state laws included both exceptions, they generally limit inquiry into a sincerely held religious belief, and have added other exemptions as well. An example is an exemption in the Florida law for an employee who intends to become pregnant. The Florida rules specifying the circumstances require the employee to be of child bearing age and that the employer must accept the representation of

intent to become pregnant. [20]

To date, at least 13 states have passed laws governing COVID-19 vaccine mandates at work in the private sector.[21] The laws list exemptions in detail and largely eliminated any inquiry into an exemption, other than a doctor's note for a medical exemption. The laws are specific to only COVID-19 vaccines and some of the laws sunset by mid-2023. As of the date of writing this article, no reported cases were identified challenging any of the private employer sections of the laws.

Several of the laws provide the mechanism an aggrieved employee would use to challenge denial of an exemption: either seeking an injunction or making a complaint to a state agency and requesting an investigation (and follow up action). Others are silent as to a mechanism and would be subject to a private cause of action. A few of the laws allow for the ability for fines to be levied against an offending company, typically though only if it is determined a violation has occurred and has not been remedied. Florida also permits the Attorney General's Office to investigate and mandates a fine if it determines by Final Order that the business improperly terminated the employee.

Alabama has included an exemption form in the text of its law,[22] and Florida's law, which may be the most comprehensive, directs the state Department of Health to create the forms for employees to document the various exemptions. For the other state laws, there is no mandated or approved form for an employee to use to disclose requested exceptions. Florida's law also includes a provision, that "An employer may not impose a policy that prohibits an employee from choosing to receive a COVID-19 vaccination.[23]

During the development of the different COVID-19 vaccines, questions arose about sincerely held religious beliefs to the different vaccines, and under what circumstances could the exemption be questioned. A few of the state laws appear to be written with those specific questions in mind.

The Kansas law bans inquiry into the sincerity of the sincerely held religious belief request.[24] The North Dakota law takes a slightly different approach but essentially ends up in the same place, with no inquiry. That law lumps together into a single certificate signed by the employee that their religious, philosophical or moral beliefs are opposed to the vaccine.[25]

On its face, the Florida law, like a few of the others, appears not to ban inquiry into the religious belief, as the Florida law states that the "employee declines COVID-19 vaccination because of a sincerely held religious belief." However, Florida's law specifically grants rule making authority and creation of the exemption forms to the state Department of Health (DOH). In the DOH rule, it is clear that like the Kansas law, no inquiry is permitted, as it states "An employer shall not inquire into the veracity of the employee's religious beliefs."[26] The exception form developed by the DOH goes a step further and provides:

> "I hereby declare that I decline the COVID-19 vaccination because of a sincerely held religious belief, which may include a sincerely held moral and ethical belief."
>
> NOTE: An employer shall not inquire into the veracity of the employee's religious beliefs. Pursuant to section 381.00317(2), Florida Statutes, this completed exemption statement requires the employer to allow the employee to opt-out of the employer's COVID-19 vaccination mandate.

With the uncertainty about COVID-19, there is the chance that future flare-ups could again create significant ramifications in the workplace. Businesses that operate in more than one state must be prepared to operate differently in different states as to COVID-19 vaccine mandates or other like occurrences. The laws could also be a framework for other pandemics or emergencies and could arise much earlier in a future crisis.

20 Fl. Stat. Section 381.00317(1)(a) and 64 DER21-17(2)(a) and (b).

21 Tennessee and Montana effectively ban a COVID-19 vaccine mandate at work and at least 10 other states – including Alabama, Arkansas, Arizona, Florida, Utah, North Dakota, Kansas, Nebraska, Iowa and Indiana provide for exemptions, typically for sincerely held religious beliefs, for medical reasons and for other basis; there is an Executive Order in Texas and legislation pending in other states.

22 Alabama SB 9, 2021.

23 Fl. Stat. Section 381.00317(8).

24 Kansas H.B. 2001, signed into law November 23, 2021.

25 North Dakota H.B. 1511 (2021).

26 64 DER 21-17(3).

Employment Litigation and Legislation in the COVID Era:
Religious Accommodations, Return-to-Work Risks, and Vaccine Mandates

Lauren E. Fisher White, Esq.
Julie A. Moore, Esq.
Robert A. Shimberg, Esq.

Religious Discrimination Litigation in COVID-19

Presented by:
Lauren E. Fisher White

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Title VII of the Civil Rights Act and Religion

- Failure to Accommodate Claim:
  - Religious practice;
  - Employer notice; and
  - Religious practice was the basis for an adverse action.

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The EEOC and Federal Court Process

- Charge of Discrimination
- Investigation
- Right to Sue Letter
- Litigation

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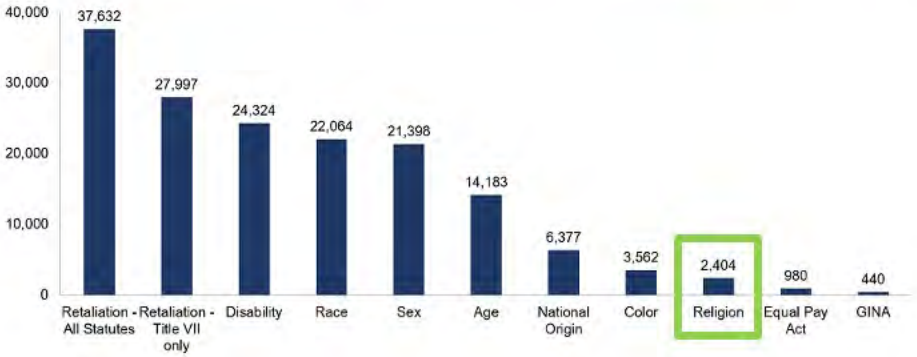
Nationwide Charge Receipts by Basis FY 2020



EEOC Guidance on Vaccine Mandates

- Vaccine mandates permissible
- Mandates must provide exemptions
- "Religion" broadly defined
- "Undue hardship" case-by-case determination

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Private Employer Vaccine Mandates

- Flood of religious exemption requests
- First step: grant or deny request for religious exemption
- Second step: approve accommodation or assert undue hardship

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Sincerely Held Religious Beliefs

- "Sincerely Held" – no reason to disbelieve
- "Religious" – not political, scientific, etc.
- "Belief"– observances or practices

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The Undue Hardship Defense

- More than "de minimis" cost is an undue hardship
  - Risk of the spread of COVID-19
  - Coworkers would bear the brunt of hazardous work
- Must be analyzed on a case-by-case basis
  - Consider: working conditions
  - Consider: all possible accommodations

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Preliminary Injunctions

- Likely to succeed on the merits;
- Likely to suffer irreparable harm;
- Balance of equities favors; and
- Injunction is in the public interest.

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The NorthShore Hospital Litigation

- Flip-flopping treatment of request
- Unvaccinated = undue hardship
- No irreparable harm
- Problem: possibility of success on the merits

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The United Airlines Litigation

- 2,000 employees sought exemptions
- Accommodation undue hardship for customer-facing employees
- Problem: "Crisis of conscience"
- Success on merits?

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Where We Go From Here

- Litigation!
- An altered landscape
  - Irreparable harm and impossible choices
  - Hindsight: was masking alone truly an undue hardship?

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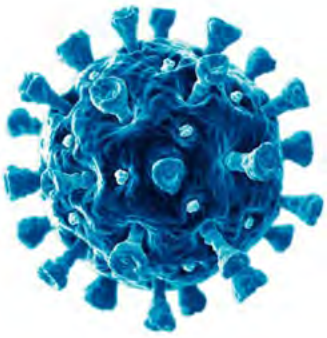


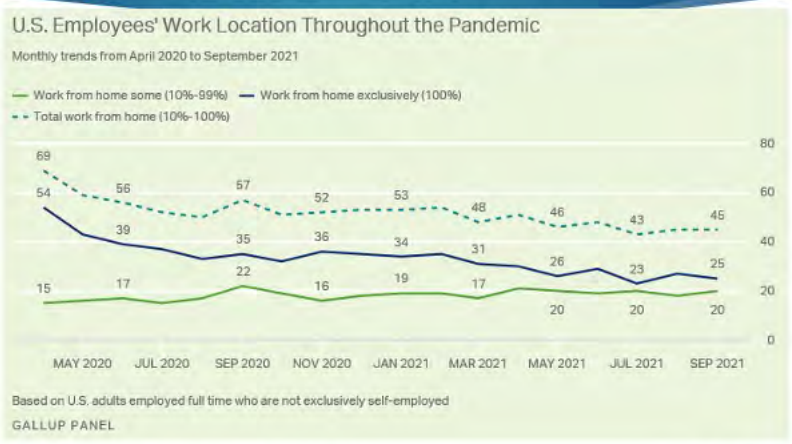
EMPLOYMENT LITIGATION RISKS IN THE NEW, PANDEMIC-SHAPED WORKPLACE

By: Julie A. Moore, Esq.

Bowles Rice

The New Normal . . .

Bowles Rice



Source: https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx

Bowles Rice

- 25% of all professional jobs in U.S. will be remote by the end of 2022.
- Remote opportunities will continue to increase through 2023.

Source: https://www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say/?sh=f7e736e20a6c

Bowles Rice

Litigation Risks: Fully Remote & Hybrid Arrangements

Bowles Rice

Litigation Risks: Fully Remote & Hybrid Arrangements

- #1: Wage & hour issues
  - Timekeeping & overtime for non-exempt workers
  - Meal and rest breaks
  - Gratuitously-granted fringe benefits for exempt employees tied to hours worked
  - PTO/leave tracking

Bowles Rice

Litigation Risks: Fully Remote & Hybrid Arrangements

- #2:
  - Tax withholdings
  - Unemployment compensation
  - Workers' compensation

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Litigation Risks: Fully Remote & Hybrid Arrangements

- #3: State & local laws
  - Paid sick leave
  - Civil rights protections
  - Minimum wage
  - Meal and rest breaks
  - Business expense reimbursements

Graphic credit: https://www.wtwco.com/en-US/Insights/2021/07/state-and-local-paid-sick-leave-law-developments

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Litigation Risks: Fully Remote & Hybrid Arrangements

- #4: Performance management & evaluations

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Litigation Risks: Fully Remote & Hybrid Arrangements

- #5: Family and Medical Leave Act
  - *telework is not a substitute for family or medical leave*
  - *rescinding telework approval after FMLA leave requested or taken*

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Litigation Risks: Fully Remote & Hybrid Arrangements

- #6: Americans with Disabilities Act
  - the *duty to accommodate still applies to employees engaged in remote work*

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Litigation Risks: Fully Remote & Hybrid Arrangements

- #7: Discrimination –
  - *who gets approved to engage in telework*
  - *avoiding stereotyping based upon protected characteristics*
  - *compensation decisions*

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Litigation Risks: Fully Remote & Hybrid Arrangements

- #8: Sexual Harassment
  - *virtually/electronically*

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Litigation Risks: Fully Remote & Hybrid Arrangements

- #9: Information technology
  - *no expectation of privacy while using employer's device and/or connecting to employer's network while working from home*
- #10: Confidentiality
  - *personnel information*

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Litigation Risks: Returning to the Office

Litigation Risks: Returning to the Office

- September 7, 2021: the EEOC filed its first lawsuit alleging that an employer had discriminated against an employee on the basis of disability by failing to allow telework as a reasonable accommodation due to her increased risk of COVID-19.

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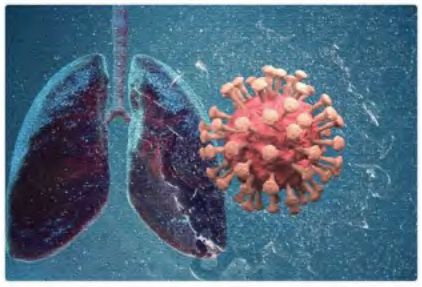

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- Employer is entitled to understand the disability-related limitation that necessitates an accommodation.
- Elimination of essential function not required.
- Temporarily excusing performance of essential function ≠ function permanently eliminated.
- Effective alternative may be implemented.

Source: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Bowles Rice

Temporary remote work is relevant to considerations of accommodation requests to work from home if the period of temporary remote work demonstrated that the individual could satisfactorily perform all the essential functions of the position.

Bowles Rice


Step 1
Recognize an accommodation request
Step 2
Gather information
Step 3
Explore accommodation options
Step 4
Choose an accommodation
Step 5
Implement the accommodation
Step 6
Monitor the accommodation
Each step requires careful documentation.
Image credit: https://www.standard.com/employer/workplace-possibilities-program/basic-better-best-practical-ways-improve-your-adaaa
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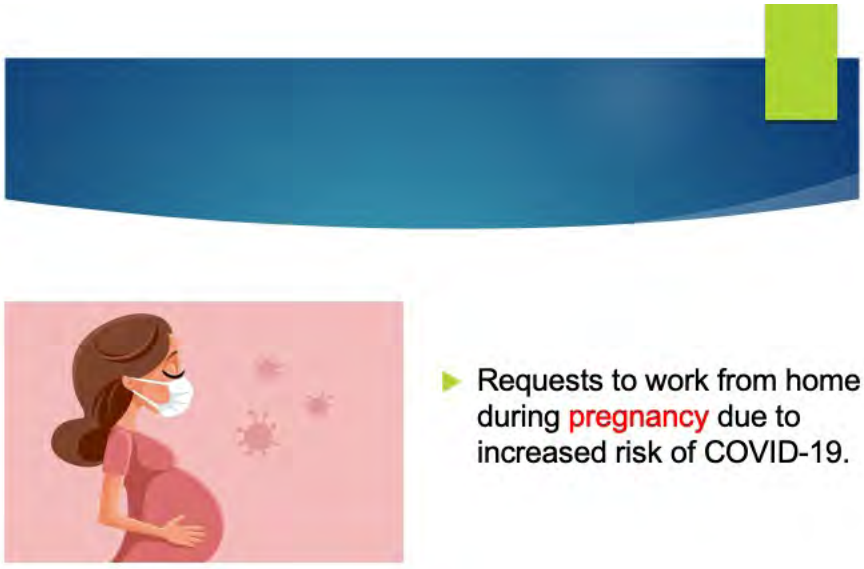

Requests to work from home during pregnancy due to increased risk of COVID-19.

Litigation Risks: Returning to the Office

- Wage & hour class actions arising from mandatory COVID-19 screenings
  - Temperature checks
  - Symptom questionnaires
  - Questions about recent travel or recent exposure to COVID-19

Bowles Rice

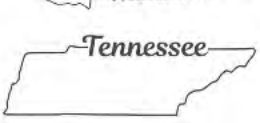
Bowles Rice

COVID-19 Mandates: State Action

In the second half of 2021 individual states began taking action (Executive Orders and Laws) on COVID-19 vaccine mandates in the private sector workplace.

State Action

- Two states effectively banned vaccine mandates in the workplace
- 10+ states codified exemptions



State Action: Trends

- Trend toward:
  - No inquiry into Sincerely Held Religious Belief (see state laws, rules, and executive orders); and
  - Additional exemptions

Enforcement

- Mechanism for Enforcement:
  - Injunction
  - State Agency Action
  - Fines

Looking to the Future

- Has a roadmap been created for other states in the event of:
  - Future significant COVID-19 outbreaks that greatly impact the workplace?
  - Other pandemics or medical or emergency situations?

Any Questions?

