Lakeside Litigation SuperCourse

Litigation CLE SuperCourse

April 27-30, 2023 **The Ritz-Carlton Reynolds, Lake Oconee**

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A Litigation CLE SuperCourse

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Crushin' Concussions: Defending Against Frivolous Brain Injury Claims

Jerry Glas
Deutsch Kerrigan (New Orleans, LA)

CRUSHIN' A CONCUSSION: 200 Questions to Ask About a Mild TBI
John Jerry Glas

Once upon a time, when dinosaurs roamed the earth, defense attorneys were satisfied to end their cross-examination by getting a doctor to admit that the plaintiff sustained "just a concussion." But today, when a doctor testifies that a plaintiff sustained a concussion, jurors have more questions than answers. The diagnosis of a mild traumatic brain injury ("TBI") now marks the beginning, not the end, of your cross-examination.

Every lawyer needs a strategy for attacking claims of permanent cognitive and behavioral impairment following a concussion or "mild TBI." The following list of questions was designed for a concussion case involving no objective evidence of brain damage and no neurological deficits on arrival at the hospital.

Obviously, every line of questioning will not apply in every concussion case, but the goal of cross-examination should always be: (1) to rule-out the "more serious" brain injuries that could have happened, but did not; (2) to review the significant predictors of outcome following a concussion; (3) to establish the lack of objective findings on examination and imaging; (4) to establish the lack of subjective complaints associated with TBI; (5) to challenge the force exerted on the neck, skull, and brain; (6) to prove the plaintiff's symptoms are not consistent with the severity of the injury; and (7) to attack the results of DTI-MRI. Teach the jury that the plaintiff's symptoms are an aberration, and the jury will question the cause and existence of those symptoms.

Define the Mechanism of a Coup Injury

Jurors like bright lines, and bright lines can frame the discussion and define the severity of an injury. In a case involving mild traumatic brain injury, a defense attorney can frame the discussion and define the severity of the injury by focusing the jury's attention on whether the brain "struck the inside of the skull vault." That is a bright line that jurors can remember and understand. To draw that bright line, you will have to teach the jury a little about the mechanism of a coup injury, but that time is well spent. Here are ten carefully worded questions that you can ask plaintiff's experts to make sure you are "on the same page" before you start ruling out "more serous" brain injuries.

Is the skull rigid?
The cranium is the upper portion of the skull. The eight cranial bones include the frontal, parietal (2), temporal (2), occipital, sphenoid, and ethmoid. These cranial bones are strong but light weight. They are held together by fibrous joints called "sutures," which are held together by "Sharpey's fibres." Sharpey's fibres grow from one cranial bone into the adjacent bone and bind them in a way that permits very little movement.

Is the brain surrounded by fluid?
The brain is surrounded by cerebrospinal fluid (CSF), which occupies the subarachnoid space and the ventricular system around and inside the brain. CSF is a clear solution containing ions and different substances to serve as an intracerebral transport medium for nutrients, neuroendocrine substances & neurotransmitters.

Does the anchored brain "basically" float inside the rigid skull?

The cranium is the upper portion of the skull. When asked by a (less knowledgeable) lawyer, most experts will generally agree that the brain "kinda sorta" floats in cerebrospinal fluid inside the skull vault (or "cranial vault"). Jurors often remember this imagery of the brain being "cushioned gently by the surrounding spinal fluid;" it can also help jurors focus on what happened to the brain itself.

If the rigid skull is moving forward and stops abruptly, will the floating brain continue to move forward?
Inertia is the resistance of an object to a change in its state of motion. When the skull stops moving forward, the brain's inertia keeps it moving forward. Newton's first law of motion states: "An object at rest tends to stay at rest and an object in motion tends to stay in motion with the same speed and in the same direction unless acted upon by an unbalanced force."

If the rigid skull is moving at sufficient speed and stops abruptly, can the brain strike the inside of the skull vault?
When the skull is moving at sufficient speed and stops abruptly, brain tissue can strike the inside of the cranial vault. Depending on the angle and force involved, the brain tissue may also rotate along (or rub against) the cranial vault.

Does the inside of the skull vault contain bony ridges?
The inside of the cranial vault is not smooth. The interior of the skull contains sharp bony ridges that can injure the brain. The following is an excerpt from a deposition of a neuropsychologist in a case where a plaintiff wearing a hard hat struck walked into a steel beam:

"Q. And that part of the brain. . . is the basic area that is associated with the forehead and directly above?
A. Correctly more – and also the region behind the eyes and sinus passages. The inside of the skull vault is not very smooth in that area."

When the brain strikes the bony ridges of the skull vault, can the brain suffer a traumatic injury?
Brain tissue is vulnerable to trauma. Different experts describe brain tissue differently. Some describe it as being "firm gelatin-like"; others insist it has "the consistency of warm butter." Always find out how an expert describes the brain tissue. When there is no evidence of a coup injury, embrace those definitions which make the brain tissue sound more vulnerable because it makes the possibility of contact without injury (bruising, tearing, swelling, bleeding) sound impossible or unlikely.

Is a brain injury at the site where the brain first strikes the bony ridges of the skull vault called a "coup" injury?
During a coup injury, the skull stops abruptly, and the brain collides with the inside of the cranial vault. This type of injury is called a "focal injury," as opposed to a "diffuse axonal injury."

If the skull is moving fast enough, and stops abruptly, can the brain bounce off the skull vault, accelerate backwards, and strike the opposite skull vault?
If sufficient speed/force is involved, the brain can experience deceleration forward and then acceleration backwards.

Is a brain injury opposite the "coup" injury called a "contrecoup" injury?
Whereas a coup injury occurs under the site of impact with an object, a contrecoup injury occurs on the side opposite the area that was hit. Coup and contrecoup injuries can occur individually or together. When a moving object impacts the stationary head, coup injuries are typical, while contrecoup injuries are produced when the moving head strikes a stationary object. A contrecoup injury is a "focal phenomenon" and is not like a diffuse axonal injury.

Rule-Out Gross Abnormalities:

All traumatic brain injuries are not created equal. But that is what some plaintiff attorneys want jurors to believe. During my second civil jury trial, I had a (very famous) plaintiff attorney ask a neuropsychologist: "Isn't having brain damage like being pregnant; you can't be a little pregnant?"

Part of our job as defense attorneys is to help jurors understand and picture where "on the totem pole" this concussion ranks. Always identify the spectrum of coup injuries and define the (lack of) severity of the brain injury at the point where the brain could

have impacted the cranial vault if sufficient force had been involved. Start by establishing that striking the cranial vault can cause each injury, and what injuries the diagnostic image(s) taken of the plaintiff's brain can reveal. When you have laid the proper foundation, prove that the diagnostic image(s) revealed no objective evidence of any of these injuries (from most severe to least severe) and obtain the admissions you need to show jurors how far down the totem pole this concussion ranks.

Brain Herniation

The skull is rigid, and the space between the skull and the brain is small. Subdural hematoma can cause an increase in intracranial pressure. It can have a "mass effect" on the brain, potentially causing brain herniation and/or midline shift. Brain herniation occurs when the brain shifts across structures within the skull, or through the hole called the foramen magnum in the base of the skull (through which the spinal cord connects with the brain). The diagram shows the six types of brain herniation: (1) uncal; (2) central; (3) cingulated; (4) transcalvarial; (5) upward; and (6) tonsillar.

Can TBI cause or result in brain herniation?
Can MRI/CT show brain herniation?
Did plaintiff's MRI/CT show brain herniation?
Did Plaintiff experience brain herniation?

Midline Shift

A subdural hematoma or intracranial pressure can cause the brain to shift past its center point ("Midline Shift"). Midline Shift is a measure of ICP, and the presence of midline shift is an indication of intracranial pressure. Immediate surgery may be indicated if there is midline shift of more than 5mm.

Can TBI cause midline shift?
Can MRI/CT show midline shift?
Did plaintiff's MRI/CT show midline shift?
Did Plaintiff experience midline shift?

Mass Effect

Mass effect is the effect exerted by any mass, including intracerebral hemorrhage and significant hematoma.

Can the brain's striking the skull vault cause mass effect?
Can MRI/CT show mass effect?
Did plaintiff's MRI/CT show mass effect?
Did Plaintiff experience mass effect?

Intracranial Pressure

Intracranial Pressure (ICP) is the pressure in the cranium, and it is measured in millimeters of mercury. ICP is derived from the circulation of cerebral blood and cerebrospinal fluid (CSF). ICP is maintained in a tight normal range dynamically, through the production and absorption of CSF and pulsates approximately 1mmHG in a normal healthy adult. Traumatic brain injury (e.g., bleeding in the subdural space) can disturb this circulation and provoke an increase in ICP. The resulting increase in ICP can impede blood flow and cause ischemia.

Is Intracranial Pressure (ICP) derived from the circulation of cerebral blood and cerebrospinal fluid (CSF)?
Is ICP measured in millimeters of mercury?
At rest, is ICP normally 7=15 mmHg for a supine adult?
Can the brain's striking the skull vault cause elevated ICP?
Can MRI/CT reveal elevated ICP?
Did plaintiff's MRI/CT show (evidence of) elevated ICP?
Did plaintiff experience elevated ICP?

Cerebral Laceration (Tearing)

A cerebral laceration occurs when the tissue of the brain is mechanically cut or torn. The injury is similar to a cerebral contusion, but the pia-arachnoid membranes are torn during a cerebral laceration (but not during a cerebral contusion).

Can the brain's striking the skull vault cause a laceration (cut)?
Can MRI/CT reveal a brain laceration?
Did plaintiff's MRI/CT show any brain lacerations?
Did plaintiff experience a brain laceration?

Cerebral Contusion (Bruising)

A cerebral contusion is a "bruise of the brain tissue." It has been described as a heterogenous areas of hemorrhage (bleeding) into the brain parenchyma.

Can the brain's striking the skull vault cause a contusion (bruising)?

Can MRI/CT reveal a brain contusion?
Did plaintiff's MRI/CT show any brain contusions?
Did plaintiff experience a brain contusion?

Cerebral Edema (Swelling)
Cerebral edema is an accumulation of fluid in the brain tissue that causes the brain to swell.

Can striking the skull vault cause cerebral edema (swelling)?
Did MRI/CT reveal cerebral edema?

Hematoma (Pooling of Blood)
A subdural hematoma is a collection of blood within the meningeal layer of the dura ("on the surface of the brain").

Can striking the skull vault cause hematoma (pooling of blood)?
Can MRI/CT reveal hematoma?
Did plaintiff's MRI/CT reveal hematoma?
Did plaintiff have subdural hematoma?

Hemorrhage
Brain hemorrhage or "intracranial hemorrhage" (bleeding) includes four broad types of hemorrhage: (a) epidural hemorrhage; (b) subdural hemorrhage; (c) subarachnoid hemorrhage; and (d) intraparenchymal hemorrhage. When there is evidence of hemorrhage, always determine what type of hemorrhage and the location of that hemorrhage.

The dura is the outer protective covering of the brain. Whereas epidural bleeding usually results from tears in arteries, subdural bleeding usually results from tears in veins that cross the subdural space. MRI and CT can reveal macroscopic bleeding. Susceptibility Weighted Imaging (SWI) can reveal microscopic bleeding by detecting the presence of hemosiderin, which the brain does not reabsorb after hemorrhage.

Can striking the skull vault cause hemorrhage (bleeding)?
Did [Imaging] reveal subdural hemorrhage?

Gliosis
Gliosis is a nonspecific reactive change of glial cells in response to damage to the central nervous system (CNS). In most cases, gliosis involves the proliferation or hypertrophy of several different types of glial cells, including astrocytes, microglia, and oligodendrocytes. Some experts believe that trauma-induced gliosis will more likely than not occur along the gray-white matter border.

Can striking the skull vault cause gliosis (scarring)?
Can MRI/CT reveal gliosis?
Did plaintiff's MRI/CT reveal gliosis?
Does plaintiff have gliosis?
Is that gliosis located along the gray-white matter border?