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Lauren Fisher White

Partner | Christian & Barton (Richmond, VAI)

Lauren Fisher White is a partner in the firm's Labor and Employment and Litigation practice groups. She counsels clients on the enforceability of restrictive covenants, disciplinary decisions, and employee handbooks, and equips them with the language tailored to achieve the results they desire, based on business needs. She assists clients with employment and personnel matters including implementation and adherence to state and federal laws governing the workplace, and the investigation and response to harassment, interference, discrimination, and retaliation complaints.

Since the onset of the COVID pandemic, Ms. Fisher White has spent significant time advising public and private entities seeking to protect their workforce and their business. This counsel includes vaccine mandate and exemption request strategies and policies, and guiding employers and human resource professionals through Virginia Department of Labor and Industry audits and whistleblower complaints. She also monitors evolving, and often overlapping, COVID-related legislation and regulation to distill the specific implications for her clients.

Practice Areas

- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Trials / Appeals / Alternative Dispute Resolution

Representative Matters

- Advised employers on complex issues such as harassment and discrimination claims, leave under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act(FMLA), worker misclassification, and pay equity.
- Counseled clients on the enforceability of restrictive covenants, such as non-competition, non-solicitation, confidentiality, and trade secret clauses, and represented clients in negotiation and litigation involving such covenants.
- Guided employers through COVID-related regulations, including vaccine mandates, exemption requests, and Virginia Department of Labor and Industry audits and whistleblower complaints.
- Provided strategic guidance to clients regarding key employee issues, such as workforce reorganizations and the development of wellness and diversity, equity, and inclusions programs.
- Prepared employment agreements, independent contractor agreements, severance agreements, settlement agreements, and employment handbooks.
- Served as counsel to boards of directors in connection with internal investigations and removal of executive personnel.

Education

- Washington & Lee University, J.D., 2010 - Cum Laude; Managing Editor, Journal of Civil Rights and Social Justice; Roger D. Groot Scholarship Recipient
- Vanderbilt University, B.A., English and Psychology, 2006 - Magna Cum Laude

Ethics: Getting a Fair High-Stakes Trial Amidst Corporate Villainization in the Media

Jessie Zeigler

Bass Berry & Sims (Nashville, TN)

How To Avert Media Narrative And Get A Fair High-Stakes Trial
Jessie Zeigler

Our court system is intended to be a place where justice is served. But as technology has expanded and with a 24-hour news cycle seemingly here to stay, it can be difficult for a corporate defendant to find justice in our courtrooms when its industry as a whole is portrayed as a villain in the media.

For example, regardless of whether the defendants in the infamous “Varsity Blues” college admissions bribery cases were guilty or not, their attorneys faced an uphill battle as the widely publicized scandal led to massive press coverage with negative sentiment toward their clients.

Another recent example of media influencing perception in big cases is the treatment of big banks during the recent economic crisis.

This is a conundrum all too familiar for businesses that find themselves portrayed as the bad guy in the media while dealing with legal challenges.

In all manners of bet-the-company litigation — whether it be mortgage, tobacco or pharmaceutical litigation, or any other high-stakes litigation involving a corporate defendant — in certain courtrooms across the country, a company may find itself defending not against the facts pertaining to it, but facts expounded in the media about the industry as a whole and the perception that any entity in that industry is a bad actor.

Beating the perceptions portrayed by the media in the courtroom is challenging at best.

In some courtrooms, every motion may go against the corporate defendant in high-stakes litigation, whether it be related to compelling discovery, scheduling a trial date or the application of law to bar claims from proceeding. There may be times when it seems there is no application of the law to the facts in a particular case.

When faced with a complete inability to obtain any favorable rulings in a high-stakes case, there are some tools in the trial toolbox that can be used to help build a more constructive defense and to try to change the dynamic.

Hire a Public Relations Professional

Messaging is critical during bet-the-company litigation.

It can be a daunting task to get a favorable message out, particularly when the industry as a whole is being villainized through an ambush of bad press. A public relations professional with specialized training in preparing a unified message and speaking with one voice during pending litigation can be an important part of the litigation team.

Certain factors must be considered, however, to work effectively with a media spokesperson.

Gag Orders - Before making any public statements, make sure a judge has not imposed a gag order to prohibit speaking to the press during a pending case.

Preserve Attorney-Client Privilege - Communications with third parties generally break the chain of attorney-client privilege. The laws are very specific to the jurisdiction where litigation is pending. In mass

litigation, consider the laws of each jurisdiction where cases will be heard to ensure that any information shared with a media spokesperson either maintains its privilege or is known to be nonprivileged.

If such communications are not privileged in the relevant jurisdiction, it is imperative that any information shared with a media spokesperson is carefully tailored to ensure that confidential information is not shared.

Work Within the Confines of the Ethics Rules - Some jurisdictions have ethics rules that prohibit a party from trying its case in the press. It seems unfair, given the barrage of anti-industry media that occurs when a company is in the midst of being villainized on a daily basis while cases are pending.

However, counsel and a party can be subject to sanctions, so the applicable ethics rules must be carefully reviewed and any public statements tailored accordingly.

For instance, the American Bar Association's Model Rules of Professional Conduct Rule 3.6(a) prohibits an attorney from making:

> an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[1]

There is a list of exceptions set forth in that rule, however, as well as a catchall exception in Rule 3.6(c) that provides:

> Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.[2]

The company's legal counsel should review the specific ethics rules in the jurisdiction where the case is pending when working with a spokesperson to address adverse publicity during the proceedings.

Lack of Subject Matter Jurisdiction

When it does not appear that the company can have a fair trial, research the possibility of arguments that the court lacks subject matter jurisdiction over the dispute.

When a court lacks subject matter jurisdiction, it has no "authority to adjudicate [the] dispute brought before it," as the Tennessee Court of Appeals held in its 2010 decision in Freeman v. CSX Transportation Inc.[3] Any "[J]udgments or orders entered by a court without subject matter jurisdiction are void and bind no one."[4]

Because "a lack of subject matter jurisdiction is so fundamental ... it requires dismissal whenever it is raised and demonstrated even if raised for the first time on appeal," the court held.[5]

Investigate a Change in Venue

When the plaintiff is trying its case in the local press, consider whether you can move for a change of venue under the applicable law of the jurisdiction where the case is pending.

For instance, the Tennessee Code provides that a party may apply for a change of venue for "good cause" by making:

> a statement of facts, in writing, under oath or affirmation, that the party verily believes that, owing to prejudice, or other causes then existing, the party cannot have a fair and impartial trial in the county, or before the general sessions judge, where the cause is pending, the truth of which statement shall, in a court of record, be verified and supported by the oath of at least three (3), and before a general sessions judge, of one (1) or more, respectable and disinterested persons.[6]

1 Mod. Rules Prof. Cond. 3.6(a).

2 Mod Rules Prof. Cond. 3.6(c).

3 Freeman v. CSX Transp., Inc ., 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010); See also Arbaugh v. Y&H Corp ., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."); Varian Med. Sys., Inc. v. Delfino , 106 P.3d 958, 969 (Cal. 2005) ("[I]the absence of subject matter jurisdiction, a trial court has no power," and "any udgment or order rendered by a court lacking subject matter jurisdiction is void on its face" (internal quotation and citation omitted)).

4 Freeman, 359 S.W.3d at 176 (internal citation and quotations marks omitted).

5 Id. (internal citation and quotation marks omitted).

6 Tenn. Code Ann. §§ 20-4-201, 20-4-203.

Unfortunately, changing venue may be in the discretion of the presiding judge in many jurisdictions.[7] You may find there is a strong precedent for moving a criminal trial in the face of adverse publicity, but a dearth of such cases for moving a civil case.

Given the high stakes of these cases, conduct thorough research to determine whether a motion to change venue is worth attempting.

Factors to consider include whether a change in venue also results in a change in the judge assignment and whether an interlocutory appeal of a denial of a change in venue is permitted.

When to Consider a Recusal Motion

Canon 1 of the Code of Conduct for United States Judges is titled, "A Judge Should Uphold the Integrity and Independence of the Judiciary." It states:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.[8]

Despite this first and foremost obligation of judges, a company may at times find itself in a forum where a judge repeatedly does not apply the clear mandates of a statute or binding judicial precedent.

The company may find that it can never get a favorable ruling, whether it is on a simple scheduling motion or a critical dispositive motion. And it may find that the judge continuously parrots what the plaintiff's counsel says in orders or in open court without ever swaying or even changing the language used, such that the plaintiff's submitted orders are those constantly adopted by the court.

This also brings to bear the second canon of judicial conduct, which is titled, "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities," and instructs judges to respect and comply with the law. It states that judges should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.[9]

The cons of a recusal motion are evident: A failed motion likely results in a judge even less happy with the company presiding over the remainder of the case.

But in circumstances where not much can get worse, it may be worth considering. A successful motion would hopefully land the company before an impartial judge who rules based upon the laws and facts before the court. And in some jurisdictions, filing the motion may stay the case while a denial goes up on appeal.

Create an Appellate Record

Unfortunately, in certain instances, relief from unfair or biased rulings can only be obtained from the appellate court.

It is therefore crucial to build a record that includes context for the judge's rulings, which can expose unfair proceedings. Throughout the pretrial and trial proceedings, consider filing the following:

- Transcripts of all hearings;
- Proposed orders submitted by both parties; and
- Motions to reconsider to allow the court another chance to follow the law and facts presented.

An appellate court can only review what is in the record, so make sure to file items you may later want considered that are not typically otherwise filed with a notice of filing.

In addition, it can be helpful to keep a running list of all discovery/pretrial issues, which should include a description of how they were ultimately resolved, as well as a list of any delays that occurred in pretrial proceedings, with an explanation for each.

These types of notes will be helpful in constructing an appellate argument, which may occur several months, or in some instances, years, after the trial.

7 See Tenn. Code Ann. 20-4-204.

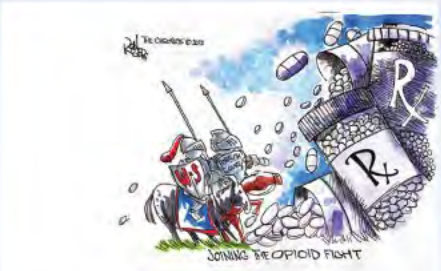
8 Code of Cond. for United States Judges, Canon 1.

9 Id. at Canon 2.

Conclusion

In zealously defending our clients in high-stakes litigation, it is critical to think strategically and consider all
options that may allow the client to change course to a fair trial, despite being villainized in the media.

Opioid Litigation Publicity/Trials



Editorial cartoon by Ron Rogers

BASS BERRY + SIMS

Varsity Blues Litigation

BASS BERRY + SIMS

Big Banks/Mortgage Litigation

BASS BERRY + SIMS

STEP 1: Hire a PR Professional

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ETHICS Considerations:

- Gag Orders
- Preserve Attorney-Client Privilege
- Ethics Rules of the Jurisdiction

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Professional Conduct

- Model Rules of Professional Conduct- Rule 3.6(a) - prohibits an attorney from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

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Exceptions:

- Catchall Exception in Rule 3.6(c):

  Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

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Lack of Subject Matter Jurisdiction

- Can ethically be raised at any time
- Consider arguments not previously raised
  - When a court lacks subject matter jurisdiction, it has no "authority to adjudicate [the] dispute brought before it," *Freeman v. CSX Transp., Inc.*, 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010); *See also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."); *Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 969 (Cal. 2005) ("[l]the absence of subject matter jurisdiction, a trial court has no power," and "any judgment or order rendered by a court lacking subject matter jurisdiction is void on its face" (internal quotation and citation omitted)).

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Lack of Subject Matter Jurisdiction

- Any "[j]udgments or orders entered by a court without subject matter jurisdiction are void and bind no one." *Freeman*, 359 S.W.3d at 176 (internal citation and quotations marks omitted). Because subject matter jurisdiction "is so fundamental," "it requires dismissal whenever it is raised and demonstrated even if raised for the first time on appeal."

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Change in Venue

- Look at law of the jurisdiction where case is pending
- Example: May apply for a change of venue for "good cause" by making "a statement of facts, in writing, under oath or affirmation, that the party verily believes that, owing to prejudice, or other causes then existing, the party cannot have a fair and impartial trial in the county, or before the general sessions judge, where the cause is pending, the truth of which statement shall, in a court of record, be verified and supported by the oath of at least three (3), and before a general sessions judge, of one (1) or more, respectable and disinterested persons." Tenn. Code Ann. §§ 20-4-201, 20-4-203.

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Change in Venue

- Changing venue may be in the discretion of the presiding judge in many jurisdictions. *See* Tenn. Code Ann. 20-4-204.
- Civil v. Criminal cases
- Other considerations:
  - Will a change in venue result in a change in the judge assignment
  - is an interlocutory appeal of a denial of a change in venue is permitted

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Recusal Motion

- Canon 1 of the Code of Conduct for United States Judges
- "A Judge Should Uphold the Integrity and Independence of the Judiciary"
- "An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

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Canon 2 of the Code of Judicial Conduct

- "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities"
- Instructs judges to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

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Pros and Cons of a Recusal Motion

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Creating an Appellate Record

- "***A trial court has no discretion in determining what the law is*** or in its application of the law to the facts. Therefore, a trial court abuses its discretion if it misapplies the law to the facts of the case before it." *See id.* at 727 (internal citation omitted) (emphasis added). *In re Paris Packaging, Inc.*, 136 S.W.3d 723, 727 (Tex. App. 2004).

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Duty to Zealously Advocate

- "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Model Rules of Professional Conduct, Preamble, Parag. 2

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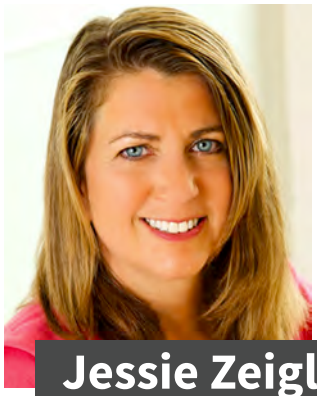

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Jessie Zeigler

Member | Bass BErry & Sims (Nashville, TN)

As both a seasoned litigator and crisis management strategist, Jessie Zeigler has represented clients in some of the nation's most high-profile cases over the last 25 years. From her defense of opioid cases, 2,500 Fen-Phen cases, and victories on behalf of automobile industry clients that saved hundreds of millions of dollars, Jessie has returned successful results 100% of the time in the cases she has handled.

Jessie recently served as local counsel in a precedent-setting opioid litigation and win at the Tennessee Supreme Court, defending an international pharmaceutical company in court rooms across Tennessee, Kentucky and Virginia in litigation that has made national headlines. She also argued the first ever Tennessee Supreme Court Zoom hearing (held during the pandemic) and, along with a joint defense group, won a huge victory for her product manufacturer client, and product manufacturers generally, in a ruling that held that a product manufacturer cannot be held liable in Tennessee for failing to warn about the risks of another product manufacturer's products. In addition, she successfully obtained summary judgment in nine consolidated cases on behalf of a tree company against allegations of negligence and nuisance in wildfire litigation in which the plaintiffs sought approximately $45 million in claims.

Related Services

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- Litigation & Dispute Resolution
- Environmental
- Utilities – Telecom, Energy & Water
- Life Sciences
- Digital Health
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- Benchmark Litigation — Local Litigation Star: Tennessee (2019-2021)
- Best Lawyers® — Nashville Litigation: Environmental "Lawyer of the Year" (2021)
- The Best Lawyers in America© — Environmental Law; Litigation: Environmental; Natural Resources Law (2007-2022)
- Nashville Business Journal — "Women of Influence, Trailblazer Category" (2015)
- Nashville Bar Association — President's Award (2014)
- Mid-South Super Lawyers (2009-2021)
- Top 50 Women Mid-South Super Lawyers (2011-2012, 2016, 2020-2021)
- Top 50 Nashville Super Lawyers (2021)
- Top 100 Tennessee Super Lawyers (2020-2021)
- Phi Beta Kappa

Education

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

Litigating Against a Moving Target: Challenges Posed by the Constantly Changing Positions of the NLRB

Vito Gagliardi
Porzio Bromberg & Newman (Morristown, NJ)

Litigating Against a Moving Target: Challenges Posed by the Constantly Changing Positions of the NLRB
Vito Gagliardi

For nearly 90 years, the National Labor Relations Board has been responsible for enforcing the National Labor Relations Act. As the party in control of the Executive Branch tends to control the NLRB, and without any applicable principle akin to stare decisis, the NLRB's interpretation of the NLRA can and does change nearly as frequently as the interior décor of The White House. Since the 2020 election marked the first time in four decades that control of the Executive Branch changed parties after only a single term, in-house counsel and employment and labor law practitioners should pay close attention to shifts in the landscape of NLRB decisions in order to ensure that employment and labor policies and practices remain NLRA-compliant.

Management-side attorneys should resist the temptation to assume that the NLRB's jurisprudence applies only to unionized workforces. Although this is a common misconception, Section 7 of the NLRA applies widely to nearly all private sector employers[1] and protects the rights of nearly all private sector employees to engage not only in traditional union-related activities such as organizing and collective bargaining, but in "other concerted activities for the purpose of . . . mutual aid or protection."[2] Concerted activity can include discussions among non-union employees about terms and conditions of the work environment such as wages and safety issues,[3] and can be protected in various forms, including social media posts and reactions or comments to social media posts.[4]

In the past five years, the NLRB has revisited decisions on its interpretation of concerted activity as well as its standards governing whether an employer's policies or employment actions restrict impermissibly such protected activity, and to what extent an employer must permit its employees to use company resources to engage in protected activity. In addition, the NLRB has reversed itself concerning more traditional labor issues such as access by non-employee union representatives to an employer's premises, and whether an employer is required to provide notice and an opportunity to bargain prior to disciplining union employees. Summaries of recent shifts in the NLRB's position and the current state of the law follow.

The Extent of an Employer's Obligation to Permit Employees to Use Its Resources to Engage in Concerted Activity

In 2007, with the ubiquity of electronic communications on the rise in workplaces, a Republican-controlled Board reviewed the issue of whether prohibiting employees from using their employer's e-mail system for any non-job-related solicitation violated the NLRA's mandate to refrain from interfering with concerted activity.[5] In The Guard Publishing Company D/B/A The Register-Guard and Eugene Newspaper Guild, the employer had disciplined an employee for using its e-mail system to send three union-related e-mails. The Board's majority held that the NLRA does not confer on employees a right to use employer equipment for purposes protected by Section 7. However, in 2014, in the matter of Purple

1 29 U.S.C. § 152(2).

2 29 U.S.C. § 157.

3 See e.g, MCPC, Inc. v. N.L.R.B., 813 F.3d 475, 483-484 (3d Cir. 2016).

4 Butler Medical Transport, LLC and Michael Rice and William Lewis Norvell, 365 N.L.R.B. No. 112 (July 27, 2017).

5 The Guard Publishing Company D/B/A The Register-Guard And Eugene Newspaper Guild, CWA Local 37194, 351 N.L.R.B. No. 70 (December 16, 2007).

Communications, Inc., a Democrat-controlled Board reversed Guard Publishing, finding a presumption "that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."[6] The Board intended for this presumption to be rebuttable only by a showing that that "special circumstances necessary to maintain production or discipline justify restricting its employees' rights."[7] While the Board recognized that circumstances supporting a total ban would be rare, it anticipated that employers applying "uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline" would comply with Section 7.

Notwithstanding, in 2019, after control of the Board returned to the Republican Party, the NLRB reversed itself once again in the matter of Caesars Entertainment, holding that "employers generally have the right to impose nondiscriminatory restrictions (including outright bans) on the use of employer-owned IT systems for nonwork purposes," and essentially reinstating the Register Guard decision.[8] The Board in Caesars articulated that Supreme Court precedent on the issue of employee access to the workplace for Section 7 activity focused on ensuring "adequate" avenues of communication for employees and ensuring that employers do not create an "unreasonable impediment to self-organizing" and that a ban on email use for non-business purposes would comport with the spirit of that precedent provided employees have other reasonable ways to communicate with one another.[9]

Although the NLRB has not revisited this issue since Democrats resumed control in September 2021, it may be subject to change under the new regime. For the time being, however, even the broadest restrictions on email use will remain compliant with Section 7, provided they are not applied in a manner that targets protected activity.[10]

6 Purple Communications, Inc., 361 N.L.R.B. 1050, 1063 (December 11, 2014).

7 Id.

8 Caesars Entertainment, 368 N.L.R.B. No. 143 (December 16, 2019).

9 Id. (citing Republic Aviation v. N.L.R.B., 324 U.S. 793, 802 (1945)).

10 See Communications Workers of America, AFL-CIO v. National Labor Relations Board, 6 F.4th 15, 25 (D.C. Cir. 2021) (holding that while a facially neutral restriction on email use is presumptively permissible, an employer's decision to discipline an employee for sending NLRA-protected e-mails was not a neutral application of such a restriction).

The Extent of an Employer's Obligation to Provide Notice and an Opportunity to Bargain Prior to Disciplining a Bargaining Unit Employee

In the traditional labor context, in the matter of Total Security Management, a Democrat-controlled NLRB held in 2016 that discretionary discipline is a mandatory subject of collective bargaining.[11] Accordingly, the Board found that, once employees had voted to be represented by a union, but before the employer and union had entered into a complete collective-bargaining agreement or other agreement governing discipline, the employer was obligated to provide notice to the union and an opportunity to bargain before discharging three of its employees.

Four years later, in 800 River Road Operating Company, a Board appointed by President Trump reversed this decision, lamenting that Total Security Management created a new rule that was contrary to 80 years of precedent.[12] It therefore again is the rule that commencement of a collective bargaining relationship does not trigger a duty on the part of the employer to provide the union notice and an opportunity to bargain. In 800 River Road Operating Company, the NLRB applied this rule to hold that the employer did not violate the NLRA in suspending three employees and discharging a fourth employee during collective bargaining negotiations without providing such notice and opportunity. Notwithstanding, if the Biden Administration's NLRB has the opportunity to rule on this issue, a reinstatement of Total Security Management may be on the horizon.

The Extent of an Employer's Obligation to Permit Non-Employee Union Agents Access to the Employer's Premises

President Trump's Board also overruled a Clinton-era decision on the issue of whether an employer is obligated to permit non-employee union representatives to access its premises to protest in favor of the union. In the 1999 matter of Sandusky Mall Company, non-employee union representatives had sought and were denied access to a shopping mall for the purpose of distributing handbills urging consumers not to patronize a

11 Total Security Management, 364 N.L.R.B. No. 106 (August 26, 2016).

12 800 River Road Operating Company, 369 N.L.R.B. No. 109 (June 23, 2020).

particular store because the store was employing non-union labor for a remodeling job.[13] The Board held that the denial of access violated the NLRA by discriminating against the union, as it had permitted non-employees to access the premises "for other commercial, civic, and charitable purposes."[14] The Sixth Circuit reversed the Sandusky Mall Company decision in 2001,[15] but the NLRB did not revisit it until 2019, in the matter of Kroger Limited Partnership, where the Republican-controlled Board held that an employer is not required to permit non-employee union representatives to access its premises for protest-related purposes if it does not allow other organizations access for protest purposes, even if it does allow non-employees access for various reasons not related to protesting.[16] This decision may be worth watching as President Biden's appointees begin to assert themselves.

The Test for Evaluating Whether an Employer Policy Unlawfully Restricts Section 7 Rights

The test for unlawful restriction of Section 7 rights, which arguably is one of the most impactful issues the NLRB has decided, is somewhat peculiar in its jurisprudence, as its most recent articulation results from a Trump-era Board's reversal of a George W. Bush-era Board. In 2004, in the matter of Martin Luther Memorial Home, the Board held that an employer policy that does not expressly restrict Section 7 activity may be unlawful nonetheless if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[17] In that case, the Board upheld rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" as complying with the NLRA, but found that rules prohibiting solicitation, loitering, and unlawful strikes, work stoppages, or other interference were unlawful.[18]

In 2017, however, another Republican-controlled Board overruled the "reasonably construe" standard. In Boeing Company, the NLRB evaluated whether a policy restricting the use of camera-enabled devices such as cell phones on company property unlawfully restricted Section 7 rights. The Administrative Law Judge had found that the policy violated the NLRA because a reasonable employee could construe the policy to violate Section 7 rights, but the NLRB reversed the ALJ, adopting a new test setting forth that if a policy is not explicitly unlawful, the Board will evaluate "(1) the rule's potential impact on protected concerted activity; and (2) the employer's legitimate business justifications for maintaining the rule."[19] Tribunals applying the Boeing rule essentially would engage in a balancing test to evaluate whether and to what extent a rule's potential unlawful impact outweighed its justifications, and also would consider whether the employer had applied the rule to restrict Section 7 rights, leaving intact the "applied to restrict" factor of the Martin Luther test.[20]

Then, in 2021, as the Board remained in Republican control but anticipated its imminent return to control by Democrats, the NLRB revisited its own precedent to further narrow the rule, divesting the "applied to restrict test" from the inquiry as to lawfulness of a rule itself, and thereby overruling what remained of Martin Luther.[21] In AT&T Mobility, the NLRB upheld a rule prohibiting employees from recording in accordance with Boeing, but determined that the employer had applied the rule to restrict union activity in violation of the NLRA when it prohibited an employee from recording what clearly was protected Section 7 activity.[22] Instead of striking down the rule for failing the "applied to restrict" test, the Board held that whether a rule had been applied to restrict Section 7 rights no longer was part of the test, and instead was a violation to be evaluated and addressed separately.[23] While this is less an example of the rule of law changing at the whims of which party is in office, and more an example of increasingly conservative Boards overruling themselves in order to narrow the application of Section 7 over time, it serves as a prime example of the sensitivity of NLRB jurisprudence to the political

13 Sandusky Mall Co., 329 N.L.R.B. No. 62 (September 30, 1999).

14 Id.

15 Sandusky Mall Co. v. N.L.R.B., 242 F.3d 682 (6th Cir. 2001).

16 Kroger Limited Partnership I Mid-Atlantic, 368 N.L.R.B. No. 64 (September 6, 2019).

17 Martin Luther Memorial Home, 343 N.L.R.B. No. 75 (November 19, 2004).

18 Id.

19 The Boeing Company, 365 N.L.R.B. No. 154 (December 14, 2017).

20 Id. at *5.

21 AT&T Mobility, LLC, 370 N.L.R.B. No. 121 (May 3, 2021).

22 Id.

23 Id.

landscape. It also can be expected that President Biden's NLRB, which was restored to control of Democrats four months after AT&T Mobility, will add its touch to this test before the end of his term.

Expanded Remedies and Penalties on the Horizon

While the NLRB presently does not set forth a private right of action, it can and does award remedial relief to successful claimants. This remedial relief can include reinstatement, backpay, or the order of an informational remedy such as the posting of a notice. Claimants who are pursuing charges under the NLRA also may seek temporary injunctive relief from the appropriate U.S. District Court during the pendency of an NLRA action.

Perhaps predictably, however, the newly Democrat-controlled NLRB has invited party briefs and amici on the issue of whether traditional NLRA remedies should be expanded to include "consequential damages" for employees aggrieved by an unfair labor practice.[24] These briefs were due on January 10, 2022, and responsive briefs were due on January 25, 2022.[25] Beyond pending decision, Congress would have to act in order to impose civil penalties, and an opportunity to do so is imminent. The version of the Build Back Better Act that passed the House in November 2021 would add civil penalties of $50,000 per unfair labor practice violation, and penalties as high as $100,000 for employer violations that cause serious economic harm to an employee where the employer has a history of similar violations.[26]

It remains to be seen whether the NLRB will expand the NLRA's traditional remedies or whether, and to what extent, civil penalties will be part of the version of Build Back Better that may or may not become law, but these possibilities serve as yet another reason for all employment and labor lawyers to pay close attention.

Moving Forward

At this point, the NLRB has been back in Democratic control for less than a year, so the only safe prediction is that more changes are coming. If one wanted to get a sense of what they might be, the best prediction is what the decisions looked like during the last time the NLRB was controlled by a Democratic majority. Given how quickly this jurisprudence can evolve, attorneys who handle labor and employment matters need to be certain that what they knew only yesterday is the same today or likely to change tomorrow.

24 Thryv, Inc., 371 N.L.R.B. No. 37 (2021).

25 The NLRB Extends Time For Filing Briefs Regarding Consequential Damages Remedy For Employees In Thryv, Inc., 2021 WL 5918610 (December 15, 2021).

26 Build Back Better Act, H.R. 5376, 117th Cong. (2021).

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Litigating Against a Moving Target: Challenges Posed by the Constantly Changing Positions of the NLRB

Vito A. Gagliardi, Jr.
Principal

Section 7 of the NLRA:

Applies to nearly <u>all</u> private sector employees and protects the rights of their employees to:

- Engage in traditional organizing and collective bargaining
- Engage in "other concerted activities for the purpose of ... mutual aid or protection"

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Concerted Activity

- Can include discussions – including through social media – among employees about terms and conditions of the work environment (e.g., wages and safety issues)

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Gerald Ford

Jimmy Carter

Ronald Reagan

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Barack Obama

Donald Trump

Joe Biden

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Purple Communications (2014)

- Product established "that employees … have a right to use the email system to engage in Section 7 protected communications"
- Presumption can only be rebutted by "special circumstances"

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Caesars Entertainment (2019)

- Holding that "employers generally have the right to impose nondiscriminatory restrictions (including outright bans) on the use of employee-owned IT systems" for concerted activity
- Presumed that employees have other reasonable ways to communicate

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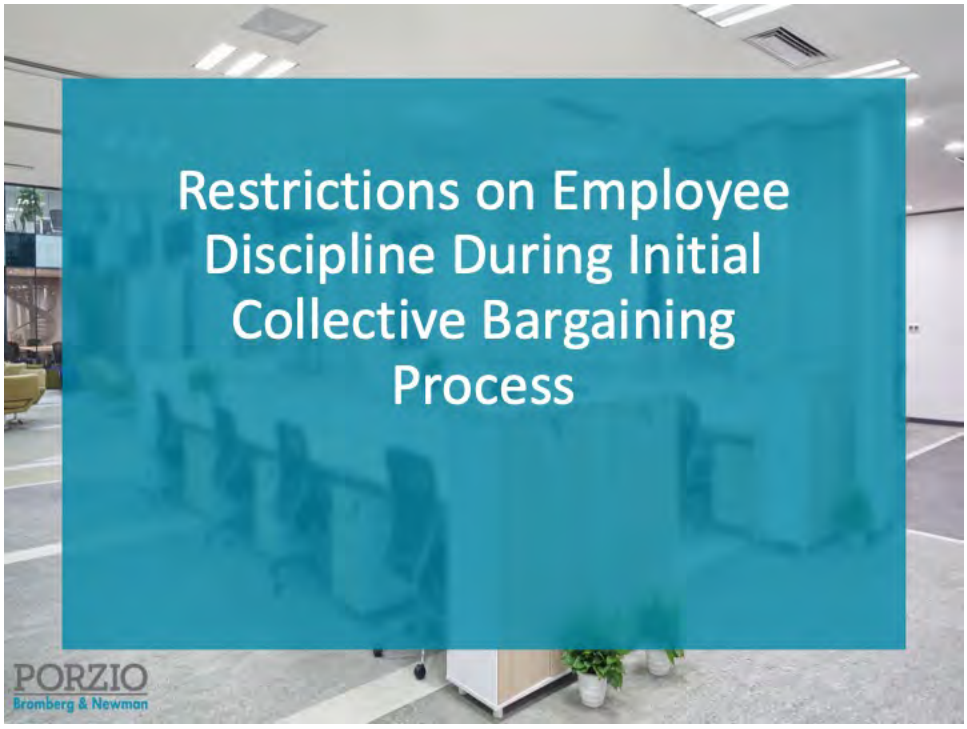

- Once employees vote to be represented by a union, even before a CBA is negotiated, employer is obligated to provide notice and opportunity to be heard to union before employees are disciplined / discharged

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- The commencement of collective bargaining does NOT trigger a duty to provide the union notice and an opportunity to bargain over proposed discipline

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- Issue of access had been clear, but not so in terms of attending protest

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Sandusky Mall Company (1999)

- Denial of access to non-employee union representatives to distribute handbills to customers violated the NLRA
- Deemed as discrimination against union
- Mall had permitted non-employees access "for other commercial, civic, and charitable purposes"

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- Access for non-employee union representatives NOT required for protest-related purposes unless other organizations are allowed access for protest-related purposes

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- Arguably one of the most impactful issues NLRB decides

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Martin Luther Memorial Home (2004)

An employee policy that does not expressly restrict Section 7 activity nonetheless may be unlawful if....