Encephalomalacia
Encephalomalacia (or cerebromalacia) refers to the softening of brain tissue, which can be caused by a traumatic brain injury and can be visualized on certain diagnostic images. Softening of the brain tissue can coincide with loss of brain tissue and volume at the same location. When there is encephalomalacia, always determine whether there is encephalomalacia and atrophy.

Can the brain's striking the skull vault cause encephalomalacia (softening of brain tissue)?
Can MRI/CT reveal encephalomalacia?
Did plaintiff's MRI/CT reveal encephalomalacia?
Does plaintiff experience encephalomalacia?

Atrophy & Volume Loss
Regarding brain tissue, atrophy describes a loss of neurons and the connections between them. Brain atrophy can be classified into two main categories: generalized and focal atrophy. Generalized atrophy occurs across the entire brain whereas focal atrophy affects cells in a specific location.

Can the brain's striking the skull vault cause focal atrophy (loss of brain tissue) and loss of volume?
Can MRI/CT reveal focal brain atrophy and volume loss?
Did plaintiff's MRI/CT reveal focal brain atrophy and volume loss?
Has plaintiff experienced brain atrophy and volume loss?

Gray-White Differentiation
The terms white matter and gray matter refer to different components of nervous tissue found in the

brain and spinal cord, which make up the central nervous system. Neurons, specialized cells that send and respond to electrical impulses, make up a large portion of the nervous system and are responsible for forming the basis of the CNS. Neurons arrange themselves in distinct ways within the CNS, which makes the brain and spinal cord appear as gray or white color. These differences are due to the presence or absence of myelin, a fatty covering on the axons of neurons. Gray matter refers to tissue that is made up of nonmyelinated neurons; white matter refers to areas of myelinated neurons.

Can the brain's striking the skull vault cause abnormal gray-white matter differentiation?
Did MRI/CT reveal abnormal gray-white differentiation?
Does plaintiff have abnormal gray-white differentiation?

White Matter Hyperintensities
Hyperintensity is a term used in MRI reports to describe how part of an image looks on MRI scan. Most MRIs are black/white with shades of gray. A "hyperintensity" is an area that appears lighter in color than the surrounding tissues; a "hypointensity" would be darker in color. White Matter Hyperintensities ("WMH") are common in MRIs of asymptomatic individuals and their prevalence increases with age. When an MRI shows a WMH, and plaintiff's experts argue that they are "gliosis" or "scarring of the brain," be prepared to ask the following line of questions.

Please name all the potential causes of the WMHs?
Can you rule-out the possibility that plaintiff's WMHs were caused by the normal process of aging?
How many WMHs does the (peer-reviewed medical and scientific) literature predict the plaintiff will have at the plaintiff's age?
Can you rule-out the possibility that plaintiff's WMHs were caused by vascular disease?
Can you rule-out the possibility that plaintiff's WMHs were caused by a "transient ischemic attack" or "micro-stroke"?
Can you rule-out the possibility that plaintiff's WMHs were inherited?

Attack DTI-MRI Results

Diffusion Tensor Imaging
Diffusion Tensor Imaging (DTI) is a variant of diffusion-weighted imaging (DWI) that utilizes a tissue water diffusion rate for image production. Water molecules will diffuse differently through space depending on the tissue type, components, structure, architecture, and integrity. DTI is an MRI-based neuroimaging technique that measures movement of water along axons, analogous to the straws in a glass of water.

Isotropy is defined as uniformity in all directions and when applied to water molecules; isotropy occurs when the diffusion of water is entirely uninhibited (such as water movement in a glass of water). Anisotropy is when there is a directionality in the diffusion of water present, and the movement of water is no longer random (such as water movement along straws placed in a glass). The greater the anisotropy; the more directional and linear the diffusion of water molecules. DTI produces DTI images (DICOM files). On a scale of anisotrophy "zero" means "fully isotropic diffusion" (water can diffuse in all directions equally) and "one" means "fully anisotropic diffusion" (water can move in only one direction).

Three common diffusion imaging techniques are: (a) fractional anisotropy map (FA is an index for the amount of diffusion asymmetry within a voxel; (b) principal diffusion direction map, which assigns colors to voxels based on a combination of anisotropy and direction; and (c) fiber tracking maps, which maps axonal tracts using a deterministic method knows as FACT (fiber assignment by continuous tracking), where the user selects "seed voxels" in a certain areas of the brain and automated software computes fiber trajectories in and out of that area. Basic DTI questions include:

Classify the DTI Period

On what date was the DTI imaging performed?
What is the period of time between the TBI and the DTI imaging?
Was the DTI imaging performed during the acute, subacute, or chronic period following the TBI?

Identify DTI-MRI Confounding Variables

Was plaintiff scanned on the same MRI scanner as the normative database?
What method was used for harmonization of multi-site diffusion images?
What medical, psychiatric, social, and environmental factors can affect DTI results? How?
Could any of the plaintiff's medical conditions, psychiatric conditions, social factors, or environmental factors have affected plaintiff's DTI imaging results? How?
What additional confounding variables are involved in comparing plaintiff's DTI-MRI with the normative control group?

Investigate the Control Group

Did you compare plaintiff's DTI imaging to a normative control group or normative database?
What was your exclusion criteria for that normative control group?
"Q. What is your definition of a normative database?
A. So a normative database in our case is individuals without any reported history of learning or development disorders, psychiatric disorder, substance abuse or traumatic brain injury." (Jeffrey Lewine, PhD, 12-11-2020 Deposition, at 30:12-18).
What matching (i.e., age range matching & gender matching) was applied to the normative control group?
How many people were included in that normative control group?
What methodology and software did you use to compare the plaintiff's metrics to the normative data?
What was defined as a "standard deviation"?
What was the rate of error (what is the P value)?
"A. So we said a P value of .05 is the criteria. And so what that is saying is that there is a 5 percent chance that something—so at the level of .05 there's a 5 percent chance that someone without an abnormality might still appear to have an abnormality…
…
So, as a neuroscientist, I set the bar at .05, which in general is – it's certainly a higher bar than the typical legal standard of more likely than not. I want 95 percent confidence, not 51 percent confidence."(Jeffrey Lewine, PhD, 12-11-2020 Deposition, at 46:12-47:4).
How many of the members of the control group had ALL of plaintiff's medical conditions (hypertension, etc.) and medical history (drugs, alcohol, PTSD, depression, anxiety, medication, etc.)?

Significant Predictors of Outcome

Prospective and retrospective longitudinal medical studies will often divide concussion study members into different "severity groups" based on certain significant predictors of outcome. The following questions can help a defense attorney define the severity of the injury.

Loss of Consciousness (LOC)
Medical studies have reported a dose-response relationship between loss of consciousness and cognitive impairment.[1] The longer the person experiences loss of consciousness (LOC), the less likely that person will have a full recovery. Some TBI medical studies divide study members into "severity of injury" groups based on the duration of LOC. When the study divides TBI into three groups (mild, moderate & severe), a concussion will usually meet the criteria for the "mild" TBI group. When the study divides TBI into groups based solely on LOC, a concussion will usually meet the criteria for the least severe group. For example, one study divided members into five "severity groups":

Study Group 1:	LOC < 1hr
Study Group 2:	LOC = 1-23 hr
Study Group 3:	LOC = 1-6 days
Study Group 4:	LOC = 7-13 days
Study Group 5:	LOC = 14-28 days

Concussions are also classified based on LOC. According to the Cantu Guidelines, a Grade I concussion is associated with no LOC. A Grade II concussion is associated with LOC for less than 5 minutes; a Grade III concussion is associated with LOC for more than 5 minutes.

Did plaintiff lose consciousness?
What was the duration of plaintiff's loss of consciousness?

1 Martin L. Rohling, John E. Meyers, and Scott R. Millis, Neuropsychological Impairment Following Traumatic Brain Injury: A Dose-Response Analysis, The Clinical Neuropsychologist, 2003, Vol. 17, No. 3, pp. 289-302, at 289 (stating in the Abstract that "A significant does-response relationship between loss of consciousness (LOC) and cognitive impairment was found. . . ").

Seizure

Approximately 5-10% of individuals with traumatic brain injury experience new onset seizure. The risk of seizure increases with increasing injury severity, depressed skull fracture, intracranial hematoma, and penetrating trauma. The risk is greatest in the first two years after injury and gradually declines thereafter. All types of seizures may occur as a result of trauma, but the most frequent are focal or partial complex seizures. Generalized complex seizures (what are commonly called "grand mal' seizures) occur in approximately 33% of cases. Immediate onset seizures, those that occur immediately or in the first few hours after a brain injury, do not suggest a chronic seizure disorder. Early onset seizures and those which develop within the first 7-8 days after trauma require prophylaxis for up to one year. Spontaneous resolution of seizure activity has been noted in this group.[2]

Did plaintiff experience a seizure?
What type of seizure did plaintiff experience?

Total Duration of Impaired Consciousness

Some plaintiffs will admit that they did not lose consciousness, but insist that they were dazed, disoriented, or confused following the accident. Check the ER records to see if "confusion/ disorientation" is checked in the "Neuro/Psych" subsection of the Physical Examination; and determine when plaintiff first spoke and exactly what plaintiff said. The ability to engage in normal conversation is relevant to determining GCS score and cognitive functioning. Total duration of impaired consciousness = Time to Follow Commands (TFC) plus duration of Post-Traumatic Amnesia (PTA).

Was plaintiff dazed, confused, or disoriented after the accident?
How long did plaintiff remain dazed?
When was plaintiff oriented to person, time, place, situation?
Note: Look for "orientedx4" or "AAOX4".
When was plaintiff able to communicate?
Did plaintiff "repeat questions"?
What was the "total duration of impaired consciousness"?

Time to Follow Commands (TFC)

Some medical studies divide study members into "severity of injury" groups based on the time to follow commands after the injury (TFC), like "raise your hand" or "stick out your tongue."[3] When the study divides TBI into groups based solely on TFC, a concussion will usually meet the criteria for the least severe group. For example, one study divided members into six "severity groups":

Study Group 1:	TFC < 1hr
Study Group 2:	TFC = 1-23 hr
Study Group 3:	TFC = 1-6 days
Study Group 4:	TFC = 7-13 days
Study Group 5:	TFC = 14-28 days
Study Group 6:	TFC > 28 days

What was the Time to Follow Commands?

Glasgow Coma Scale (GCS)

The Glasgow Coma Scale (GCS) is the most widely used scoring system for quantifying levels of consciousness following TBI. The GCS requires ER doctors and staff to assess three things: eye opening, motor response and verbal responses. A perfect GCS score is 15/15. In order to receive a 15/15 the plaintiff would have to: (1) demonstrate spontaneous eye movement; (2) have normal motor response; and (3) demonstrate normal conversation. GCS is used by ER staff because it correlates well with outcome following TBI. A low GCS score more than an hour after an accident can be an indicator that the plaintiff sustained a TBI and can be a significant predictor of outcome following TBI. The better the GCS score at presentation, the more likely the plaintiff will enjoy a full recovery.

When/what was Plaintiff's first recorded GCS score?
When/what was Plaintiff's GCS score on arrival ("on presentation") at the hospital?

Duration of Post-Traumatic Amnesia (PTA)

A traumatic brain injury can cause amnesia, and the plaintiff's recall can be important in evaluating the severity of the injury. Always check the ER records to determine what details the plaintiff was able to give ER staff about the accident and/or the plaintiff's medical history. Some ER records will also

2 Jay Meythaler, JD,MD, & Tom Novack, PhD, Post Traumatic Seizures Following Head Injury, published by the UAB Traumatic Brain Injury Care System, posted online at http://main.uab.edu/tbi.

3 See Cynthia A Austin, et al, Time to follow commands remains the most useful injury severity variable for predicting WeeFIM scores 1 year after paediatric TBI, J Pediatr Rehabil Med. 2009:2(4):297-307.

require the ER staff to circle whether the plaintiff "remembers event" and/or "remembers… coming to hospital." Those questions are designed to screen for retrograde and anterograde amnesia.

Retrograde Amnesia
Retrograde amnesia is a type of mental health disorder where the memories formed prior to a TBI are affected. The psychiatric disorder can be caused by damage to the memory storage areas of the brain.

At the scene, was plaintiff able to tell witnesses or first responders what happened before the accident?
At the hospital, was plaintiff able to recall events immediately before the accident?
Since discharge from hospital, has plaintiff been able to recall events immediately before the accident (i.e., during subsequent evaluations, examinations, and depositions)?

Anterograde Amnesia:
Anterograde amnesia is a condition in which a person is unable to create new memories after an amnesia-inducing event.

Was plaintiff able to tell the witnesses or first responders what happened immediately after the accident?
At the hospital, was plaintiff able to recall events immediately after the accident (anterograde amnesia)?
Since discharge from hospital, has plaintiff been able to recall events immediately before the accident (i.e., during subsequent evaluations, examinations, and depositions)?

Memory Loss:
Memory loss should be treated as separate and distinct from the determination of retrograde or anterograde amnesia. Always ask more general questions regarding memory loss.

When interviewed at scene/hospital, did plaintiff remember and accurately personal details?
When interviewed at scene/hospital, did plaintiff remember and accurately provide medical history?
Did plaintiff complain of memory loss?
Did hospital find "impairment of recent or remote memory?"
Did hospital find memory was "normal" or "NL" or "WNL"?

Objective Findings On Examination

Cranial Nerve Exam:
There are twelve (12) conventionally recognized cranial nerves, and those cranial nerves emerge directly from the brain stem. The cranial nerve exam is used to identify problems with the cranial nerves by physical examination. It has 9 components, and each test evaluates at least 1 of the 12 cranial nerves (I-XII). The cranial nerves evaluate sense of smell (I), visual fields and acuity (II), eye movements (III, IV, VI) and pupils (III, sympathetic, and parasympathetic), sensory function of face (V), strength of facial (VII) and shoulder girdle muscles (XI), hearing (VII, VIII), taste (VII, IX, X), pharyngeal movement and reflex (IX, X), and tongue movements (XII).

ER doctors abbreviate "cranial nerve" as "CN." Cranial nerve examinations vary. The doctor will detect and interpret the signs during many of the CN examinations; however, during certain neurological examinations, especially of the sensory system, the doctor will rely on the patient to report what he/she is feeling or not feeling. A CN examination will usually include an evaluation of the patient's motor function, reflexes, coordination & gait, and sensory functions. Those aspects are artificially divided below, but only for the sake of organization. Many CN tests will evaluate more than one cranial nerve.

Did plaintiff have normal sense of smell?
The olfactory nerve is the 1st cranial nerve. It is composed of sensory fibers, and its sole function is to discern smells. Olfaction depends on the integrity of the olfactory neurons in the roof of the nasal cavity and their connections through the olfactory bulb, tract, and stria to the olfactory cortex of the medial frontal and temporal lobes. To test olfaction, a doctor can present an odorant (concentrated vanilla, peppermint, or coffee extract) to each nostril, and asks the patient to identify each smell. ERs rarely test smell (CN I), which is why ER records usually indicate that cranial nerve examinations II through XII (CN II-XII) were normal.

Did plaintiff have normal (same as before) visual acuity?

Visual acuity is the eye's ability to detect fine details and is the quantitative measure of the eye's ability to see an in-focus image at a certain standard. The standard definition of normal visual acuity (20/20) is the ability to resolve a spatial pattern separated by a visual angle of one minute of arc. If the plaintiff can see at a distance of 20 feet an object that can normally be seen at 20 feet, then the plaintiff has 20/20 vision. If the plaintiff can see at 20 feet what a normal person can see at 40 feet, then the plaintiff has 20/40 vision. Visual acuity is often measured with a Snellen chart (see right).

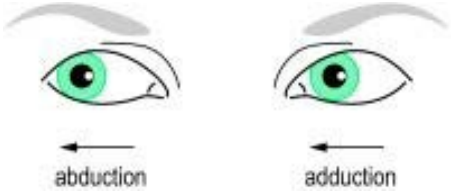
Were plaintiff's pupils equal, round, and reactive to light (PERRL)?

The oculomotor nerve is the 3rd cranial nerve. An examination of pupilary function includes inspecting the pupils for equal size (1mm or less of difference may be normal), regular shape, and reactivity to light. To test pupilary reaction, the doctor can use the swinging flashlight test. Normally, both pupils will constrict when the first pupil is exposed to light. Normally, as the light is being moved from the first pupil toward the second pupil, both pupils will begin to dilate; and, when the light reaches the second pupil, both pupils will constrict again. In hospital records, this examination may be abbreviated PERRL, which stands for Pupils Equal, Round, Reactive (or Responds to Light).

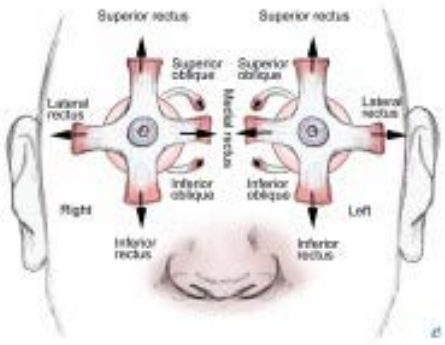
Did plaintiff report sensitivity to light?

Photophobia is not a morbid fear of light; it is the experience of discomfort or pain to the eyes due to light exposure. When too much light enters the eyes, the light causes over stimulation of the photoreceptors in the retina, and excessive electrical impulses to the optic nerve. Damage to the eye (i.e., corneal abrasion) can allow too much light to enter. Damage to the pupil's ability to constrict equally (i.e., damage to oculomotor nerve) can also allow too much light to enter. See question supra regarding normal constriction.

Was plaintiff's extraocular movement intact (EOMI)?



The "follow my finger test" requires a patient to follow the doctor's finger as it moves through the six principal positions of gaze (in an "H" pattern). The test involves adduction (rotation of the eye toward midline) and abduction (outward rotation of the eye away from midline). The test can reveal problems with the 2nd Cranial Nerve (Optic Nerve), the 4th Cranial Nerve (Trochlear Nerve) or the 6th Cranial Nerve (Abducens) Nerve.



The Optic nerve contains special sensory afferent fibers that convey visual information from the retina to the occipital lobe via the visual pathway. The extra-ocular muscles are the six muscles that control the movements of the eye. To test slow tracking or "pursuits," a doctor can use the "follow my finger test."

The Trochlear Nerve supplies somatic efferent motor fibers that innervate the superior oblique muscle. To test the superior oblique muscle (and isolate the trochlear nerve), the doctor can move a finger downward during the "H" pattern.

The Abducens Nerve supplies somatic efferent motor fibers to the lateral rectus muscle, which functions to abduct the eye. To test the lateral rectus muscle (isolate the Abducens Nerve), the doctor can move a finger horizontally during the "H" pattern.

Did plaintiff have normal saccadic function?
The eyes do not move continuously over a line of text; they make short rapid movements ("saccades") intermingled with short stops ("fixations"). To evaluate saccades, the doctor can have the patient move his/her eyes quickly to a target at the far right, left, top and bottom. If the eyes are unable to "jump" from one place to another, it may impair the patient's reading ability and other skills.

Did plaintiff have normal accommodation response?
The extra-ocular muscles are responsible for accommodation. To test accommodation, the doctor may hold a finger about 4 inches from the patient's nose and then moving that finger toward the patient. If the eyes can maintain focus on the finger, then the eyes have exhibited a normal accommodation response. In hospital records, this examination may be included with the pupil examination and abbreviated as the "A" in "PERRLA" (Pupils Equal, Round, Reactive (or Responds To Light), & Accommodation).

Did plaintiff have normal positioning of the upper eyelids?
Ptosis is an abnormally low position (drooping) of the upper eyelid. Ptosis can be caused by damage to the muscles that raise the eyelid (levator & Müller's muscles) or by damage to the 3rd Cranial Nerve (Oculomotor Nerve) which controls this muscle.

Did plaintiff have normal peripheral vision?
To test the visual fields, the doctor can perform confrontation field testing in which each eye is tested separately to assess the extent of the peripheral field. During that test, the doctor covers one of the patient's eyes, and tells the patient to fixate the uncovered eye on the doctor. The doctor then tells the patient to count the number of fingers that are briefly flashed in each of the four quadrants.

Did plaintiff have normal vision (no double vision)?
Diplopia is commonly known as "double vision." It is the simultaneous perception of two images of a single object. These images may be displaced horizontally, vertically, or diagonally (i.e., both vertically & horizontally) in relation to each other. Temporary diplopia can be caused by a concussion. Loss of the 4th Cranial Nerve (Trochlear Nerve) can cause diplopia with compensating head tilt. Loss of the 6th Cranial Nerve (Abducens Nerve) can elicit complaints of horizontal diplopia and may cause patients to appear esotropic (where one or both eyes turn inward).

Did plaintiff have normal sensation and pain symmetry?
The trigeminal nerve is the 5th cranial nerve. It supplies both sensory and motor fibers to the face and periorbital area. The afferent sensory fibers separate into three division and carry touch, pressure, pain, and temperature sense from the oral and nasal cavities, and the face. To test the sensory portion of the trigeminal nerve, the doctor can touch one side of the forehead with a tissue, touch the opposite side of the forehead with a tissue, and ask the patient (whose eyes are closed) to compare sensations. A sharp object can be used in the same manner when testing for pain symmetry. The test is then repeated on the cheek and jaw line to assess the second and third divisions.

Did plaintiff have normal (symmetric) blink response?
An additional test used to evaluate the trigeminal nerve is the corneal reflex test. To evaluate the corneal reflex, the doctor can gently touch each cornea with a cotton wisp and observes any asymmetries in the blink response. This tests both the sensory portion of the 5th Cranial Nerve (Trigeminal Nerve) and the motor portion of the 7th Cranial Nerve (Facial Nerve), which is responsible for lid closure.

Did plaintiff have normal (symmetric) tone in the masseter muscles?
To test the motor component of the 5th Cranial Nerve (Trigemial Nerve), the doctor can feel and compare the tone of the masseter muscles during jaw clench. The doctor asks the patient to open his/her mouth and resist the examiner's attempt to close it. If there is weakness of the pterygoids, the jaw will deviate towards the side of the weakness.

Did plaintiff have normal functioning of the Facial Nerve?

The Facial Nerve is the 7th Cranial Nerve. It supplies efferent nerve motor innervation to the muscles of facial expression and carries sensory afferent fibers from the anterior two thirds of the tongue for taste. To test the motor division of the Facial Nerve, the doctor can ask a patient to wrinkle the forehead and checks for asymmetry. The doctor can then ask the patient to shut the eyes tightly while the doctor attempts to open them, checking for any weakness on one side. The doctor may also have the patient show his/her teeth or smile and compare the nasolabial folds on either side of the patient's face.

Did plaintiff have normal sense of taste?
To test the sensory fibers of the Facial Nerve, the doctor can apply sugar, salt, or lemon juice on a cotton swab to the lateral aspect of each side of the tongue, and then ask the patient to identify the taste. Taste is often tested only when specific pathology of the facial nerve is suspected.

Did plaintiff have normal hearing?
The Vestibulocochlear Nerve is the 8th cranial nerve. It carries two special sensory afferent fibers, one for audition (hearing) and one for vestibular function (balance). Damage to the 8th Cranial Nerve can lead to hearing loss, dizziness, loss of balance, tinnitus, and deafness. To test the cochlear division, the doctor can screen for auditory acuity. To test auditory acuity, the doctor can lightly rub fingers together next to each of the patient's ears and comparing the left and right side responses.

Weber Test: The Webber test consists of pacing a vibrating tuning fork on the middle of the forehead and asking if the patient feels or hears it best on one side or the other. The normal patient will say that it is the same on both sides. The patient with unilateral neurosensory hearing loss will hear it best in the normal ear, and the patient with unilateral conductive hearing loss will hear it best in the abnormal ear. The tuning fork is struck and placed in the middle of the patient's forehead. The patient compares the loudness on both sides.