"(1) the employees would reasonably construe the language to prohibit Section 7 activity;
(2) the rule was promulgated in response to union activity; or
(3) the rule has been implied to restrict the exercise of Section 7 rights."

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In short, NLRB found...

LAWFUL	UNLAWFUL
Rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse"	Rules prohibiting solicitation, loitering, unlawful strikes, work stoppages

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Boeing Company (2017)

NLRB upheld a policy restricting the use of camera-enabled devices such as cell phones on company property

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NLRB upheld a policy restricting the use of camera-enabled devices such as cell phones on company property

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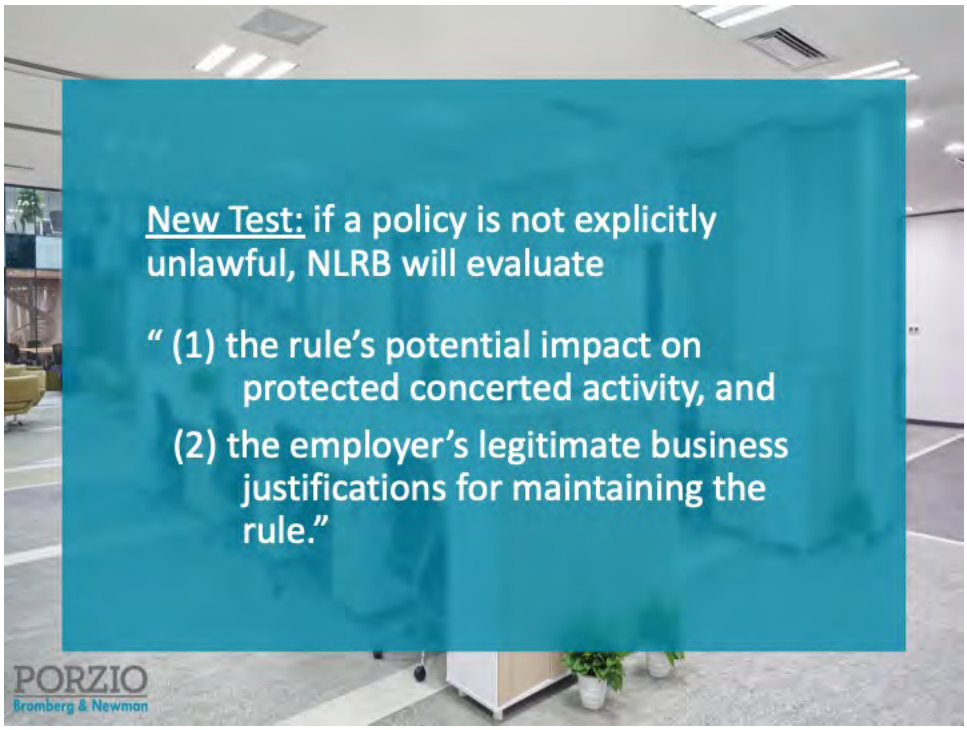

- Essentially now a balancing test (restrictions on lawful activity v. justifications)
- And whether actually "applied to restrict" Section 7 rights (although this aspect was stripped away from analysis of the role in 2021 as this Board majority was coming to an end)

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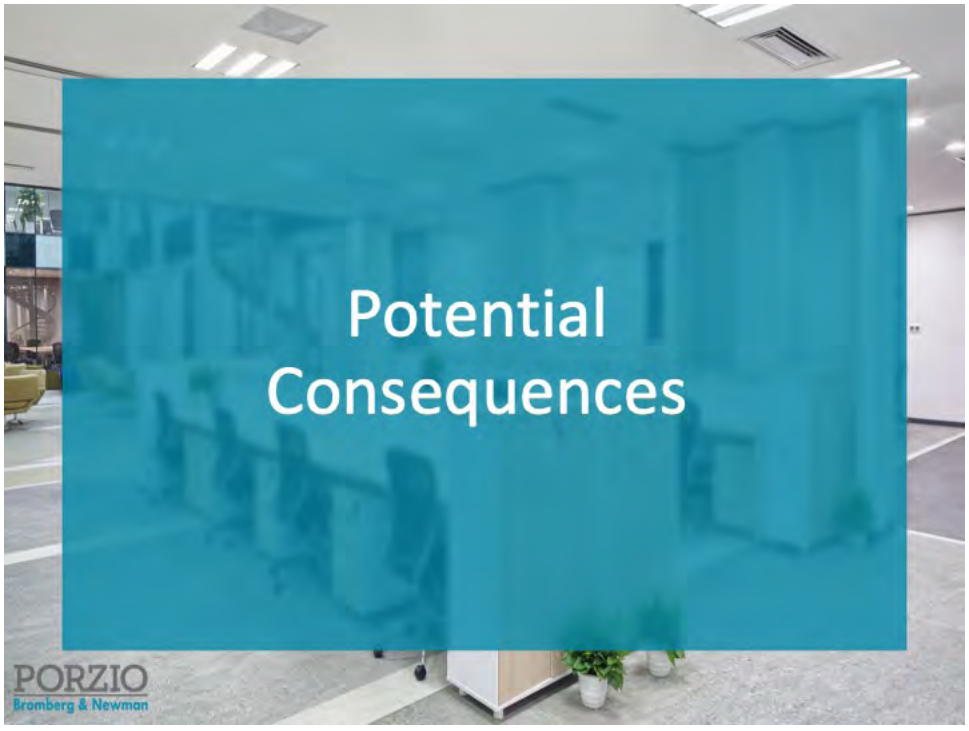

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Principal | Porzio Bromberg & Newman (Morristown, NJ)

Vito A. Gagliardi, Jr. is Managing Principal of Porzio, Bromberg & Newman. In this capacity, he serves as President and CEO of the firm's subsidiaries, Porzio Life Sciences, Porzio Governmental Affairs and Porzio Compliance Services. He also co-chairs the firm's Litigation Practice Group and the Education and Employment Team.

Vito represents schools in numerous matters and handles an extraordinary variety of employment law matters for public and private sector clients in state and federal courts and agencies, and before arbitrators. Vito litigates and counsels clients in every area of labor and employment law, including issues of restrictive covenants, harassment, discrimination and whistleblowing. He represents management in labor grievances and before PERC. Vito regularly guides clients through reductions in force and on employment issues related to restructuring and consolidation. He also handles investigations by management into allegations of employee wrongdoing.

Practice Areas
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- Employment and Labor
- Litigation

Areas of Focus
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- Discrimination, Harassment and Retaliation
- Employment Counseling
- HR Training & Policy Development
- Reductions in Force
- Restrictive Covenants
- Wage and Hour

Industries
- Education
- Life Sciences

Recognitions
- Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
- Recognized in Chambers USA—America's Leading Lawyers for Labor & Employment (2017-2021).
- Recognized on the New Jersey Super Lawyers List, Employment and Labor (2005 - 2021).
- Recognized in Best Lawyers in America, Education Law (2012 - 2022), Corporate Law (2013), Litigation - Labor & Employment (2013 - 2022).
- Recipient, 2016 Chief George C. Tenney Award, New Jersey State Association of Chiefs of Police.
- Recipient, 2011 President's Award, New Jersey State Association of Chiefs of Police

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- Washington and Lee University School of Law - J.D., 1989; cum laude
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Presidents, Judges, and Police: Lessons from Unconventional Advocacy

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Presidents, Judges, and Police: Lessons from Unconventional Advocacy
Jack Sharman

Conventional advocacy—at least, its traditional model—is binary. There are two poles— plaintiff versus civil defendant, state versus criminal defendant, even regulator versus regulated. There may be additional role-players such as victims, witnesses, or experts, but such persons are usually instruments of one side or the other rather than independent values. The dispute plays out in one forum (a courtroom, for example, or a hearing room) and there is only one memorialization of the proceedings (such as by a court reporter). There is a set of rules that applies to everyone, and everyone is reasonably aware of and familiar with those rules. There are signposts to identify winners and losers (including dismissals, declinations, dispositive motions, and jury verdicts).

Few of those principles apply to unconventional advocacy. There is a constellation of parties, if the participants can be accurately called "parties." Unconventional advocates have to work in multiple fora. External commentators—bloggers and Tik Tokkers— can be far more powerful than any traditional court reporter or appellate opinion-writer. There may be unconventional rules; obscure rules; one-sided rules; or no rules at all. In unconventional advocacy, there are multiple poles. For unconventional advocacy, a critical pole is the commonweal, the question of what is the public good. A person's hidden and unarticulated conception of the commonweal cuts across partisan, regional, income, and racial lines.

This paper addresses key components of unconventional advocacy, beginning with an important aspect of the commonweal: the nature of power.

Power Is Blurred

Lord Acton (1834-1902), the English historian, famously said that "power tends to corrupt, and absolute power corrupts absolutely." The ancients were equally suspicious: as Augustine noted, "[j]ustice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms."[1] The academic inventor of the concept of "white-collar crime" based his definition on the use of power through position: to him, "white collar crime" was committed by a group "composed of respectable or at least respected business and professional men."[2] Professor Sutherland's observations from eighty years ago sound prescient: the wrongdoing of "present-day white-collar criminals" shows up in "investigations of land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiverships, bankruptcies, and politics."[3]

Further, the definitional lines between policy conflicts, ethical transgressions, and criminal acts have become blurred over time for many reasons, including Congress's habit of criminalizing unpopular behavior; prosecutors' creativity; and instantaneous access to fragmented information through the Internet generally and social media in particular. This "blurring" is a fundamental aspect of unconventional advocacy.

1 Augustine, The City of God.

2 Edwin Sutherland, "White-Collar Criminality," American Sociological Review 5:1–12 (February 1940).

3 Id. at 2.

Finally, assumptions or beliefs about misuse of power with regard to race—for example, with regard to police brutality—may be consistent with popular assumptions or beliefs about the misuse of power generally. In unconventional advocacy, early and clear acknowledgment of the issues of race and power may go some ways towards blunting their less helpful effects.

Who Is the Client?

Who is the client? That old law school chestnut is as important in unconventional advocacy as it is in conventional. That is the first question we need to answer. Who is my client? A citizen-police review board? The officeholder? Her office? The judicial-conduct commission? Or the commissioners themselves? The answers to these questions will determine a great deal of how we move forward and how we generate a final product.

Manage the Narrative

Trial lawyers know that story is important. In unconventional advocacy, it is even more important to get ahead of the narrative because there will be an external, public narrative as well as an internal, private narrative. We need to be able to influence both of those narratives. How might we do that?

Answers will vary, but two things are critical in unconventional advocacy. First, the story must be simple, straightforward, and of unquestioned integrity. Second, source materials should be readily available to the public in general and the media in particular so that those people would find us a credible party.

One way to accomplish this goal is to create a webpage—for example, as my Lightfoot colleagues and I did in the Huntsville police investigation. This page was an enormous success and potentially determinative of the outcome.

A Sidebar on Congressional Tools

The January 6th Committee is conducting a congressional investigation into the insurrection at the Capitol. Congressional investigations are peculiar creatures, both substantively and procedurally—part law, part political theater, part constitutional struggle. Because most people are familiar with congressional investigations only through television, they assume that if they are caught up in an investigation they will be summoned to testify before a committee as was John Dean (during Watergate) or Oliver North (during Iran/Contra), with cameras clicking amid vigorous partisan drama.

Although a client may indeed be called to testify in a public hearing—and one should prepare as though the client will be called—it is more likely that constraints of time, the demands of the media, and political pressure and compromise having little to do with your client will result in your client never being called. If your client testifies, remember that in many instances the committee members' "questions" are not actually designed to elicit information from the witness. Rather, questioning is often more like speech- making designed to maximize camera time on the questioner or to score political points against the opposition.

On the other hand, a seemingly anodyne tool—staff depositions—has received new life and could make congressional investigations faster, more penetrating, and more dangerous.

The centerpiece of a congressional investigation is that of the public committee hearing. Witnesses are called before the assembled committee Members in open session. The witnesses give a statement, normally written out and provided to the committee and the public in advance. Members of the committee make statements and ask the witnesses questions within their allotted time, questions usually designed to showcase the Member rather than elicit substantive testimony from the witness. At the conclusion of such hearings, a congressional committee has a range of options: do nothing, produce a report, propose legislation and, in rare instances, take affirmative action against witnesses (such as contempt proceedings or criminal referrals). The arc of a committee hearing and its aftermath is public.

As with a trial or any proceeding that is both adversarial and fact-finding, however, most of the

real work is done in private and before the event. One tool for getting that work done is the congressional staff deposition. Why is that important, and what has changed to make it potentially more important for witnesses, businesses and public officials?

As an initial matter, there is nothing novel about Congress's broad power to investigate, including the use of staff and compulsory subpoena power for oversight and investigation purposes.[4]

Staff depositions are nothing new. They have been used at least since 1980, in the investigation of the relationship between Libya and Billy Carter, the brother of President Jimmy Carter. Staff depositions were also taken in the various investigations into the Iran/Contra affair involving President Ronald Reagan; the impeachment and Senate trial of President Bill Clinton; the Whitewater investigation involving President Clinton; the investigation of the Clinton White House travel office; and matters of discipline of Members. As of this writing, the January 6 Committee is conducting staff depositions and transcribed interviews.[5]

Previously, with some exceptions, congressional rules have generally provided that depositions must be conducted by a Member or, if conducted by staff (for example, by committee counsel), with at least a Member present. In theory, because a deposition would be in aid of a committee hearing, or even as a substitute or placeholder for a committee hearing, it was only appropriate that a Member actually be present, even if he or she did little to contribute to the examination of witnesses.