Rinne Test: The Rinne test consists of comparing bone conduction, assessed by placing the tuning fork on the mastoid process behind the ear, versus air conduction, assessed by holding the tuning fork in the air near the front of the ear. Normally, air conduction volume is greater than bone conduction sound volume. For neurosensory hearing loss, air conduction volume is still greater than bone conduction, but for conduction hearing loss, bone conduction sound volume will be greater than air conduction volume. A tuning fork is held against the mastoid process until it can no longer be heard. It is then brought to the ear to evaluate the patient's response.

Did plaintiff report sensitivity to noise?

Hyperacusis (also spelled "hyperacousis") is a condition of reduced tolerance to auditory stimuli. A person with hyperacusis may experience ambient noises (i.e., dog barking, dishwasher purring) as inner ear pain or pressure. Hyperacusis is usually caused by damage to the inner ear or the auditory nerve, but it can occur as a cerebral processing disorder (i.e., as a result of the brain's perception of the sound). A doctor can use the Johnson's Hyperacusis Quotient to measure its severity.

Did plaintiff report "ringing" in the ears (tinnitus)?
Tinnitus is the perception of sound within the human ear in the absence of corresponding external sound. It is usually described as a ringing sound, but it can take the form of a high-pitched whining, buzzing, hissing, screaming, humming, tinging or whistling sound. It can be intermittent or continuous. To quantitatively measure tinnitus, a doctor can play sample sounds of known amplitude, and decreasing the amplitude until the tinnitis becomes audible. The tinnitus will always be equal to or less than the sample noises heard by the patient.

Did plaintiff have a normal gag reflex?
The gag reflex tests both the sensory & motor components of the 9th Cranial Nerve (Glossopharyngeal Nerve) and the 10th Cranial Nerve (Vagus Nerve). To test the involuntary gag reflex, the doctor can stroke the back of the pharynx

with a tongue depressor and watches the elevation of the palate (as well as causing the patient to gag).

Did plaintiff pass the "say aah" test?
To test the motor division of the 9th Cranial Nerve (Glossopharyngeal Nerve) & the 10th Cranial Nerve (Vagus Nerve), the doctor can ask the patient to say "ahh" or "kah." The palate and uvula will normally elevate symmetrically without deviation. Paralysis of the 9th nerve can cause a pulling of the uvula to the unaffected side.

Was plaintiff able to swallow normally?
Did plaintiff have a normal voice (not hoarse)?
Did plaintiff have normal laryngeal function?
The Vagus Nerve is the 10th Cranial Nerve. It carries sensory afferent fibers from the larynx, trachea, esophagus, pharynx, and abdominal viscera. It also sends efferent motor fibers to the pharynx, tongue, thoracic and abdominal viscera and the larynx. Testing of the vagus nerve is performed by the gag reflex and the "ahh" test. A unilateral lesion affecting the vagus nerve can produce hoarseness and difficulty swallowing due to a loss of laryngeal function.

Did plaintiff have normal speech (no slurred speech)?
"Slurred speech" is abnormal speech in which words are not enunciated clearly or completely but are run together or partially eliminated. There are many causes of slurred speech, but it can be associated with post-concussion syndrome.

Did plaintiff have symmetric muscle tone?
The Accessory Nerve is the 11th Cranial Nerve. It carries efferent motor fibers to innervate the sternomastoid and trapezius muscles. To test the Accessory Nerve, the doctor can ask the patient to shrug the shoulders (trapezius muscles) and turn the head (sternomastoid muscles) against resistance. While the patient is turning the head, the doctor palpates the sternocleidomastoid muscles. The muscle tone on both sides is compared.

Did plaintiff have normal tongue strength and control?
The Hypoglossal Nerve is the 12th Cranial Nerve. It supplies efferent motor fibers to the muscles of the tongue. To test the hypoglossal nerve, the doctor can ask the patient to stick out their tongue and move it side to side. If there is unilateral weakness, the protruded tongue will deviate toward the side of the weakness. Further testing includes moving the tongue right to left against resistance, or having the patient say "la, la, la."

Was the Cranial Nerve Exam "normal"?
Always conclude by asking the more general questions of whether the entire cranial nerve examination was normal.

Evaluation of Motor Function:

Did patient have normal muscle tone?
Did plaintiff have normal strength in each muscle group?
Did plaintiff have any muscle wasting or hypertrophy?
Doctor may test the muscle strength of each muscle group and record it in a systematic fashion. To determine muscle tone, the doctor can ask the patient to relax, and then passively move each limb at several joints to evaluate any resistance or rigidity that might be present.

Did patient have normal fine movement control?
To test fine movement control, a doctor can ask a patient to make rapid hand movements or tap a foot rapidly.

Did plaintiff have normal upper extremity motor strength?
To test upper extremity motor strength, the doctor can ask a patient to raise both arms in front of them while the doctor provides resistance. The doctor then records any weakness of one limb when compared to the contralateral limb.

Did plaintiff have normal lower extremity motor strength?
To test lower extremity motor strength, the doctor can ask a patient to flex and extend both legs in front of them while the doctor provides resistance. The doctor then records any weakness of one limb when compared to the contralateral limb.

Did plaintiff have normal posturing?
Abnormal posturing is an involuntary flexion or extension of the arms and legs. It occurs when one set of muscles becomes incapacitated while

the opposing set is not, and an external stimulus (such as pain) causes the working set of muscles to contract. It can be caused by conditions that lead to large increases in intracranial pressure, and typically indicates severe brain damage.

Did plaintiff have any involuntary movements?
Did plaintiff have any fasciculations?
A complete neurological examination should include observation of any twitches or involuntary movements. Fasciculations are quivering movements caused by firing of muscle motor units.

Did plaintiff have any motor deficits?
Did plaintiff have normal motor function?

Evaluation of Reflexes:

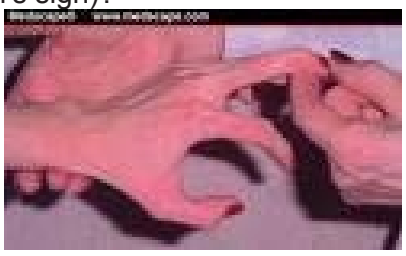
Did plaintiff have normal deep tendon reflexes?
In a normal person, when a muscle tendon is tapped briskly, the muscle immediately contracts due to a two-neuron reflex arc involving the spinal or brainstem segment that innervates the muscle. To test deep tendon reflexes, a doctor can perform the patellar tendon (knee jerk) test. When the doctor strikes the patellar tendon with a reflex hammer, it should be possible to feel the quadriceps contract and the knee extend. The deep tendon reflexes are typically graded as follows:
0 = no response
1+ = a slight but definitely present response
2+ = a brisk response
3+ = a very brisk response
4+ = a tap elicits a repeating reflex (clonus)
Whether the 1 + and 3 + responses are normal depends on what they were before the accident (i.e., the patient's reflex history), what the other reflexes are, and analysis of associated findings such as muscle tone, muscle strength, or other evidence of disease. Asymmetry of reflexes suggests abnormality.

Did plaintiff have normal plantar response (Babinski's sign)?

To test plantar response, a doctor can try to elicit the Babinski response. There are different methods, including stroking the sole (the plantar surface of the foot) firmly with a thumb from back to front along the outside edge. There are three possible responses:
Flexor: the toes curve inward and the foot everts; this is the response seen in healthy adults (aka a "negative" Babinski)

Indifferent: there is no response.
Extensor: the hallux dorsiflexes and the other toes fan out - the "positive Babinski's sign" indicating damage to the central nervous system.
Babinski's sign is associated with upper motor neuron lesions anywhere along the corticospinal tractHoffmann's Note: It may not be possible to elicit Babinski's sign if there is severe weakness of the toe extensors.

Did plaintiff have normal finger flexor reflexes (Hoffmann's sign)?



There is no precise hand equivalent for the plantar response, however, finger flexor reflexes can help demonstrate hyperreflexia in the upper extremities. To test finger flexor reflexes, a doctor can tap gently on the palm with the reflex hammer. Alternatively, heightened reflexes can be demonstrated by the presence of Hoffmann's sign.

To elicit Hoffmann's sign, a doctor can hold the patient's middle finger loosely and flick the fingernail downward, causing the finger to rebound slightly into extension. If the thumb flexes and adducts in response, Hoffmann's sign is present. Hoffmann's sign (heightened finger flexor reflexes) suggest an upper motor neuron lesion affecting the hands.

Cerebellar Exam:
The neurological aspect of motor function is based on the activities of the cerebellum. The cerebellum is responsible for equilibrium, coordination, and the smoothness of movement. Specific tests used to evaluate cerebellar function include assessments of gait and balance, pronator drft, the finger-to-nose test, rapid alternating action test, and heel-to-shin test.

Did plaintiff have normal gait (no ataxic gait)?
Did plaintiff have problems walking?
Did plaintiff perform the heel-to-shin test?
To test a patient's gait, a doctor can ask the patient to walk across the room. The doctor then watches for normal posture and coordinated arms movements. The doctor can ask the patient to walk heel to toe (tandem gait) across room, to walk on their toes (to test for plantar flexion weakness), and to walk on their heels (to test for dorsiflexion weakness). An ataxic gait is an unsteady, uncoordinated walk, employing a wide base and the feet thrown out.

Did patient have pronator drift (or Barre' test/sign)?
To test for drift, the doctor can ask a patient to close her/his eyes and extend both arms to the front with palms up. The doctor then observes the patient's arms to determine if one or both drift downward to side.

Did plaintiff have normal balance and equilibrium?
The cerebellum coordinates muscle actions to produce organized activates such as walking. To test coordination, the doctor can ask the patient to perform rapidly alternating and point-to-point movements; ask the patient to place hands on thighs and then rapidly turn the hands over and lift them off the thighs; and, holding an index finger at arms length from the patient, ask the patient to touch the patient's nose and then the doctor's finger. This is repeated with patient's eyes open and then with them closed. Nose to finger touching is an example of a point-to-point movement. A patient with a disorder of the cerebellum tends to overshoot the target.

Did plaintiff have Romberg's sign?
Balance comes from the combination of several neurological systems, namely proprioception, vestibular input, and vision. If any two of these systems are working, then the plaintiff should be able to demonstrate a fair degree of balance. To test balance, a doctor can ask the patient to stand with heels and toes together; to close their eyes, and to balance. The doctor will observe for one minute. If the plaintiff loses balance (sways or falls) while the eyes are closed, then the Romberg's test is positive.

Evaluation of Sensory Functions:

Did plaintiff have normal tactile sensation?
To test a patient's tactile sensation, a doctor can ask the patient to close her/his eyes, and then touch the patient's fingers and toes lightly with a tissue. The doctor can then ask the patient to identify when they feel the stroke of the tissue.

Did plaintiff have normal pain sensation?
To test a patient's pain sensation, the doctor can ask the patient to close his/her eyes, and then touch the patient on the fingers and hand with a safety pin. The doctor alternates the sharp tip with the blunt end to determine whether the patient can tell the difference between sharp and dull sensations. This test may be repeated on the toes.

Did plaintiff have normal vibration sense?
To test a patient's vibration sense, the doctor can strike a tuning fork and place it over the base of the nail bed on the patient's index finger. The doctor can then place a finger under the patient's finger to feel the vibration and ask the patient to identify when they (both) no longer feel the vibration. The doctor will test each side of the body for each extremity and make a comparison. A significant finding during testing is a marked decrease in sensitivity.

Summary "Objective Findings" Questions

Did plaintiff have a normal neurological examination?
Did plaintiff have a "focal neurological deficit"?
Always end by asking these more general questions regarding the objective findings at the ER or first visit with neurologist/neurosurgeon.

Subjective Complaints

Nausea/Vomiting
Nausea and vomiting are generally considered "classic" symptoms of a concussion. Most people

think that vomiting is controlled by the stomach, but it is actually controlled by an area of the brain which some call the "vomiting center" (yes, seriously). Whatever it is called, that area of the brain initiates the vomiting sequence, which causes the windpipe to close and the abdominal wall and diaphragm muscles to tighten suddenly and forcefully. The brain can initiate the vomiting sequence in response to infection or concussion. Remember that some pain medications can cause nausea and some medications reduce nausea. That is why it is important to find out whether there was vomiting and nausea before medication.

Did plaintiff vomit before receiving medical treatment? When?
Was plaintiff nauseous before receiving medical treatment?