From a congressional investigator's point of view, this "Member-present" rule is cumbersome and benefits witnesses, not the investigation. The best-defended deposition is one that never takes place. Scheduling a deposition around the schedules of Members means that delay—perhaps beyond the end of the session—is likely, if not inevitable. Further, many Members are not lawyers; fewer find it a profitable political investment to spend hours or days in preparation for a witness examination; and even fewer ask questions that are incisive, on point, and difficult to evade. Finally, because there is virtually no political value for a Member to sit in a conference room while a staffer asks questions for much of the day, it can be challenging for staff to timely find a Member willing to serve in that role. Combined with normal scheduling difficulties among witness counsel, witnesses, and staff counsel, depositions in the former Member-present regime can be difficult to set and to complete in a timeframe politically useful for the committee.

That landscape and timeframe changes, if staff counsel is vested with authority to notice, set and conduct depositions free from the burden of a Member's calendar.

As Special Counsel to the House Financial Services Committee for the Whitewater investigation of President and Mrs. Clinton, I and my committee staff used staff depositions to great advantage. In addition to the normal pressures that a looming deposition can place upon a witness, political and public relations pressure played a role as well. If a witness balked at submitting to the deposition and attempted to force us to bring the matter to the committee's attention (in a contempt citation hearing or otherwise), we told the witness (or his or her lawyer) that we would do no such thing—but that we would tell the Washington Post and New York Times that the witness was refusing to answer questions, and they would be perfectly free to discuss their recalcitrance with the media. There was much grumbling; ultimately, no witness whose deposition we noticed refused to submit.

Deposition transcripts are also useful in preparation for committee hearings and the hearings themselves. For the Whitewater hearings in August 1995, for example, we assigned to Members a lead position on each witness. As part of their preparation to examine witnesses, we provided each Member with excerpts of the testimony and deposition of his or her respective witnesses. Staff lawyers, of course,

4 "A legislative body cannot legislative wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. [T]he constitutional provisions which commit the legislative function to the two house s are intended to include this attribute to the end that the function may be effectively exercised." McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

5 See Jay R. Shampansky, Staff Depositions in Congressional Investigations, CRS Report for Congress (Dec. 3, 1999) at 1 n.2 ("In the congressional sphere, depositions are utilized not only in congressional investigations conducted in furtherance of Congress' legislative and oversight functions, but also in quasi-judicial proceedings in which the Senate and House perform their constitutional responsibilities with regard to seating and disciplining Senators and Representatives and with regard to impeaching officials of the executive and judicial branches.")

had readily at hand the full, indexed transcripts and could assist Members in real time if witnesses' testimony at the hearing deviated from their sworn deposition testimony.

Congressional hearings are about the Members, not the witnesses. Expanding the role of staff in prehearing testimony does not change that fundamental political fact. Nevertheless, staff depositions are a powerful, incisive instrument for congressional oversight investigators intent on bringing maximum pressure to bear on witnesses and their organizations.

Parallel Proceedings

Unconventional advocacy will inevitably pose the problem of parallel proceedings— congressional, criminal, civil, regulatory, electoral. What are some points to keep in mind as these trains move down their parallel tracks?

The Grand Jury Is Grand. The criminal investigators will largely call the shots. How so? There are two reasons.

Telling Tales. The first reason is one common to all federal criminal investigations: no prosecutor wants his or her witnesses making statements, especially public statements under oath. Sworn statements lock the witness into a story and can be used by defense counsel for cross examination in a potential criminal trial.

Federal Knights Who Say "Ni!" The second reason is that, much like the terrifying "Knights Who Say 'Ni!'" in the 1975 film Monty Python and The Holy Grail who look down upon the coconut-slapping Knights of the Round Table, federal prosecutors do not usually hold congressional investigators in high esteem although they convey that view with varying degrees of politeness. (Of course, I have expressed a differing view, sometimes with varying degrees of politeness). I learned this lesson both from my Whitewater time as Special Counsel to the House Financial Services Committee for the investigation of President and Mrs. Clinton's dealings with Madison Guaranty and also from the impeachment investigation of Alabama Governor Robert Bentley.

This clash between prosecutors and congressional investigators should not be too surprising. Congressional investigations and grand jury investigations serve different institutional and constitutional mandates. From time to time, there will be some tension.

Immunity? Congress can cause problems for a criminal investigation by granting witnesses immunity in exchange for their testimony. As noted by Philip Shenon in Politico, after the Iran-Contra prosecutions of Colonel North and Admiral Poindexter, that is unlikely to happen:

> The special prosecutor was convinced that Congress was on the verge of sabotaging his politically charged investigation—one that led straight into the White House and threatened to end with a president's impeachment. And so he went to lawmakers on Capitol Hill with a plea: Do not grant immunity to witnesses in exchange for their testimony if you ever want anyone brought to justice
>
> .
>
> But the plea failed. And the special prosecutor, Lawrence Walsh, a former federal judge appointed in 1986 to investigate the Iran-contra affair during the Reagan administration, watched two of his highest-profile targets go free: former National Security Adviser John M. Poindexter and Poindexter's deputy, Lieutenant Colonel Oliver North. Although both former Ronald Reagan aides were later convicted at trial of multiple felonies, the convictions were overturned, with appeals courts deeming the prosecutions tainted as a result of the testimony the men had given to Congress with grants of supposedly limited immunity.

As a reminder: a grant of congressional immunity raises a potential "Kastigar" problem for a criminal prosecutor. As the United States Court of Appeals for the District of Columbia Circuit said in United States v. North:

> Because the privilege against self-incrimination "reflects many of our fundamental values and most noble aspirations," Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S. Ct. 1594, 1596, 12 L. Ed. 2d 678 (1964), and because it is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460, 86 S. Ct. 1602, 1620, 16 L. Ed. 2d

694 (1966).

The prohibition against compelled testimony is not absolute, however. Under the rule of Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), a grant of use immunity under 18 U.S.C. § 60021 enables the government to compel a witness's self-incriminating testimony. This is so because the statute prohibits the government both from using the immunized testimony itself and also from using any evidence derived directly or indirectly therefrom. Stated conversely, use immunity conferred under the statute is "coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege…. [Use immunity] prohibits the prosecutorial authorities from using the compelled testimony in any respect…." Kastigar, 406 U.S. at 453, 92 S. Ct. at 1661 (emphasis in original). See also Braswell v. United States, 487 U.S. 99, 108 S. Ct. 2284, 2295, 101 L. Ed. 2d 98 (1988) ("Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively.").

When the government proceeds to prosecute a previously immunized witness, it has "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Kastigar, 406 U.S. at 461-62, 92 S. Ct. at 1665. The Court characterized the government's affirmative burden as "heavy." Most courts following Kastigar have imposed a "preponderance of the evidence" evidentiary burden on the government. See White Collar Crime: Fifth Survey of Law-Immunity, 26 Am.Crim.L.Rev. 1169, 1179 & n. 62 (1989) (hereafter "Immunity"). The Court analogized the statutory restrictions on use immunity to restrictions on the use of coerced confessions, which are inadmissible as evidence but which do not prohibit prosecution. Kastigar, 406 U.S. at 461, 92 S. Ct. at 1665. The Court pointed out, however, that the "use immunity" defendant may "be in a stronger position at trial" than the "coerced confession" defendant because of the different allocations of burden of proof. Id.

The North opinion has been criticized as a "three-decade old precedent from a split panel [that] rested on a mushy determination that North's congressional testimony 'tainted' the criminal prosecution." As Judge David Sentelle's judicial clerk at the time, I reiterate the court's observation:

> The fact that a sizable number of grand jury witnesses, trial witnesses, and their aides apparently immersed themselves in North's immunized testimony leads us to doubt whether what is in question here is simply "stimulation" of memory by "a bit" of compelled testimony. Whether the government's use of compelled testimony occurs in the natural course of events or results from an unprecedented aberration is irrelevant to a citizen's Fifth Amendment right. Kastigar does not prohibit simply "a whole lot of use," or "excessive use," or "primary use" of compelled testimony. It prohibits "any use," direct or indirect. From a prosecutor's standpoint, an unhappy byproduct of the Fifth Amendment is that Kastigar may very well require a trial within a trial (or a trial before, during, or after the trial) if such a proceeding is necessary for the court to determine whether or not the government has in any fashion used compelled testimony to indict or convict a defendant.
>
> We readily understand how court and counsel might sigh prior to such an undertaking. Such a Kastigar proceeding could consume substantial amounts of time, personnel, and money, only to lead to the conclusion that a defendant– perhaps a guilty defendant–cannot be prosecuted. Yet the very purpose of the Fifth Amendment under these circumstances is to prevent the prosecutor from transmogrifying into the inquisitor, complete with that officer's most pernicious tool–the power of the state to force a person to incriminate himself. As between the clear constitutional command and the convenience of the government, our duty is to enforce the former and discount the latter.

Constitutional Theater. Congressional investigations, in part, are political theater. That is okay. The fact that there appear to be no rules in a congressional investigation underscores perhaps the primary fact that counsel should bear in mind: the committee's investigation takes place in a political environment, not a litigation environment. Although the investigatory process appears legalistic, it always unfolds in a political environment in which the actors have political goals that may or may not have anything to do with your client. When a congressional committee issues a subpoena, for example, it may (and will) do so with the knowledge and expectation that the recipient may not make even a good-faith attempt at compliance.

Police Department Investigations

Public trust is critical if law-enforcement agencies are to successfully perform their vital work and to honor their duty to serve and protect the public. Policing can be dangerous, life- threatening work, and officers are given extraordinary powers—to carry a firearm, to detain and arrest citizens, and to use force where necessary to protect their own lives or the lives of others (or, where appropriate, to prevent unlawful destruction of property). Further, citizens make amazing demands on the police. Law-enforcement officers respond to every species of emergency; they see some of the most awful things that humans do to one another; they protect the weak, the vulnerable, and the abused; they investigate crime; and, with a few exceptions, they do their best to get justice for victims (or their families) and, at the end of the day, to uphold the rule of law.

On the other hand, citizens require (and deserve) the fundamentals: that the police discharge their duties without fear, favor, or bias; that they discipline their members who fail to do so; and that they be held publicly (and sometimes uncomfortably) accountable. Law- enforcement responses to hot-button issues and civil unrest are always under scrutiny and likely always will be. Where the civil unrest focuses not on an external issue such as abortion or immigration but on police conduct itself, the value of public trust (or the danger of its absence) appears in bright relief.

In Huntsville, Alabama, the George Floyd protests were relatively peaceful—especially compared to violent instances nationwide—and many (although not all) of the Huntsville Police Department's actions were appropriate. Nevertheless, the protests also triggered confrontations between HPD and protesters, resulting in claims that officers had used inappropriate tactics and unlawful force against Huntsville citizens who were exercising their First Amendment rights.

Under these circumstances, the principles of unconventional advocacy set out above—especially consciousness of the commonweal—are critical to the success of any police-department review.


TRUMP
GOOD DAY EXTRA
COURT OF THE JUDICIARY TRIAL FOR JEFFCO, JUDGE NAKITA BLOCTON
All Us
Presidents,
Judges,
and Police:
Lessons from
Unconventional Advocacy
JACK SHARMAN
Lightfoot

PRESIDENT

Brad Raffensberger
Secretary of State of Georgia

Donald Trump
President of the United States

JUDGE

A judge on trial.

POLICE

Huntsville Police Department
IRT

SEVEN LESSONS

JACK SHARMAN
Lightfoot

Client?

Brad Raffensberger
Secretary of State Of Georgia

ADOPTED AS
AMENDED
06/25/2020

SUBSTITUTE A

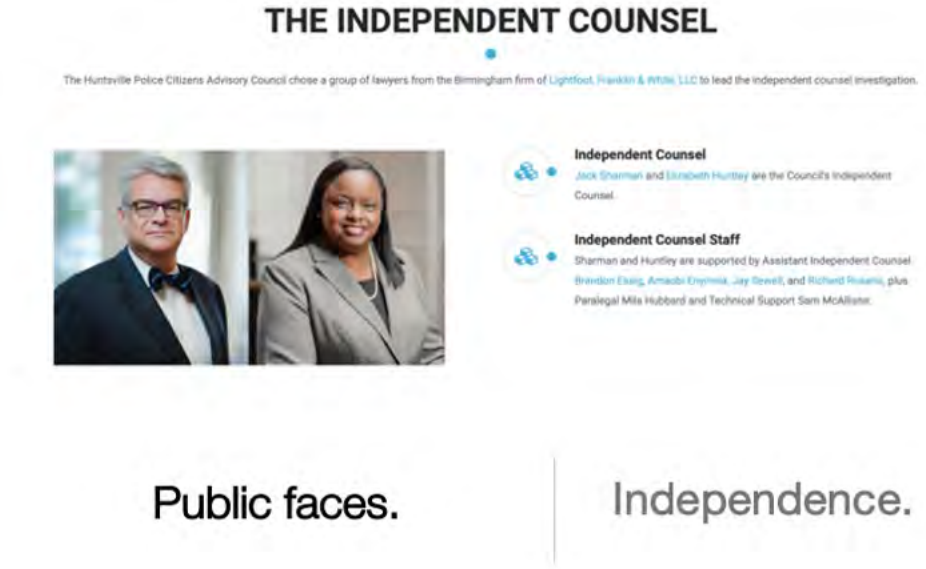
RESOLUTION NO. 20-487

WHEREAS, the tragic death of George Floyd, in Minneapolis, Minnesota, has provoked great concern and anger among citizens across the country, including the State of Alabama and the City of Huntsville; and

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Huntsville Police Citizens Advisory Council is hereby authorized and empowered as follows:

1. To fully review the protests and demonstrations which began on or about May 30, 2020, especially those which occurred on June 1 and 3, 2020, as to the interactions between the protestors and demonstrators and the Huntsville Police Department; and

2. In conducting their review, HPCAC will have access to any resources at the Huntsville Police Department, including access to employees involved in the events to be investigated and documentary evidence, such as video footage from aerial surveillance and body cameras, provided employees shall retain any constitutional or procedural protections to which they are entitled under the constitution and/or statutes of the United States and/or the State of Alabama or the Employee Policies and Procedures of the City of Huntsville; and



Public faces. | Independence.

No jury. | Factfinders.

Rules? | Present and Absent.

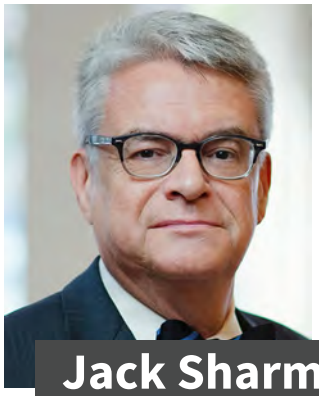
Narrative. | Personal platforms.

Narrative. | Stakeholders.

Parallel Proceedings. | They are… parallel.

Unknown unknowns.

Unknown unknowns.



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When crisis comes, Jack Sharman's your experienced ally.

Jack guides corporations and individuals through business crises, civil and criminal white-collar prosecutions, and corporate internal investigations. In an environment of increased uncertainty, regulatory scrutiny and a skeptical public, clients rely on him to respond to and navigate the most difficult circumstances they will likely ever face.
Jack leads the firm's White-Collar Criminal Defense & Corporate Investigations practice group. He handles and takes to trial matters involving kickback allegations, environmental offenses, public corruption, the Foreign Corrupt Practices Act (FCPA), congressional investigations, healthcare fraud and the False Claims Act (FCA). He also has an active civil litigation and civil mediation practice and is on the firm's Recruiting and Marketing & Business Development Committees.