Changes in Mood, Personality, Affect
Plaintiffs often report "changes in personality" following a concussion, but those changes are usually observed or noted days, weeks, or months after the accident. Check the ER records to see if "mood & affect" was checked or circled in the Neuro/Psych subsection. Also confirm that the Plaintiff was not restrained or sedated before discharge from the hospital.

Did plaintiff have to be restrained?
Was plaintiff violent or angry?
Did plaintiff engage in "inappropriate laughter?
Did plaintiff have "depressed mood"?
Was plaintiff's mood/affect normal?
Did plaintiff have "normal thought content"?'
Did plaintiff experience any mood changes?

Headaches
Plaintiffs will almost always report experiencing a headache following a concussion. Find out the severity of the headache (i.e., was it a migraine), the duration of the headache, and whether the headache resolved abruptly or tapered. Remember that headaches are non-specific findings. They can be caused by the stress of an accident, orthopedic injuries, medication, lighting, the waiting room, missing the meeting.

Did Plaintiff report a headache?
What was the duration, frequency, severity, and location of the headache?
How was the headache treated by Plaintiff?
When did the headache resolve (or change in duration, frequency, severity, or location)?
Is a headache a non-specific finding? Why?

Common Symptoms
After an accident, a plaintiff is "living in a fish-bowl." Everyone sees everything, and every subjective complaint will be "blamed on" the concussion. If the plaintiff lost her keys the day before the accident, it was because she was in a hurry or absent-minded; but, if the plaintiff loses her keys the day after an accident, family will fear she has permanent brain damage and memory problems. If the plaintiff loses his temper the night before an accident, it is because he is tired or hungry; but, if plaintiff loses his temper the night after an accident, it is because he has permanent brain damage and problems with disinhibition. That is why it is important to discover every complaint during the first few days and weeks after the accident. Find out when each symptom started, whether the symptom worsened (which is not consistent with a concussion), and when it resolved. Here are a few common subjective complaints:

Did plaintiff complain of dizziness or being light-headed?
Did plaintiff complain of weakness?
Did plaintiff complain of anxiety or depression?
Did plaintiff complain of excessive crying or crying spells?
Did plaintiff complain of "foggy thinking"?
Did plaintiff complain of insomnia?
Did plaintiff complain of excessive fatigue?
Please tell me every subjective complaint that [the plaintiff] relates to the accident?

Associated Injuries Relevant to Force of Impact

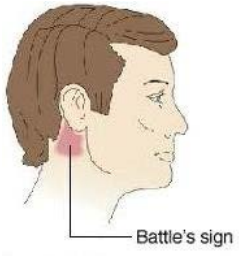
No Skull/Skin Injury:
Jurors may not understand complicated calculations of force, but they know that if you hit your head hard enough, you will get a hickey. In most concussion cases, the jury will want to know how "fast" the plaintiff was walking when he struck his head on the steel beam, or how "hard" the plaintiff fell when he struck his head against the ground. In those cases, a defense lawyer can define and limit the amount

of force involved in a concussion by reviewing the absence of those injuries at the point of impact. Start by asking about injuries requiring the most force, and end by asking about injuries requiring the least force.

Did the skull strike anything during the accident?
Did plaintiff fracture the weakest bone at point of impact?
Identify the weakest bone in the area that struck (or was struck) by the object. Establish that the force of impact was not sufficient to fracture that bone. This can be especially effective line of questioning in cases where an object simultaneously strikes the facial bones.

Did plaintiff require stitches at point of impact?
Did plaintiff have a laceration or abrasion at point of impact?
Did plaintiff have swelling or bruising at point of impact?
Did plaintiff have tenderness at point of impact?
Emergency Room records often include a diagram on which the ER staff is required to record (using specific symbols) whether their physical examination of the plaintiff revealed any lacerations, abrasions, swelling, bruising, point tenderness, or tenderness. In many concussion cases, the patient will sustain no injury to the head or face.

Did plaintiff have any evidence of head trauma at point of impact?



Emergency Room records often include a Physical Examination section; and, sometimes, that section includes a box entitled "No evidence of head trauma." Let the jury know if that box was checked.

Did plaintiff have Battle's sign?
Battle's sign ("mastoid ecchymosis") is named after William Henry Battle. It consists of bruising over the mastoid process, a conical prominence projecting from the undersurface of the mastoid process of the temporal bone. It can be an indication of a fracture at the base of the posterior portion of the skull.

Did plaintiff have bilateral "Raccoon Eyes"?
It is important to differentiate Raccoon Eyes, which are always bilateral periorbital ecchymoses, from a "black eye" caused by facial trauma. The box for Raccoon Eyes will rarely be checked in ER records because they often develop 2 or 3 days after closed head injury. Raccoon eyes are usually evidence of a basilar skull fracture and occur when damage (at the time of fracture) tears the meninges and causes the venous sinuses to bleed into the arachnoid villi and the cranial sinuses.

Did plaintiff identify the head as the location of pain or injury?
Emergency Room records often include a section which allows the ER staff to circle the "location of pain/injuries" according to the plaintiff. Always check to see if "head" is circled.

Neck Momentum (No Neck Injury):
Jurors perceive the cervical spine as more vulnerable to trauma then the lumbar and/or thoracic spine. If the force of the whiplash or "flexion/extension" event was not capable of causing any cervical injuries, they may have difficulty believing the force was sufficient to cause a traumatic brain injury or a diffuse (invisible) axonal brain injury. In the right case, this line of questioning can be very effective.

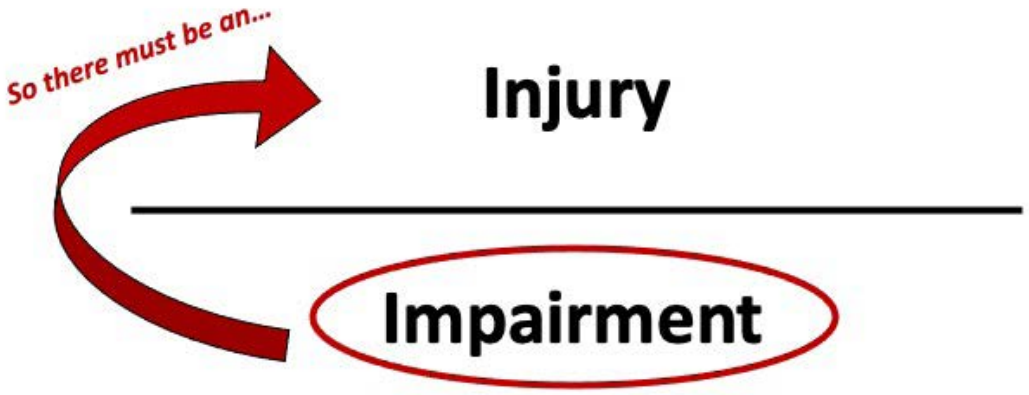
Can a cervical ("neck") injury be sustained in this type of accident?
Please name the most common neck injuries sustained as the result of trauma.
Did plaintiff sustain a cervical fracture?
Did plaintiff sustain a cervical herniation/ displacement?
Did plaintiff sustain a cervical strain/sprain?
Did plaintiff experience/report neck pain at the scene/ER?
Did CT/MRI cervical imaging reveal swelling (edema)?
Did CT/MRI cervical imaging reveal herniated disc(s)?
Did CT/MRI cervical imaging reveal any evidence of recent (acute) trauma?

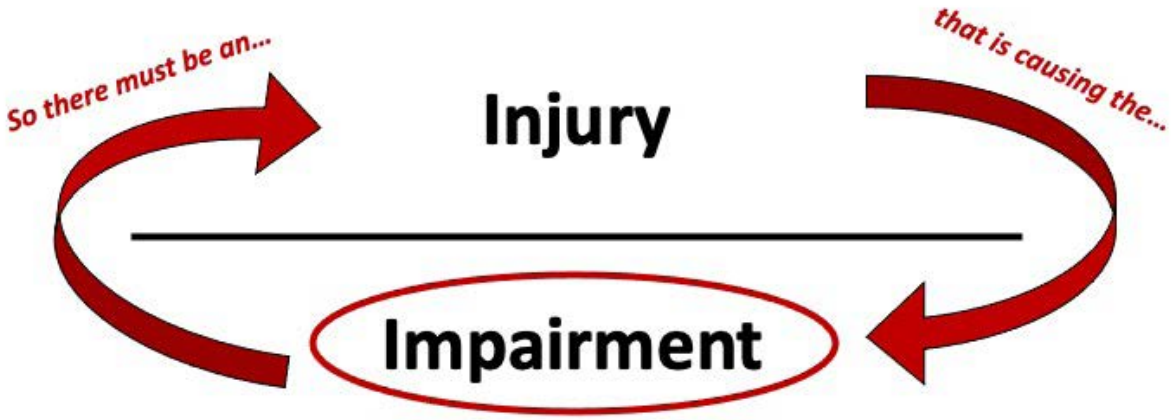
Crushin' a Concussion

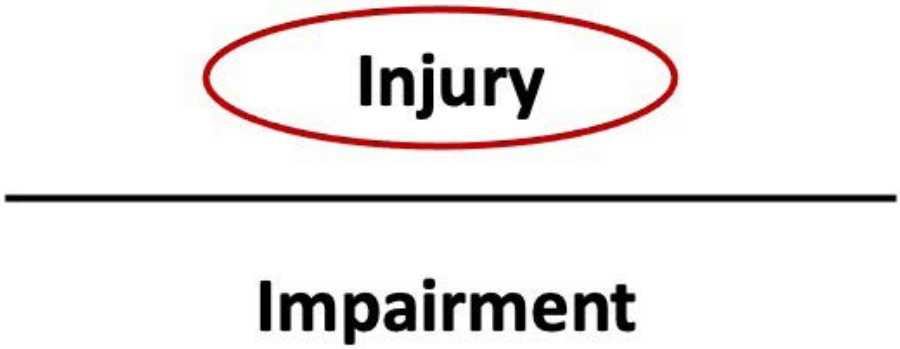
John Jerry Glas
Deutsch Kerrigan, New Orleans, LA
jerry@deutschkerrigan.com

$$\frac{\text{Injury}}{\text{Impairment}}$$

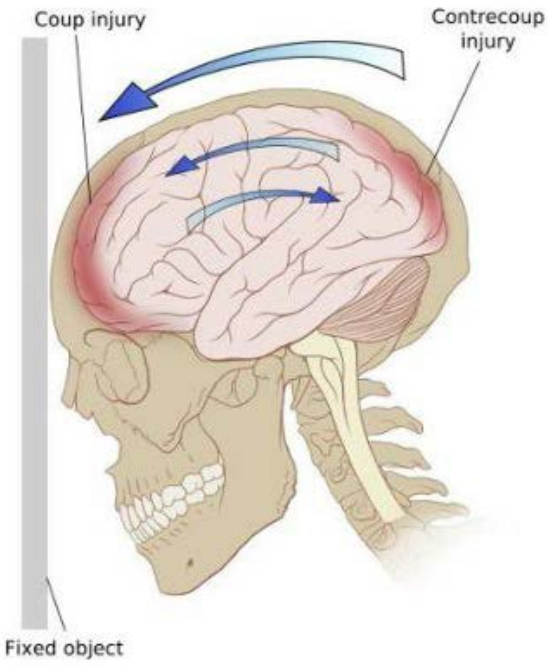
$$\frac{\text{Injury}}{\text{Impairment}}$$

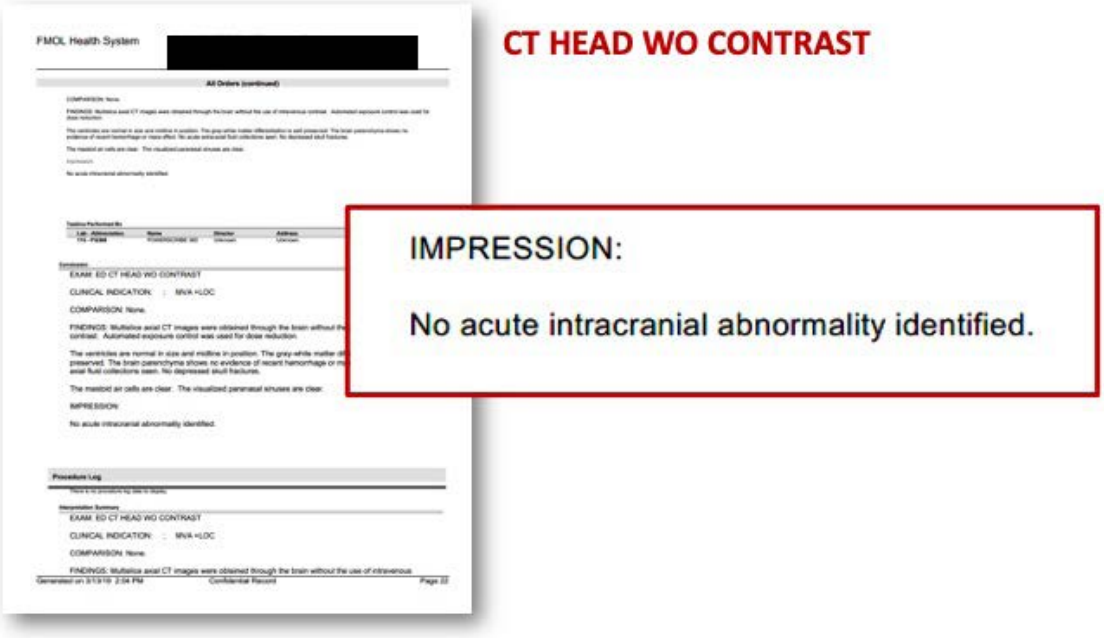

So there must be an...
Injury
Impairment


So there must be an...
Injury
that is causing the...
Impairment


Injury
Impairment


Step 1:
RULE-OUT
COUP INJURIES


Coup injury
Contrecoup injury
Fixed object


FMOL Health System
[redacted]
All Orders (continued)
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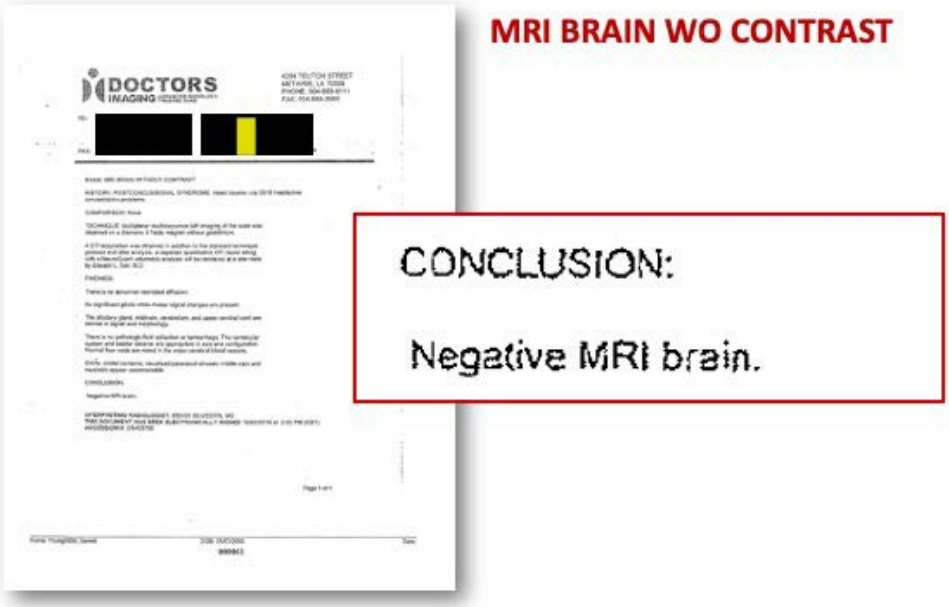
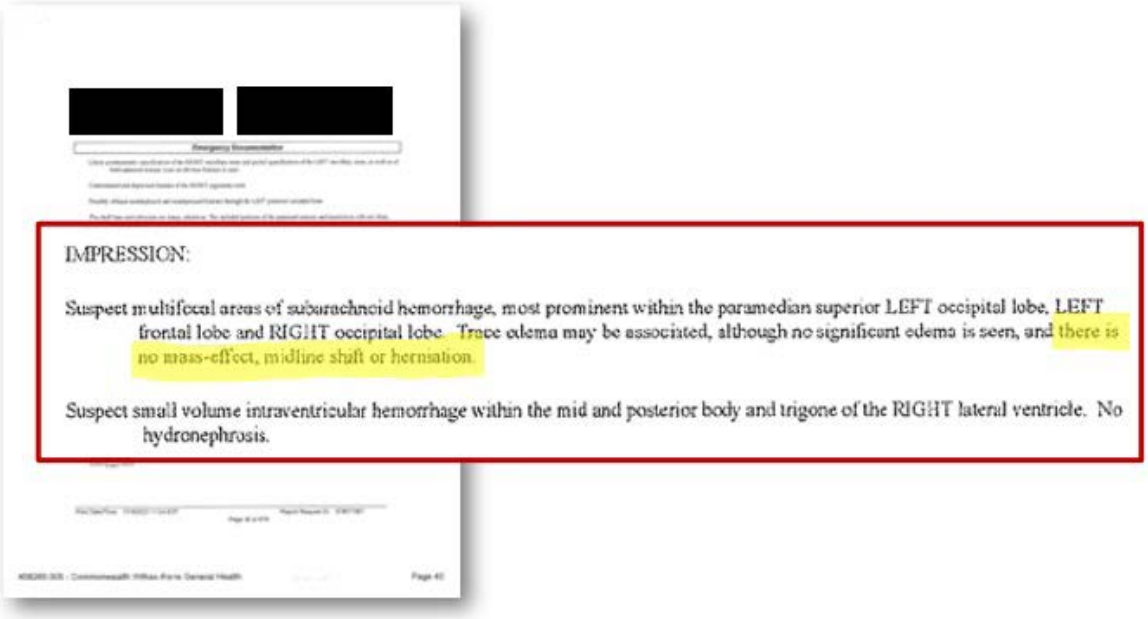
CLINICAL INDICATION: : MVA +LOC
COMPARISON: None.
IMPRESSION:
No acute intracranial abnormality identified.
Procedure Log
EXAM: ED CT HEAD WO CONTRAST
CLINICAL INDICATION: : MVA +LOC
COMPARISON: None.
CT HEAD WO CONTRAST
IMPRESSION:
No acute intracranial abnormality identified.



BRAIN INJURIES		
	YES	NO



[redacted] [redacted]

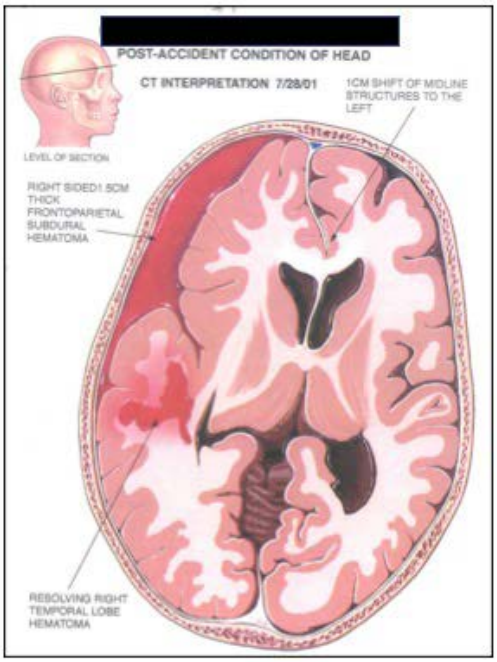
IMPRESSION:

Suspect multifocal areas of subarachnoid hemorrhage, most prominent within the paramedian superior LEFT occipital lobe, LEFT frontal lobe and RIGHT occipital lobe. Trace edema may be associated, although no significant edema is seen, and there is no mass-effect, midline shift or herniation.

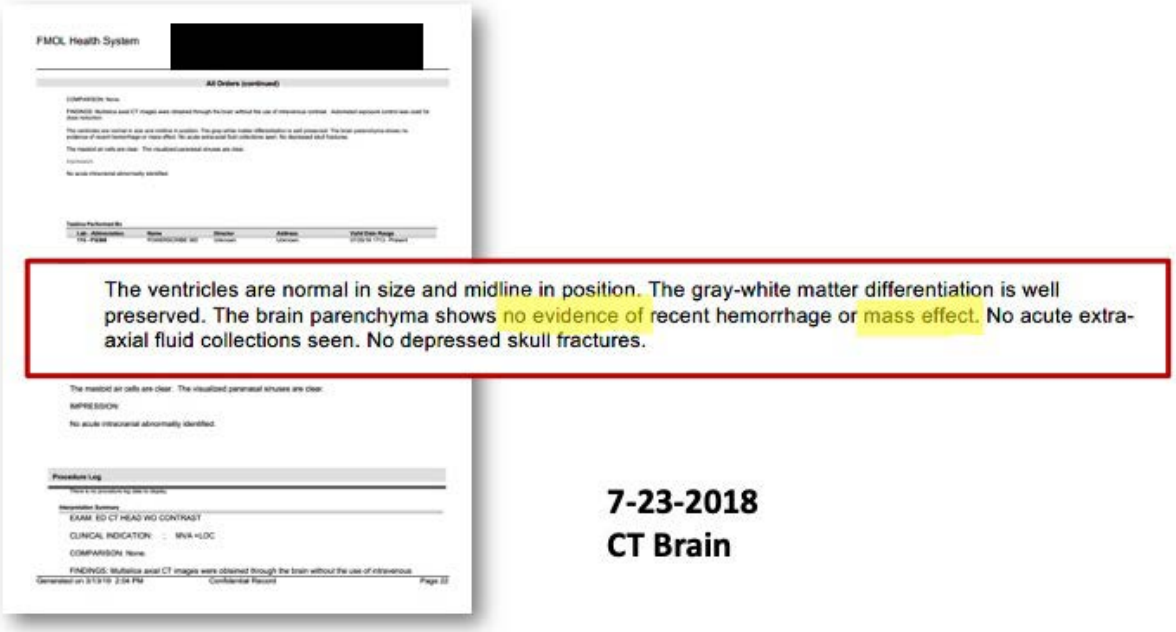
Suspect small volume intraventricular hemorrhage within the mid and posterior body and trigone of the RIGHT lateral ventricle. No hydronephrosis.

BRAIN INJURIES		
	YES	NO
Brain Herniation		✖

BRAIN INJURIES		
	YES	NO
Brain Herniation		✘
Midline Shift		



BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		



FMOL Health System [redacted]

All Orders (continued)

The ventricles are normal in size and midline in position. The gray-white matter differentiation is well preserved. The brain parenchyma shows no evidence of recent hemorrhage or mass effect. No acute extra-axial fluid collections seen. No depressed skull fractures.

The mastoid air cells are clear. The visualized paranasal sinuses are clear.

IMPRESSION:

No acute intracranial abnormality identified.