Companies and their decision-makers benefit from the decades of high-profile experience that Jack brings to the table. He served as Special Counsel to the U.S. House Financial Services Committee for the Whitewater investigation involving President Bill Clinton. From 2016-17, Jack was Special Counsel to the Judiciary Committee of the Alabama House of Representatives for the impeachment investigation of Gov. Robert Bentley.

Jack often updates his White Collar Wire blog and podcast.

Practice Areas
- Arbitration & Mediation Services
- Directors' & Officers' Liability
- International Disputes
- Complex Government Litigation & Investigations
- Securities & Shareholder Disputes
- White-Collar Criminal Defense & Corporate Investigations

Awards
- Benchmark Litigation, "Local Litigation Star" — White Collar Crime (2018-21)
- The Best Lawyers in America© by BL Rankings — Corporate Compliance Law, Corporate Governance Law, White-Collar Criminal Defense, Electronic Discovery and Information Management Law (2020-22)
- The Best Lawyers in America© by BL Rankings, "Lawyer of the Year" for Birmingham — Corporate Compliance Law (2019), Corporate Governance Law (2020)
- B-Metro magazine, "Top Flight Attorneys" (2019)
- Mid-South Super Lawyers by Thomson Reuters, "Top 50 Super Lawyers in Birmingham" (2020)
- Mid-South Super Lawyers by Thomson Reuters — White Collar Criminal Defense (2017-21)

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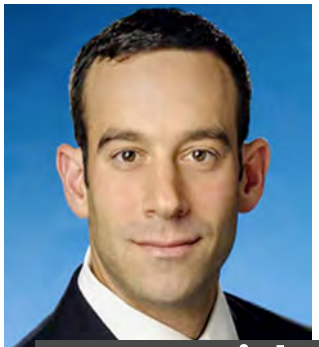
- Washington University (M.F.A., 1986)
- Institute for European Studies, Geneva, Switzerland (Certificate in European Studies, 1985)
- Washington & Lee University (B.A., 1983)



The Sky is Falling - Avoiding Discovery on Discovery

Scott Etish
Gibbons (Philadelphia, PA)

The Sky is Falling - Avoiding Discovery on Discovery
Scott A. Etish

Most attorneys have been involved in litigation where they suspect that an adversary failed to produce all relevant electronically stored information ("ESI"). Whether the failure to produce was intentional or due to an adversary neglecting to properly preserve ESI (leading to the destruction or spoliation of ESI), the requesting party faces the difficult decision of whether to pursue discovery against their adversary about its efforts to search for, locate, preserve and collect relevant ESI (a/k/a "discovery on discovery"). This article will: (1) discuss the interplay between cooperation and transparency in the context of discovery; (2) explore judicial decisions involving requests for discovery on discovery; and (3) provide practical advice and strategic considerations for the defensive and offensive use of discovery on discovery tactics.

Much has been written about the general expectation that parties cooperate in litigation to avoid discovery disputes. The Sedona Conference Cooperation Proclamation, the Federal Rules of Civil Procedure, and countless judicial decisions extol the benefits of cooperation. Several of the Sedona Conference Principles discuss the concept of discovery on discovery as it relates to the intersection between the expectation of cooperation and the recognition that a responding party is in the best position to respond to discovery. For instance, Sedona Conference Principle 3 provides that, "in some circumstances a party may effectively immunize itself from the risk of facing 'discovery on discovery' by cooperatively working to reach agreement on key ESI issues. Conversely, the failure to engage in meaningful discussions about ESI discovery can lead to expensive motion practice, which may lead to adverse court orders."[1]

Likewise, the Sedona Conference Principle 6 provides that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."[2] While refusing to cooperate is extremely risky considering the availability of sanctions under Federal Rule of Civil Procedure 37(f), there is no explicit requirement that a party be transparent about its process in responding to discovery requests. Litigants should remain vigilant in recognizing the dangers of when an adversary seeks to extend the concept of cooperation by demanding that a responding party also be transparent about its efforts in responding to discovery requests.[3]

Judicial Treatment of Requests for Discovery on Discovery

Consistent with Sedona Conference Principle 6, courts are generally reluctant to permit discovery on discovery.[4] While case law differs by jurisdiction, many courts follow the rule that discovery on discovery is "impermissible" and will usually deny such requests, unless the requesting party can demonstrate that the responding party acted in bad faith or unlawfully withheld documents.[5] Consequently, courts require

1 See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018), Principle 3, Comment 3.b., p. 78, citing Ruiz-Bueno v. Scott, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013) (ordering answers to interrogatories about search methods and noting that, where information is shared, it changes the nature of the dispute from whether the requesting party is entitled to find out how the producing party went about retrieving information to whether that effort was reasonable).

2 See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018), Principle 6, Comment 6.b., p. 118.

3 See Miller v. Thompson-Walk, 2019 WL 2150660, at *1 (W.D. Pa. May 17, 2019).

4 See Jensen v. BMW of N. Am., LLC, 328 F.R.D. 557, 566 (S.D. Cal. 2019).

5 See Alley v. MTD Prod., Inc., 2018 WL 4689112, at *2 (W.D. Pa. Sept. 28, 2018) (granting

more than a requesting party's mere suspicion or a "conclusory allegation" that it has not received all of the relevant documents in order to persuade a court to permit discovery on discovery.[6] Decisions involving discovery on discovery are highly fact-sensitive, and some courts have permitted discovery on discovery only when a requesting party provides an "adequate factual basis" for questioning the efficacy of the responding party's practices.[7] A requesting party may establish "an adequate factual basis" to justify such discovery through deposition testimony that a party never issued a litigation hold notice to important custodians; failed to issue it in a timely manner; and/or by demonstrating an absence of documents produced from certain key custodians or timeframes.[8]

Practice Tips

To avoid costly discovery on discovery, parties should cooperate with one another and seek to enter ESI Protocols that set limitations on how far a party can press for details on the discovery decision-making process, and under what circumstances those limits may be relaxed. If the responding party complies with its obligations under the ESI Protocol, a requesting party will have a more difficult time convincing a court to permit discovery on discovery. Cases in which courts have allowed discovery on discovery are reminders of the critical importance that: (1) litigation hold notices are timely issued; (2) custodians confirm receipt of the holds; and (3) custodians understand the importance of compliance with a litigation hold. Not only does discovery on discovery have the potential to significantly escalate the cost of a litigation, but it also can distract the trier of fact from considering the merits of the underlying case.

The potential for discovery on discovery should also serve as a reminder of the importance of preparing and formulating a discovery plan. This plan should be clear and detailed, and each step taken (or not taken) must be memorialized to defend against an opposing party looking to exploit non-compliance with the plan. Indeed, it is safe to assume that the requesting party will be doing everything in its power to identify inconsistencies in a production via deposition testimony (statements by witnesses indicating that documents and/or communications exist), third-party subpoenas (third-party produced communications with responding party not otherwise produced), and comparison of documents produced by the requesting party to what was produced by the responding party (to identify documents produced by requesting party that responding party failed to produce as indicative of discovery deficiencies).

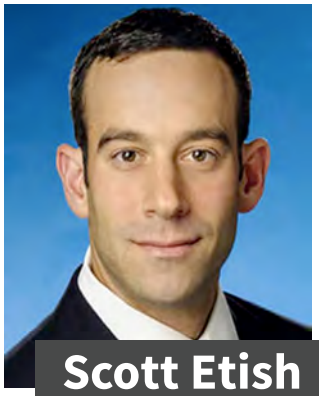
Depending on how the court will approach these issues, and whether the court will require a showing of spoliation, a requesting party is likely to be given wide berth from a court to fully explore their adversary's discovery efforts (or lack thereof) once a certain baseline showing of discovery misconduct is made. The key to the effective use of offensive discovery on discovery is restraining the impulse to seek judicial relief too early. Courts have regularly rejected discovery motions based upon a requesting party's "mere suspicion" that an adversary has engaged in discovery misconduct. While it may not be appropriate for every case, an understanding of the mechanics of discovery on discovery is of critical importance to trial lawyers who are regularly involved in matters with high volumes of ESI.

protective order with respect to deposition topics regarding defendants' "systems for creating, storing, retrieving, and retaining documents" because plaintiff did not show that defendants acted in bad faith or that they unlawfully withheld documents); see also Brand Energy & Infrastructure Servs. v. Irex Corp., 2018 WL 806341, at *6 (E.D. Pa. Feb. 7, 2018) (holding that discovery requests regarding the servers that defendants used to access and store digital information were impermissible).

6 Ford Motor Co. v. Edgewood Properties, Inc., 257 F.R.D. 418, 428 (D.N.J. 2009).

7 Winfield v. City of New York, 2018 WL 840085, at *3 (S.D.N.Y. Feb. 12, 2018); see also Korbel v. Extendicare Health Servs., Inc., 2015 WL 13651194, at *15 (D. Minn. Jan. 22, 2015) (noting that meta-discovery is only warranted when there is a "colorable factual basis" for such discovery).

8 Vieste, LLC v. Hill Redwood Dev., 2011 WL 2198257, at *1 (N.D. Cal. June 6, 2011).



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Mr. Etish is an experienced litigator who represents a wide range of clients from various industries, including food manufacturing, transportation, pharmaceutical, and real estate. His diverse litigation practice is focused primarily on complex commercial disputes, but he is also regularly involved in products liability, real estate, construction, and professional liability litigations. His complex commercial practice frequently involves business torts, restrictive covenants, antitrust, and shareholder agreements. Mr. Etish often serves as a resource to national counsel unfamiliar with litigating in the state and federal courts located within Pennsylvania and New Jersey, and he works tirelessly with clients to understand their business objectives. In many situations, this means seeking to resolve disputes cost effectively through negotiation without litigation. If negotiations are not realistic or are unsuccessful, Mr. Etish will not hesitate to take a more aggressive approach.

Areas of Focus

- Commercial Litigation
- Emergent Relief
- Restrictive Covenant Litigation
- E-Discovery
- Real Estate Litigation

Experience

- Representing supermarket chain in litigations with shopping center developer involving antitrust and tortious interference causes of action
- Represented Am Law 100 law firm in litigation involving professional liability claims
- Represented a commercial landowner with respect to environmental matters involving underground storage tanks
- Represented an international consumer packaged food company with respect to claims involving breach of contract, misappropriation of trade secrets, and unjust enrichment involving the design of an automated storage and retrieval system (ASRS) to be installed at a 402,000-square-foot meat processing facility
- Represented a title insurance company with respect to litigation involving the duty to defend and priority of coverage
- Represented the owner in a construction litigation involving claims for breach of contract and breach of a performance bond
- Represented healthcare provider in a suit involving numerous counts, including violations of the Sherman Antitrust Act and Racketeer Influenced and Corrupt Organizations Act (RICO), breach of contract, and tortious interference with contract
- Represented a regional supermarket chain in real estate litigation matters and obtained expedited relief on claims related to a “going dark” provision and summary judgment defending claims related to an “area restriction” in commercial leases

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- Selected to the Pennsylvania Super Lawyers Rising Stars list, Business Litigation, 2010-2011, 2013-2019
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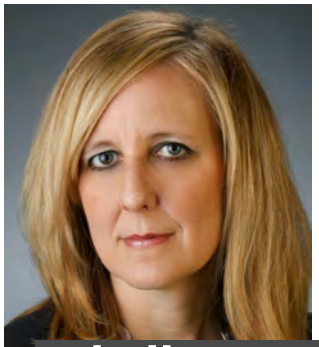

Bankruptcy Basics for Trial Lawyers and In-House Counsel

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Eight Bankruptcy Fundamentals Trial Lawyers and In-House Counsel Should Know
Shelly A. DeRousse

The chaos caused by a bankruptcy filing can threaten a thoughtful, well-designed litigation plan. Whether representing a plaintiff or defendant, trial lawyers need to understand how to use bankruptcy law to put their clients in the best position under the circumstances, . When a defendant files bankruptcy, the pursuit of the plaintiff's claims will be stayed. Plaintiffs are left with the limited remedies available for creditors under the bankruptcy code ("Bankruptcy Code").[1] If trial lawyers are mindful of the potential consequences of a bankruptcy filing, they can better counsel clients in evaluating settlement offers and negotiating the terms of such settlements.

Recent Trends in Bankruptcy Filings

When the COVID-19 pandemic hit the United States in March of 2020, government shutdowns ensued. Businesses in retail, entertainment, restaurant, travel, and transportation industries came to a grinding halt. Both businesses and consumers began spending money differently, and many businesses lost significant income which they depended on to pay operating expenses. The federal and state governments offered various solutions to slow down the creditor-debtor collection dynamics, including Paycheck Protection Program ("PPP") loans, Economic Injury Disaster Loans ("EIDL"), and moratoriums on mortgage foreclosures , and evictions.

Bankruptcy filings were at the lowest level in the year ending June 30, 2021 since 1985.[2] In 2020, there were 6,726 chapter 11 cases filed in the United States and in 2021, the filings were down by 46.6% to 3,596.[3] According to a report published by the United States Courts, business bankruptcy filings for the past 5 years were:

Business Filings for Years Ending September 30, 2017-2021[4]

Year	Business Filings
2021	16,140
2020	22,391
2019	22,910
2018	22,103
2017	23,109

The filings by bankruptcy code chapter, show a similar trend:

Total Bankruptcy Filings by Chapter for Years Ending September 30, 2017-2021[5]

Year	Chapter	
	7	11
2021	310,597	5,622
2020	409,164	8,188
2019	478,838	7,320
2018	477,248	7,014
2017	486,542	7,052

1 11 U.S.C. § 101, et al.

2 See Reuters, Bankruptcy filing lowest since 1985 amid pandemic relief, By Maria Chutchian, August 4, 2021, https://www.reuters.com/legal/transactional/bankruptcy-filings-lowest-since-1985-amid-pandemic-relief-2021-08-04/.

3 Equip, Overall December 2021 New Bankruptcy Filings Continue to Decline, January 4, 2022, www.globenewswire.com.

4 See https://www.uscourts.gov/news/2021/11/08/bankruptcy-filings-continue-fall-sharply.

5 See https://www.uscourts.gov/news/2021/11/08/bankruptcy-filings-continue-fall-sharply.

Government interventions in response to the COVID-19 pandemic have disincentivized businesses from filing bankruptcy. For example, foreclosure and eviction moratoriums buy time for businesses to delay payments to their lenders and landlords during difficult cash flow periods without the negative consequence of losing their real estate. The cash flow relief helped keep those businesses afloat and prevented (or at least delayed) the filing of bankruptcy. Often, a default on a commercial loan itself is the reason for filing bankruptcy. Protection from foreclosure risks, however, provided temporary protection from needing to file bankruptcy when a loan default occurred. And if lessees file bankruptcy, under the Bankruptcy Code, they must timely perform their lease obligations.[6] Therefore, staying out of bankruptcy appeared to be the better choice from a cash flow perspective for businesses that lease property, while the eviction moratorium was in place.

As of February 20, 2022, the United States Small Business Administration (the "SBA") reported that $789,776,462,485 in PPP loans were issued in 2020 and 2021.[7] PPP loans are forgivable, if certain requirements are met, such as using the funds for payroll expenses, rent, or other approved expenses. The infusion of extra money into the economy likely contributed to staving off a flood of bankruptcy filings. The SBA takes the position that debtors in bankruptcy do not qualify for PPP loans,[8] which could also be deterring bankruptcy filings.