Procedure Log

EXAM: ED CT HEAD WO CONTRAST

CLINICAL INDICATION: : MVA +LOC

COMPARISON: None

FINDINGS: Multiaxial axial CT images were obtained through the brain without the use of intravenous

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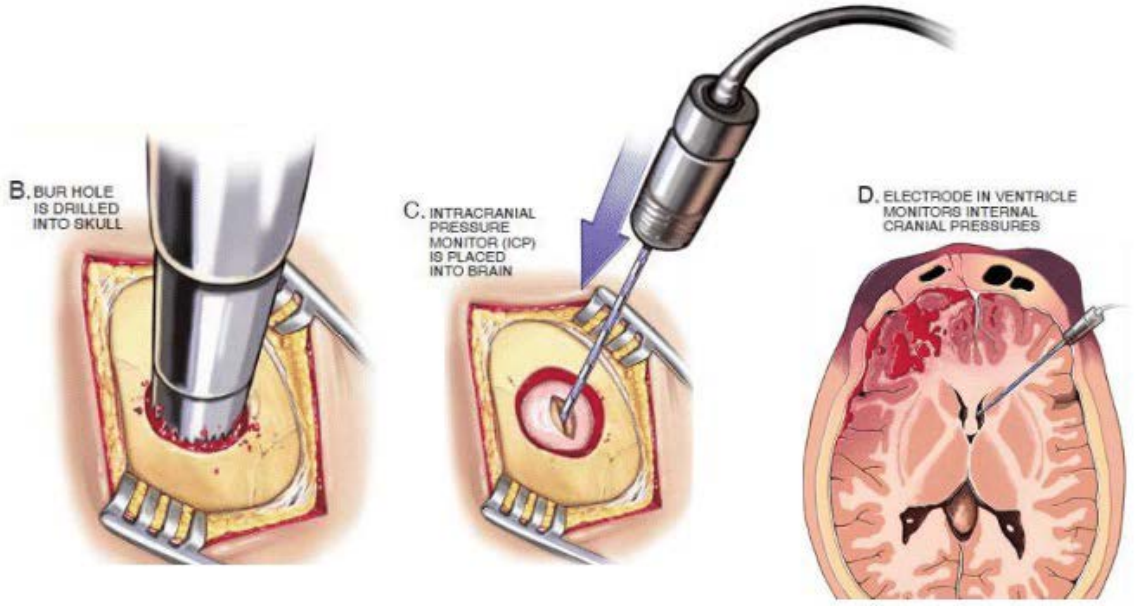
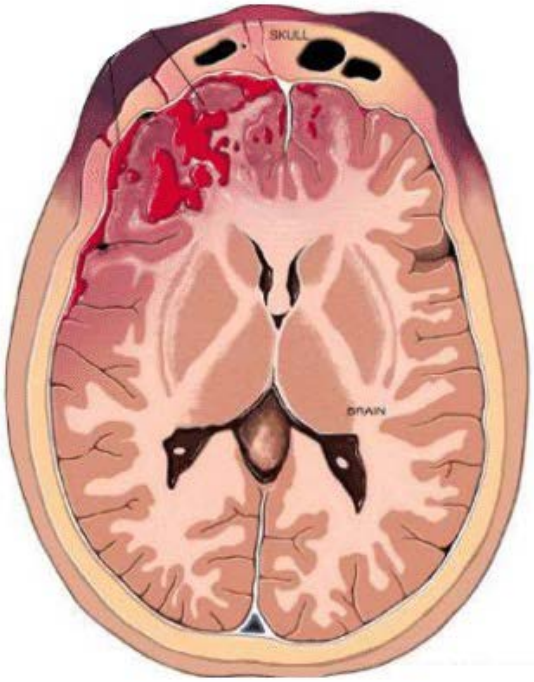
7-23-2018
CT Brain

BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		



BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		



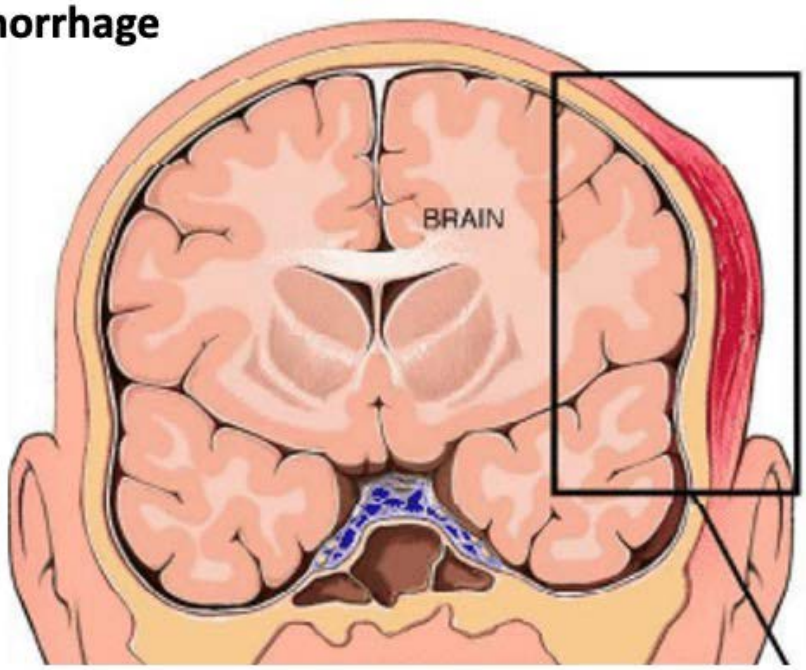
BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		

BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		

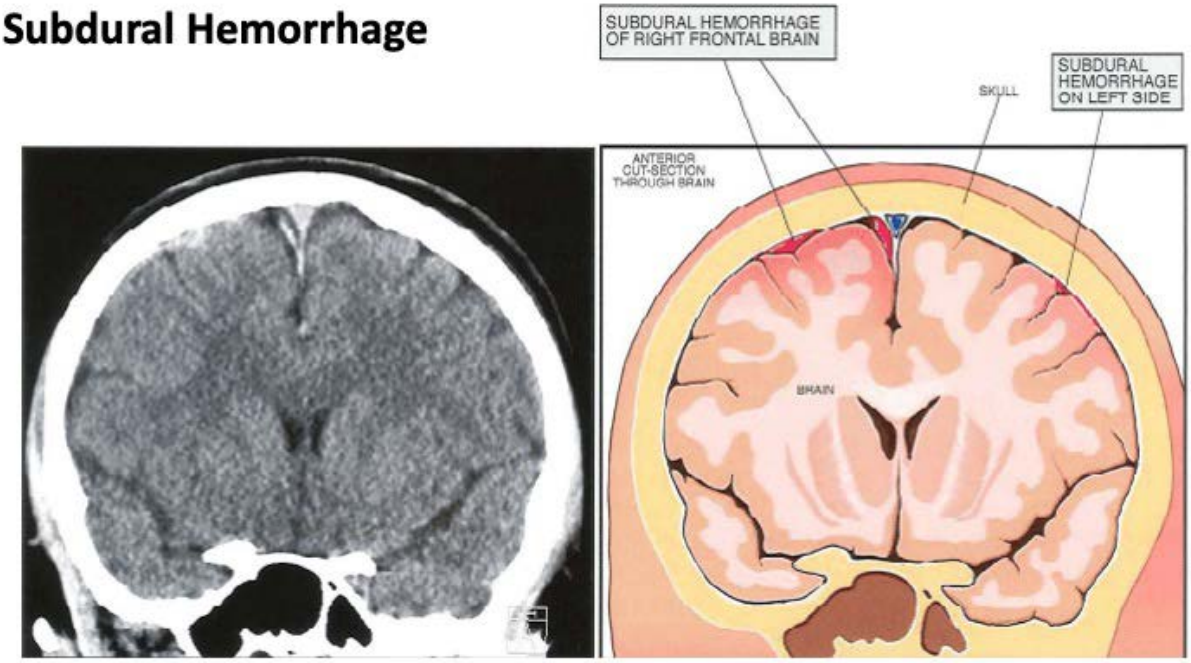
BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		✗
Brain Tissue Bruising (Contusion)		

BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		✗
Brain Tissue Bruising (Contusion)		✗
Pooling of Blood (Hematoma)		
Macroscopic Bleeding (Hemorrhage)		

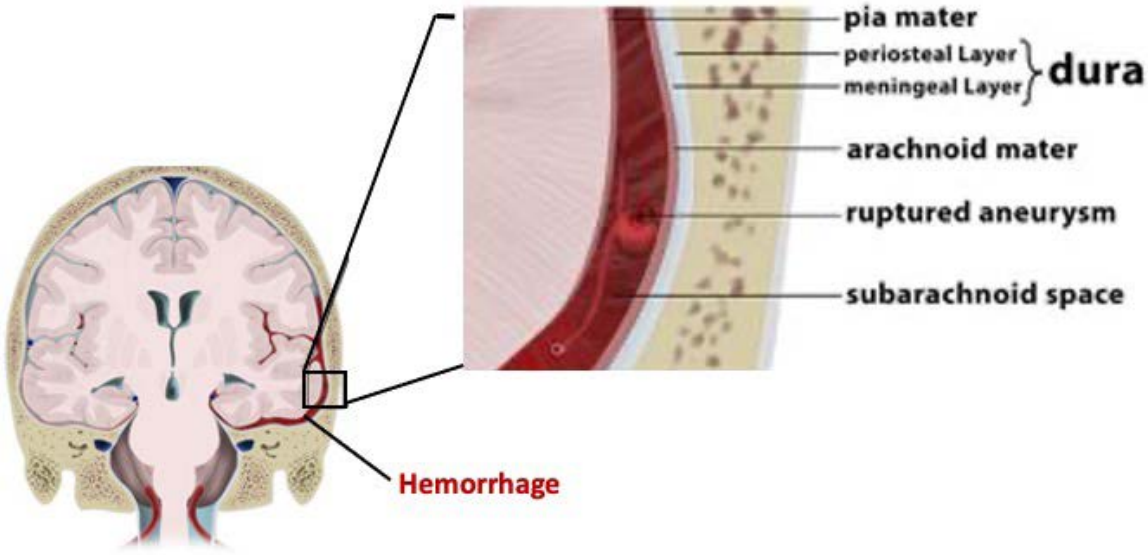
Subgaleal Hemorrhage



Subdural Hemorrhage



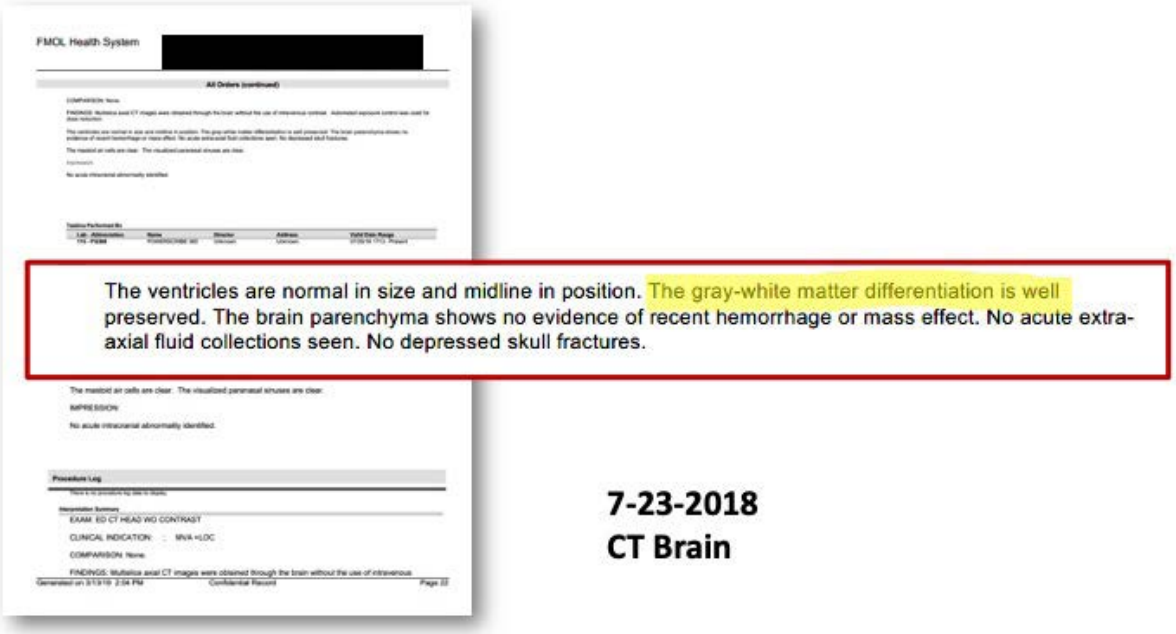
Subarachnoid Hemorrhage



BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		✗
Brain Tissue Bruising (Contusion)		✗
Pooling of Blood (Hematoma)		✗
Macroscopic Bleeding (Hemorrhage)		✗
Abnormal Gray-White Matter Differentiation		


GRAY MATTER


WHITE MATTER



FMOL Health System [redacted]

All Orders (continued)

The ventricles are normal in size and midline in position. The gray-white matter differentiation is well preserved. The brain parenchyma shows no evidence of recent hemorrhage or mass effect. No acute extra-axial fluid collections seen. No depressed skull fractures.