Some experts are predicting that corporate bankruptcies are likely to increase in 2022 and that smaller, privately-owned companies will be more at risk than large public companies.[9] As the incentives to stay out of bankruptcy, such as government subsidies and moratoriums, phase out, defendants may be more willing to use bankruptcy as a litigation tool in the latter half of 2022 and 2023.

Eight Bankruptcy Fundamentals

The Bankruptcy Code is long and complicated, but trial lawyers should have knowledge of eight bankruptcy fundamentals in order to maximize client success.

1. Difference Between the Types of Bankruptcies Under the Code

Commercial debtors generally have three types of bankruptcy they can file: Chapter 11, Subchapter V of Chapter 11 and Chapter 7.

Chapter 11: A Chapter 11 bankruptcy case is filed under and governed by Chapter 11 of the Bankruptcy Code, by a debtor who wishes to remain in possession of its assets (the "Debtor-in-Possession"). 11 U.S.C. § 1101. A trustee is not automatically appointed, and the Debtor-in-Possession has the duties of a trustee. 11 U.S.C. § 1107. The Debtor-in-Possession continues to operate the business until a Chapter 11 plan of reorganization is confirmed unless a Chapter 11 trustee is appointed for cause.[10] Chapter 11 allows Debtor-in-Possession substantial flexibility about how to reorganize a company. A Debtor-in-Possession can liquidate assets, obtain operating or exit DIP financing, refinance existing debts, or pay creditors over time with future earnings, if certain standards are met.

Creditors in a Chapter 11 bankruptcy must receive at least what they would receive if the Debtor-in-Possession liquidated its assets in a Chapter 7 case. 11 U.S.C. § 1129(a)(7). To determine that, the

6 Section 365(d)(3) of the bankruptcy code requires a debtor to timely perform all obligations arising under an unexpired lease of nonresidential real property prior to the assumption or rejection of that lease. 11 U.S.C. § 365(d)(3).

7 U.S. Small Business Administration, Forgiveness by dollar amount, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-data#section-header-10.

8 Some bankruptcy courts have ruled that the SBA exceeded its statutory authority by excluding debtors in bankruptcy from participating in PPP loans. See, e.g., Roman Catholic Church of the Archdiocese of Santa Fe v. SBA, et al. (In re Roman Catholic Church of the Archdiocese of Santa Fe), Case No. 18-13027, Adv. P. No. 20-01026 (Bankr. D. N.M. May 1, 2020) (entering temporary injunction enjoining the SBA from denying debtor's PPP application as an arbitrary and capricious attempt to impose eligibility requirements not otherwise present in the actual text of the PPP "support program"); Calais Reg'l Hosp. v. Carranza (In re Calais Reg'l Hosp.), Case No. 19-10486, Adv. P. No. 20-1006 (Bankr. D. Me. May 1, 2020) (entering temporary injunction enjoining the SBA from denying debtor's PPP application on the sole basis of debtor's pending Chapter 11 case); Penobscot Valley Hosp. v. Carranza (In re Penobscot Valley Hosp.), Case No. 19-10034, Adv. P. No. 20-1005 (Bankr. D. Me. May 1, 2020) (same); Springfield Hosp., Inc. v. Carranza (In re Springfield Hosp., Inc.), Case No. 19-10283, Adv. P. No. 20-01003 (Bankr. D. Vt. May 4, 2020) (same).

9 Yahoo!Finance, U.S. Bankruptcy Filings Set to Increase in 2022 After a Lull This Year, By Shoshy Ciment, October 12, 2021, https://finance.yahoo.com/news/u-bankruptcy-filings-set-increase-144847303.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x-lLmNvbS8&guce_referrer_sig=AQAAAFw4YHIXvj6lyBOYaIPUtFAEcMwxGIEwWCTmWs-FN-kYAmXETKaD6DQHzjOjnik37K3g5E9roONsbbPXTlilrafn7yOFNnB-TAfm71-6Aq_WnN-kieF3d59tbr5R9ZkCx1nGhwxMQR2RBTYmpkvtfdUFTYQDE5hHSsd-lZv-oJAYrw; Bloomberg Businessweek, Wait, What Happened to All Those Corporate Bankruptcies?, By Lauren Coleman-Lochner, January 6, 2022, https://www.bloomberg.com/news/articles/2022-01-06/why-bankruptcies-filed-in-2021-dropped-and-why-2022-could-be-different; S&P Global, US Corporate Bankruptcy Pace Likely To Speed Up In 2022, By Charlsy Panzino and Chris Hudgins, October 11, 2021, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/us-corporate-bankruptcy-pace-likely-to-speed-up-in-2022-67011237.

10 A party in interest may file a motion to appoint a Chapter 11 trustee to take possession of the debtor's estate. 11 U.S.C. § 1104. Cause to appoint a Chapter 11 trustee includes fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or if appointment is in the interest of creditors, any equity security holders, and other interests of the estate. Id. See also In re Ionosphere Clubs, Inc., 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990) (citations omitted).

debtor needs to do a liquidation analysis, showing how much money would be available for distribution to creditors if the debtor's assets were liquidated. In re Multiut Corporation, 449 B.R. 323 (Bankr. N.D. Ill. 2011). If the reorganization plan provides at least that amount of distribution to creditors, it satisfies the test. If a Debtor-in-Possession fails to file and confirm a plan within the exclusive period provided by the Bankruptcy Code, then a creditor or other party in interest may file a plan. In re Texaco Inc., 76 B.R. 322, 325-26 (Bankr. S.D.N.Y. 1987).

Chapter 11, Subchapter V: Subchapter V is the newest section of the Bankruptcy Code, which became effective on February 19, 2020. 11 U.S.C. §§ 1181-1195. Subchapter V is available to debtors with aggregate debt of not more than $7,500,000,[11] at least half of which must have arisen from commercial or business activities. 11 U.S.C. § 1182(1)(A). In a Subchapter V bankruptcy, a trustee is appointed at the time the petition is filed, but the debtor also stays in possession of its assets. 11 U.S.C. §§ 1183 and 1184. The trustee's role is generally limited to monitoring the bankruptcy, helping the debtor draft a confirmable plan of reorganization and mediating disputes between the debtor and its creditors. 11 U.S.C. § 1183. Subchapter V cases are generally more debtor friendly than a traditional Chapter 11 case for various reasons, including that there is no creditors' committee appointed, only a debtor is allowed to propose a plan of reorganization, a debtor does not need to file a disclosure statement with the plan, and that the owner of the debtor does not need to contribute new value to the plan in order to retain an ownership interest after plan confirmation. 11 U.S.C. §§ 1181,[12] 1187, 1189, and 1190.

A debtor must file a Subchapter V plan within the first 90 days of its bankruptcy filing. 11 U.S.C. § 1189(b). The requirements of a Subchapter V plan are more streamlined than in a Chapter 11 case. A Subchapter V plan needs to make a distribution to creditors in the amount that is higher of: (1) the liquidation value in a Chapter 7 or (2) at least the amount of the debtor's projected disposable income over a period of three to five years. 11 U.S.C. § 1191.

Chapter 7: In a Chapter 7 bankruptcy, a trustee is appointed at the time the petition is filed. 11 U.S.C. § 701. The trustee takes control of the debtor's assets and liquidates them for the benefit of the creditors and interest holders. 11 U.S.C. § 704. A Chapter 7 trustee may bring litigation to recover debts owed to the debtor, fraudulent and preferential transfers, or any other claims the debtor has against a third party. After the trustee liquidates the assets, the trustee distributes the funds to the creditors of the bankruptcy estate, in accordance with the priorities of the Bankruptcy Code and common law. 11 U.S.C. § 726.

2. Stay of Litigation

All pending, prepetition litigation against the debtor is stayed upon the filing of the bankruptcy petition, pursuant to the automatic stay provisions of Bankruptcy Code § 362. 11 U.S.C. § 362. The automatic stay is imposed "automatically" on the date of the bankruptcy petition, regardless of when a creditor receives notice of the filing. In re Tyson, 450 B.R. 754, 764 (Bankr. W.D. Tenn. 2011). If anyone knowingly violates the automatic stay, they may be sanctioned by the bankruptcy court for actual damages, including attorneys' fees, resulting from the violation. 11 U.S.C. § 362(k). Actions taken in violation of the automatic stay are voidable. In re Tyson, 450 B.R. at 764.

The automatic stay may be lifted for cause. Cause includes, among other things, lack of adequate protection of an interest in property of the creditor or with respect to a stay of an act against property, the debtor does not have an equity interest in such property, or such property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(1) and (2). One common basis for modification of the automatic stay is to allow creditors to proceed against proceeds of insurance policies. In re Downey Financial Corp., 428 B.R. 595, 608 (Bankr. D. Del. 2010); In re Mila, Inc., 423 B.R. 537 (9th Cir. 2010).

The automatic stay only stays litigation against debtors. It does not stay litigation against non-debtor co-defendants in litigation. A plaintiff may

11 The original debt limit was $2,725,625 but was raised to $7,500,000 temporarily as part of the CARES Act. As of the time of this article, the higher debt limit is set to expire on March 27, 2022. Congress may choose to extend the debt limit further or permanently.

12 The Bankruptcy Code leaves room for a court to allow the appointment of a creditors' or equity security holders' committee for cause. 11 U.S.C. § 1181(b).

seek to continue pending litigation against only the non-debtor parties. However, debtor may file an adversary proceeding under § 105(a) of the bankruptcy code, seeking an injunction to temporarily stay litigation against non-debtor insiders of the debtor. In re Philadelphia Newspapers, LLC, 423 B.R. 98 (E.D. Pa. 2010). The standard for a § 105(a) injunction staying litigation against non-debtors is difficult to satisfy. A debtor must show that unusual circumstances make the § 105(a) injunction necessary. Examples of such circumstances are a debtor's obligation to indemnify third parties for claims brought against them or the need to divert the debtor's resources in complying with discovery if the non-debtor litigation were to proceed. Id.

3. Creditors' Committee

In Chapter 11 cases, the Office of the United States Trustee (the "US Trustee") will appoint an official committee of general unsecured creditors to represent the interests of all unsecured creditors in the case (the "Creditors' Committee"). 11 U.S.C. § 1102. The Creditors' Committee will hire counsel to represent it in bankruptcy court. 11 U.S.C. § 1103. Through counsel, the Creditors' Committee may investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of the business. 11 U.S.C. § 1103. The Creditors' Committee may also participate in the formulation of a plan, submit its own plan and perform such services that are in the interest of the creditors represented. Id. The Creditors' Committee may also hire a financial advisor, if appropriate. The Creditors' Committee's professionals are paid from the assets of the bankruptcy estate, so the members of the Creditors' Committee do not individually pay the professionals. 11 U.S.C. § 330.

A Creditors' Committee will negotiate with the debtor and the lender on various issues, including terms of post-petition financing and a plan of reorganization. The Creditors' Committee's objective is to maximize the recovery of general unsecured creditors.

Serving on a Creditors' Committee is a great way for a creditor to monitor and participate in a bankruptcy case, without having to hire prohibitively expensive professionals to represent one creditor's individual interests.

4. Avoidable Transfers as a Source of Recovery

Often a good source of recovery for litigation creditors is the recovery of preferential transfers and fraudulent transfers made by the debtor prior to the bankruptcy filing.

Preferential Transfers: Section 547 of the Bankruptcy Code allows a debtor or trustee to recover preferential transfers made to creditors within 90 days of the bankruptcy petition (the "Preference Period"). 11 U.S.C. § 547. A debtor may avoid a transfer made within the Preference Period:

- to or for the benefit of a creditor;
- for or on account of an antecedent debt owed by a debtor before such transfer was made;
- made while the debtor was insolvent; and
- that enables a creditor to receive more than such creditor would receive if
    - the case was a case under Chapter 7 of the Bankruptcy Code;
    - the transfer had not been made; and
    - such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). A transferee can defend against a preferential transfer claim, by proving that one of the above elements were not met. For example, the transferee can assert that it was not a creditor at the time of the transfer (although that would create a potential fraudulent transfer exposure), the debtor was not insolvent at the time of the transfer, or that it had a lien or other right which would give it priority in Chapter 7 case.

In addition, § 547 provides explicit defenses to a creditor who received a transfer within the Preference Period, including the new value defense, ordinary course of business defense, and contemporaneous exchange defense. These defenses are summarized as follows:

New Value Defense 11 U.S.C. § 547(c)(4)	After the transfer, the creditor gave new value to or for the benefit of the debtor which was (a) not secured by an otherwise unavoidable security interest [in other words, not a conversion of unsecured debt into secured debt]; and (b) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor [in other words, the new value remains unpaid].
Ordinary Course of Business Defense 11 U.S.C. § 547(c)(2)	The transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was made in the ordinary course of business or financial affairs of the debtor and the transferee OR made according to ordinary business terms.
Contemporaneous Exchange of New Value Defense 11 U.S.C. § 547(c)(1)	The transfer was intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange of new value given to the debtor; and in fact a substantially contemporaneous exchange.

Protect Against Preferential Transfer Exposure in Settlements: When settling a case, a plaintiff may try to protect against preferential settlement payments, by requiring a third-party guaranty of the settlement which expires 90 days after the last settlement payment is made or not providing a release until after the expiration of the 90 period after the last settlement payment. Securing a settlement agreement with collateral will not protect against preference exposure because the security interest itself will be deemed a preferential transfer if it is granted within 90 days of the bankruptcy filing.

5. Section 503(b)(9) Reclamation Claim

If a creditor provides goods to the debtor within 20 days of the bankruptcy, the creditor can elevate its general unsecured claim to an administrative priority payment for those goods in the bankruptcy case. 11 U.S.C. § 503(b)(9). Section 503(b)(9) of the Bankruptcy Code states:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
>
> * * *
>
> (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of the debtor's business.

11 U.S.C. § 503(9). A § 503(b)(9) claim has the same administrative priority as estate professionals and creditors doing business with the debtor during the bankruptcy. Administrative priority claims are paid in full before general unsecured claims will receive any payout. Therefore, having a pre-petition claim elevated to an administrative claim will increase the likelihood and amount of recovery for the creditor of that claim.

For a creditor to receive priority treatment for its § 503(b)(9) claim, the creditor must file a motion for allowance of the claim with the bankruptcy court, unless the court enters an order setting a different claims process. After notice of the motion and a hearing, the judge can enter an order allowing the § 503(b)(9) claim. A creditor should be vigilant about filing a timely claim. Indeed, the bankruptcy court often will set a bar date for the filing of § 503(b)(9) claims and sometimes a debtor will file a motion for specific procedures that are required in bring such claims.

6. Critical Vendor

A creditor can effectively elevate the priority of payment of its pre-petition claim by becoming a "critical vendor." Upon motion of the debtor, a bankruptcy court may permit a debtor to designate certain vendors whose goods or services are critical to the debtor's continued operations to be a critical vendor. These creditors will be paid some or all of its pre-petition claim as an inducement to continuing to do business with the debtor post-petition.[13]

A creditor who supplies a crucial part or service to the debtor may withhold (or threaten to withhold) future transactions with the debtor to gain leverage to compel the debtor to ask the bankruptcy court to designate it as a critical vendor and pay its pre-petition claim. See In re Kmart Corp., 359 F.3d 866, 872 (7th Cir. 2004) (allowing "satisfaction of a pre-petition debt in order to keep 'critical' supplies flowing"); In re Murray Metallurgical Coal Holdings, LLC, 613 B.R. 442, 450-51 (Bankr. S.D. Ohio 2020). There is no uniform test for allowance of critical vendor payments across all jurisdictions, but generally apply some form of a test of whether the payments are necessary for the reorganization and the business judgment rule.[14]

Also, a creditor cannot withhold future goods or services from a debtor if the creditor is contractually bound to provide those goods and services, until the debtor assumes or rejects that contract. Therefore, a contractually bound creditor will not typically be designated a critical vendor, because it is already incentivized to perform.

7. Lease and Contract Rejection/Assumption

Another way for a pre-petition claim to be paid in full is for an executory contract or lease to be assumed. Section 365 of the Bankruptcy Code allows the debtor to assume or reject any lease or executory contract. 11 U.S.C. § 365. An executory contract is a contract for which performance is still owing from both parties to the agreement.

In order to assume the contract or lease, the debtor must:

- Cure all monetary and nonmonetary defaults under the contract or lease;
- Compensate the counter party for actual pecuniary losses resulting from the default; and
- Provide adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).[15] In other words, if a creditor's contract is assumed, the debtor must pay the creditor in full the amounts owed under the contract during the post-petition period.

The Bankruptcy Code provides certain deadlines for assumption or rejection. For example, in a Chapter 7 case, an executory contract or lease must be assumed or rejected within 60 days after the order for relief[16] is entered (or such other date set by the bankruptcy court), or else it will deemed rejected. 11 U.S.C. § 365(d)(1). An unexpired lease of nonresidential real property must be assumed or rejected within 120 days of the order for relief unless the deadline is extended by the bankruptcy court. 11 U.S.C. § 365(d)(4).

If the debtor rejects the executory contract, then the rejection is deemed to be a breach of contract occurring immediately before the commencement of the bankruptcy case. 11 U.S.C. § 365(g). The creditor is left with a pre-petition claim for breach of contract.

If the debtor rejects a lease of real property as the lessee, the lessor's damages are limited to a pre-petition claim capped at the lesser of one year of rent and lease payments or 15% of the payments due over the remaining term of the lease. 11 § 502(b)(6). A debtor who is a tenant of commercial property must pay rent during the post-petition period prior to assuming or rejecting the lease. Section 365(d)(3) requires a debtor to timely perform all obligations of the debtor under a lease of non-residential real property, until such lease is assumed or rejected. 11 U.S.C. § 365(d)(3). The debtor must timely perform all obligations arising under a lease of

13 Courts use 11 U.S.C. §§ 363(b) and 105(a) to allow the debtor to expend funds outside the ordinary course of business to critical vendors. In re Ionoshpere, 98 B.R. 174 (Bankr. S.D.N.Y. 1989).

14 Emory Bankruptcy Developments Journal, Vol. 37, Critical Vendors in the Retail Apocalypse: How the Economic Crunch Exacerbates the Need for Critical Vendor Codification, Kennedy Bodnarek (2020).

15 The obligation to cure does not apply to a default related to the filing of the bankruptcy itself, conditioned upon insolvency or the financial condition of the debtor, or a trustee taking possession of the debtor's assets. 11 U.S.C. § 365(b)(2).

16 The order for relief is typically entered by the bankruptcy court the same day as the petition is filed.

personal property, such as a vehicle or equipment lease, which arise from or after 60 days after the order for relief. 11 U.S.C. § 365(d)(5).

8. Third-Party Releases

A litigation creditor should be cautious of third-party releases in a plan of reorganization. Such releases have become regularly used in large mass tort Chapter 11 cases, such as USA Gymnastics, Purdue Pharma, Boy Scouts of America and Catholic Archdiocese cases. They may also appear in cases of closely held businesses, in which the owner wants a release of tort or guaranty liability. If the non-debtor insider is a party to litigation which was the impetus for the bankruptcy filing, obtaining a third-party release might have been the debtor's plan from the start.

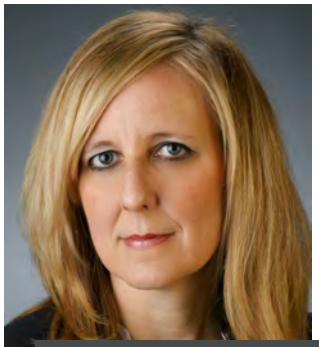
Generally, a third-party release must be consensual. However, many courts have approved a plan with non-consensual third-party releases when the injunction or release is "appropriately tailored and essential to the reorganization plan as a whole." In re Lupton Consulting LLC, 633 B.R. 844, 859 (Bankr. E.D. Wis. 2021). See also Airadigm Commc'ns, Inc. v. FCC, 519 F.3d 640, 657 (7th Cir. 2008); Some jurisdictions are more favorable to third party releases than others.[17] Recently, in the In re Purdue Pharma LP case, Judge Colleen McMahon in the United States District Court for the Southern District of New York published a 142 page opinion finding that nonconsensual non-debtor releases are not permitted by the Bankruptcy Code. In re Purdue Pharma LP, 2021 WL 5979108 (S.D.N.Y. Dec. 16, 2021).[18]

Conclusion

The Bankruptcy Code is long and can be complicated to navigate. Having a basic knowledge of how the provisions may affect a client's claims or defenses can aid a trial lawyer in advising the client when a bankruptcy, or the threat thereof, is used to as part of a litigation or settlement strategy.

17 On July 28, 2021, Elizabeth Warren introduced a bill in the United States Congress which would add a new "§ 113" of the Bankruptcy Code to prohibit non-debtor releases. See S.2497 – 117th Congress (2021-2022).

18 For an in depth discussion of the Purdue Pharma case, see American Bankruptcy Institute Journal, "The Great Unsettled Question": Nonconsensual Third-Party Releases Deemed Impermissible in Purdue, Paul R. Hage (2022).



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Shelly DeRousse

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Shelly DeRousse has extensive experience in the areas of bankruptcy, reorganization, litigation and asset sales. As lead counsel, Shelly has represented official creditors' committees throughout the country in chapter 11 bankruptcy cases. Additionally, she represents companies and high earning individuals in their restructurings or workout negotiations with their lenders and other creditors. Additionally, she is known among banks and other financial institutions as a leading attorney for lenders in bankruptcy cases, out-of-court workouts of borrowers' loans, and assignments for the benefit of creditors, using creative solutions to maximize the lenders' recovery from collateral and other assets.

In addition to her profound and comprehensive working knowledge of the U.S. Bankruptcy Code, the Uniform Commercial Code, assignments for the benefit of creditors, and receiverships, Shelly offers clients years of practical experience and knowledge of how to best solve very complex debtor-creditor issues. She has worked on every side of bankruptcies and workouts, including the representation of debtors, secured creditors, unsecured creditors, lessors, lessees, guarantors, trustees and creditors' committees.

Areas of Focus

- Banking & Finance Restructuring
- Bankruptcy Litigation
- Commercial Finance
- Creditors' Committees
- Creditors' Rights
- Credit Risk Mitigation
- Debtor and Trustee Services
- Distressed Loans, Restructurings and Workouts
- Distressed Transactions
- General Commercial Litigation
- Financial Restructurings and Workouts
- Global Fraud, Investigations and Asset Recovery Team
- Real Estate & Construction Bankruptcy
- Traditional Bankruptcy Services

Honors and Awards

- Illinois Super Lawyers - 2022, Bankruptcy: Business (cited in multiple years)
- Lawdragon - 500 Leading U.S. Bankruptcy and Restructuring Lawyers - 2022 (cited in multiple years)
- Chambers-USA Guide to America's Leading Lawyers for Business - Bankruptcy/Restructuring - 2021 (cited in multiple years)
- Crain's Chicago Business GenX Leaders in Law - 2019
- Finalist, Chambers Women in Law Awards: USA 2018
- Influential Women in Business 2010, Business Ledger
- Illinois Leading Lawyers - 2020 (cited in multiple years)

Education

- J.D. DePaul University College of Law - with honors - Order of the Coif; CALI Excellence for the Future Award; Associate Editor, DePaul Law Review
- B.S. Illinois State University

Cybersecurity: The Lawyer's Role During and After a Cyber-Incident

Robert Shimberg
Hill Ward Henderson (Tampa, FL)

The Lawyers Role Immediately After a Cyber Incident
Robert Shimberg

Assume there has been a ransomware attack and there is a credible threat that company data will be posted on the dark web if the ransom is not paid. As soon as the company becomes aware of the attack, the in-house attorney is often responsible for, amongst other things:

1. Ensuring that the company is responding in accordance with applicable law;
2. Complying with existing contractual and legal obligations to employees, customers; vendors and insurers;
3. Reviewing and signing off on internal and external communications;
4. Interacting with law enforcement and other governmental agencies; and
5. Reviewing/negotiating vendor agreements for containment, cyber security forensics, monitoring or other external resources.

This non-exhaustive list includes many of the broad categories for the in-house attorney's portion of the company's response to a cyber attack. For the attorney to best perform their responsibilities, information from outside of the legal office must be produced and relied upon at the earliest stages of the response. A primary example is a comprehensive list and understanding of the data that may be at risk.

Valuable time can be lost if there are not accurate records of the data and information stored in the company's servers and within their databases and or witihin the cloud. It is typically the responsibility of the company's IT department and not the attorney, to maintain these records. Communication between the departments is imperative. It is also helpful to have accurate information on whether electronic records retention policies have been followed.

Upon notice of the ransomware event (including potential posting of company data), in-house counsel would want to early on retrieve and have available any response plan or portion of a plan they may have prepared.[1] A plan can be a framework but also include important substantive information. With encrypted devices, the fear of posting on the dark web and knowing that at best it will be a day or two until critical information has been restored from unattached or immutable backup, time is of the essence.

Confirm with IT and other internal and or external resources exactly what information and data is stored within the system and may be subject to compromise: If company information is posted, what is the universe of that information? That should be an answerable question and could in general terms be in the cyber response plan document that you have prepared. The harder questions for the subject matter experts will likely be what was the extent of the attack and what was potentially acquired by the hackers.

Expedited contract review to engage providers to assist in restoration of systems, containment, forensics and monitoring: If contracts have been previously negotiated, then review for any necessary updates. If contracts have not been previously negotiated, then expedite review of vendor contracts. Scope of services, expected

1 As the plan must be accessible on a moment's notice and potentially without the benefit of the computer, a current version should always be maintained on paper protected by a plastic paper cover or otherwise. Keeping a few copies in different places in the office can also help ensure accessibility.

level of communication, pricing and termination are critical initial clauses for review. As the services may be provided through retention by the insurance carrier, expedited review of policies and contact with risk management or the company's insurance agent at the earliest time is crucial. A summary of cyber coverage and services provided in response to an attack (including breach containment, security, monitoring, forensic review, outside legal and communications) should be maintained with the legal cyber response plan. Often times insurers will allow the insured to select their own providers with notice to the insurer. If root cause analysis services and reports are wanted or needed, consult with outside counsel prior to requesting any preliminary reports as findings often change upon discovery of additional information. Backup settings sometimes dictate level of forensic findings.

Notifying law enforcement: A report to law enforcement may be required by a state notification statute or insurance policy. Federal law enforcement is an excellent resource for the most up to date information on ransomware and other cyber attacks. Both the FBI and Secret Service have specialized units on cyber attacks and many state wide law enforcement agencies do as well.

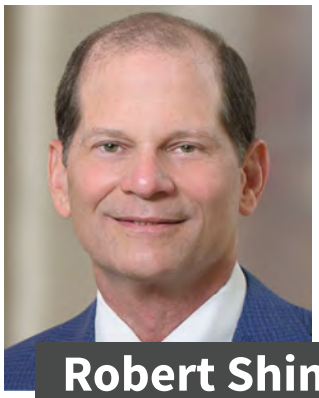
Notification of vendors and corporate customers: Each contract or agreement the company enters into likely includes a notification provision in the event of a cyber incident. The company manages and controls the language in the documents it has prepared, and if any obligations are imposed on the company then that should preferably be a single version, the contents of which should be included in the cyber response plan. Pertinent provisions of documents prepared by or negotiated as to these issues by third parties should also be maintained in the response plan file. As with insurance, these provisions typically have a short notice period.

Communication: Review initial and ongoing internal and external communication to ensure it is accurate, yet does not disclose unnecessary, unsupported or speculative information. Any communication provided by the company or its agents is likely to be shared outside of the intended audience. Consideration should be given to what internal or outside communication experts will be available to assist and answer press inquiries. Monitoring responses to company social media and web pages and comments to press stories is advised.

Notification as to PII: Assume that PII (Personal identifiable information) on the systems belonged to current, former and prospective employees. This should be information that is known ahead of time and should include the extent of the PII and the state of residence of the employees. Also known ahead of time should be the laws governing notification in each of the states, including timing, contents of a notice, requirements to notify the state Attorney General, credit bureau notice and whether the state is an acquired or access state. Acquired states require notification to those who it is reasonably believed that their PII was acquired while the access states typically require notice if it is reasonably believed the PII could have been only accessed.

Conclusion

The above is a fraction of what in-house counsel may be tasked with in the immediate aftermath of a cyber incident. Unfortunately, all of this and the other necessary work should be done with the knowledge and awareness that private litigation may follow or a state or federal agency inquiry or investigation. Table top exercises are good practice. In the event the company does experience a cyber incident, intimate knowledge of the business and regular planning will be go a long way in assisting to minimize its impact.



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Robert Shimberg earns his clients' respect by listening, understanding their immediate needs and honing in to solve issues in an extremely responsive manner.

Robert's primary areas of practice include commercial litigation, corporate compliance, cybersecurity, governmental relations and corporate investigations and representing clients under investigation by local and state administrative, regulatory and criminal agencies. Robert is also leading the firm's COVID-19 Response Team and advising clients on a number of related issues including government orders, workplace issues, liability-related issues and crisis management and communication. Robert was formerly a prosecutor with the Hillsborough County State Attorney's Office.

Robert led the effort to modify the Florida LAW RISC to include the Seller's Right to Cancel language and incorporate the conditional delivery form into the RISC. He has provided compliance-related services and training to over 300 businesses around the country. He has defended businesses against consumer claims, class action lawsuits, and provided representation in connection with government agency inquiries and investigations and conducts internal investigations. He works extensively with automobile dealerships in Florida and throughout the country on proactive compliance and litigation in areas including sales, F&I, advertising, recalls, warranty audits, TCPA, ADA, accounting and pay plan disputes. He is a frequent speaker on compliance-related topics to industry groups and associations..

Practice Focus

- Automotive
- Litigation
- Automotive Regulatory Compliance
- Corporate Compliance, Investigations & Criminal Defense
- Employment Law
- Cybersecurity, Data Breach & Protection
- Administrative/Regulatory
- COVID-19 Response Team
- Governmental Relations & Procurement

Honors

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Hillsborough County Bar Association - Jimmy Kynes Award; Red McEwen Award; Most Productive Young Lawyer
- The Best Lawyers in America© (2008-2022)
- 2021 Tampa Administrative/Regulatory Lawyer of the Year
- 2019 Tampa Administrative/Regulatory Law Lawyer of the Year
- 2016 Tampa Administrative/Regulatory Law Lawyer of the Year
- 2012 Tampa Administrative / Regulatory Law Lawyer of the Year

Education

- University of Florida, B.A., B.S., 1984
- University of Florida College of Law, J.D., 1989, Honors: Moot Court