The mastoid air cells are clear. The visualized paranasal sinuses are clear.

IMPRESSION:

No acute intracranial abnormality identified.

Procedure Log

Interpretation Summary

EXAM: ED CT HEAD WO CONTRAST

CLINICAL INDICATION: : MVA +LOC

COMPARISON: None.

FINDINGS: Multiplanar axial CT images were obtained through the brain without the use of intravenous

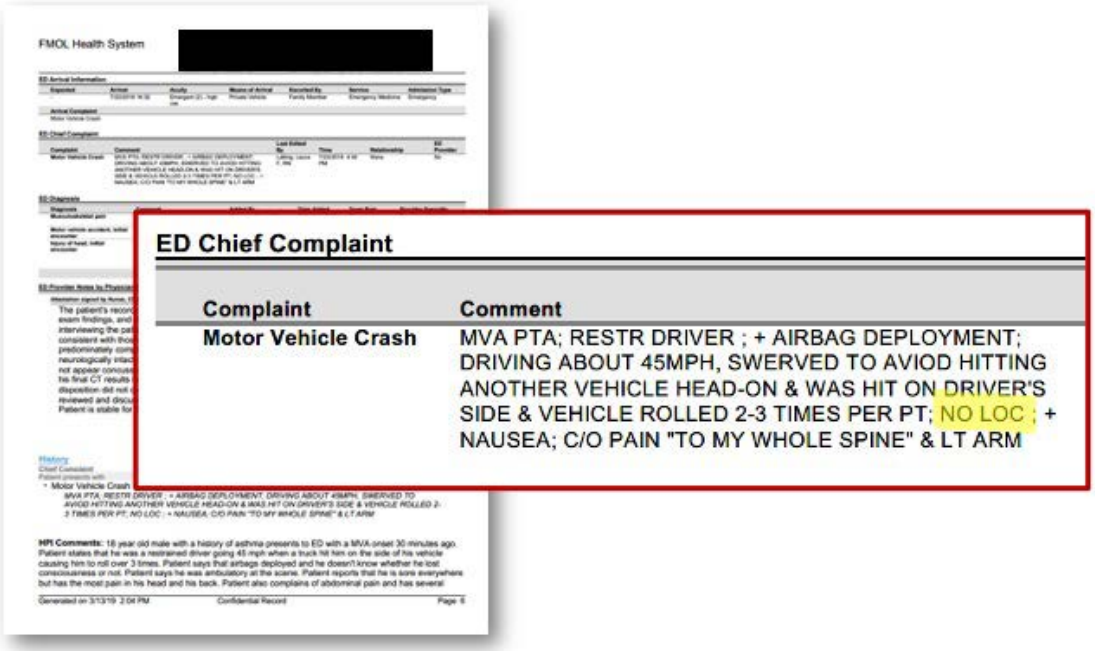
Generated on 3/13/18 2:04 PM Confidential Record Page 22

7-23-2018
CT Brain

BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		✗
Brain Tissue Bruising (Contusion)		✗
Pooling of Blood (Hematoma)		✗
Macroscopic Bleeding (Hemorrhage)		✗
Abnormal Gray-White Matter Differentiation		✗

Step 2:
NO OBJECTIVE FINDINGS

Objective Findings		
	YES	NO
Loss of Consciousness (LOC)?		



FMOL Health System [redacted]

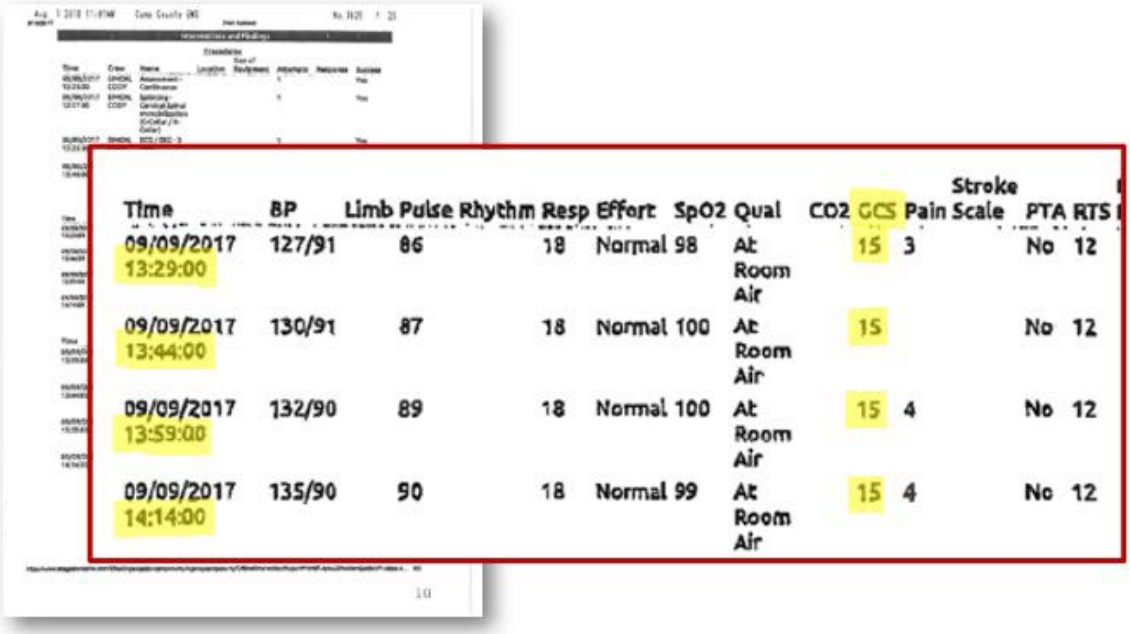
ED Chief Complaint

Complaint	Comment
Motor Vehicle Crash	MVA PTA; RESTR DRIVER ; + AIRBAG DEPLOYMENT; DRIVING ABOUT 45MPH, SWERVED TO AVIOD HITTING ANOTHER VEHICLE HEAD-ON & WAS HIT ON DRIVER'S SIDE & VEHICLE ROLLED 2-3 TIMES PER PT; NO LOC ; + NAUSEA; C/O PAIN "TO MY WHOLE SPINE" & LT ARM

Objective Findings

INJURIES	YES	NO
Loss of Consciousness (LOC)?		✖
Abnormal Glasgow Coma Scale (GCS) Score?		

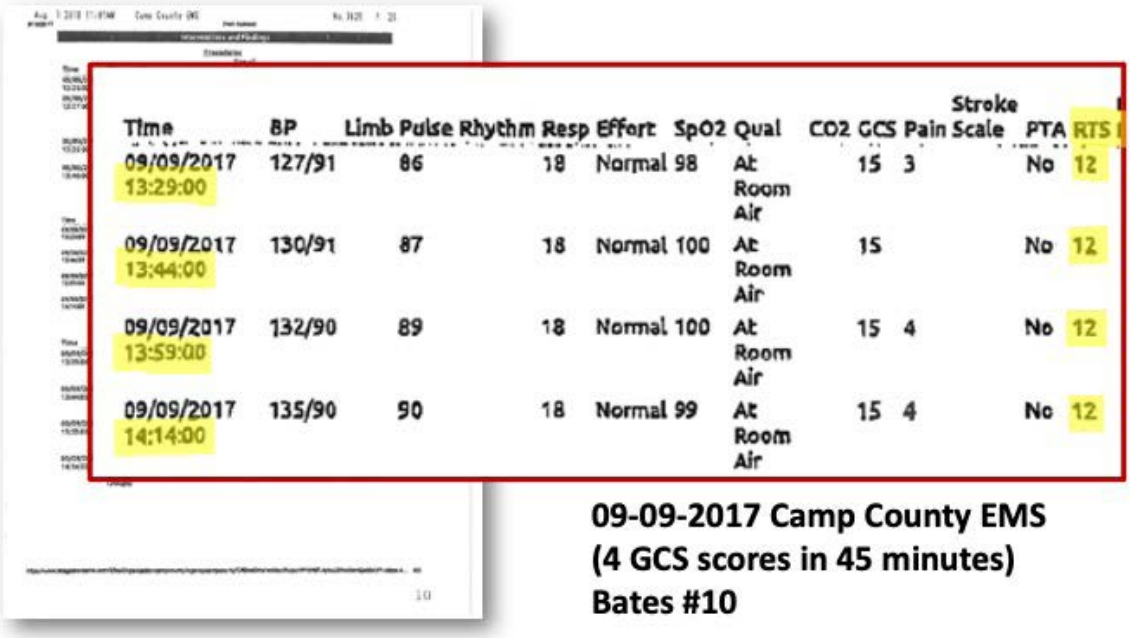
BEHAVIOUR	RESPONSE	SCORE
Best Eye Response	Spontaneously To speech To pain No response	4 3 2 1
Best Verbal Response	Oriented to time, place, person Confused Inappropriate words Inappropriate sounds No response	5 4 3 2 1
Best Motor Response	Obeys commands Moves to localized pain Flexion withdrawal from pain Abnormal flexion(decorticate) Abnormal extension(decerebrate) No response	6 5 4 3 2 1
Total Score	Best response Comatose client Totally unresponsive	15 8 or less 3



Time	BP	Limb Pulse	Rhythm	Resp Effort	SpO2	Qual	CO2	GCS	Pain	Stroke Scale	PTA	RTS
09/09/2017 13:29:00	127/91	86		18 Normal	98	At Room Air		15	3		No	12
09/09/2017 13:44:00	130/91	87		18 Normal	100	At Room Air		15			No	12
09/09/2017 13:59:00	132/90	89		18 Normal	100	At Room Air		15	4		No	12
09/09/2017 14:14:00	135/90	90		18 Normal	99	At Room Air		15	4		No	12

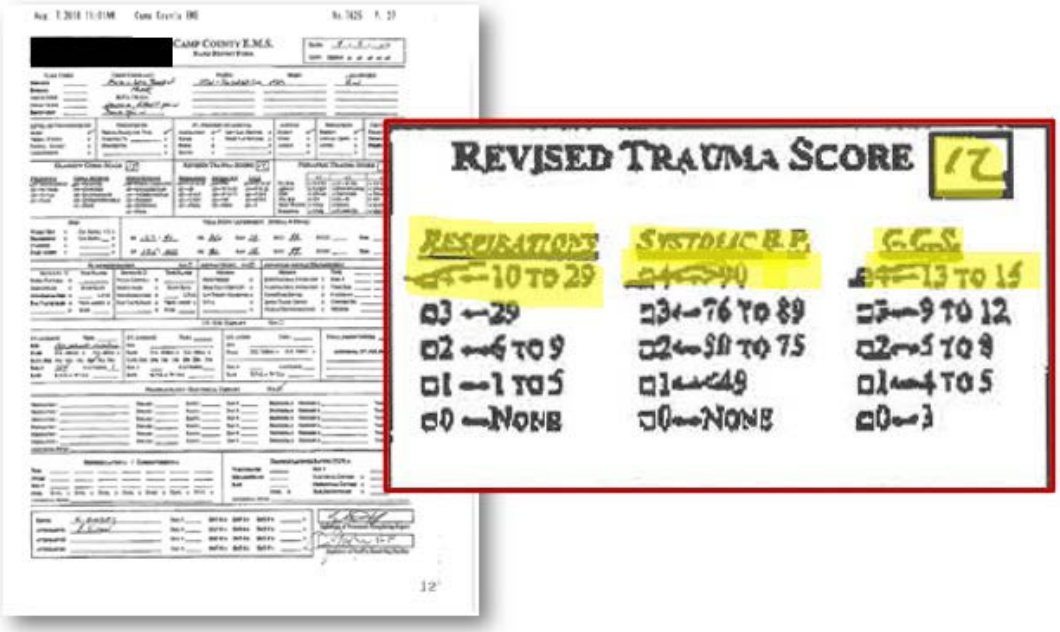
Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✖
Abnormal Glasgow Coma Scale (GCS) Score?		✖
Abnormal Revised Trauma Scale (RTS) Score?		

Glasgow Coma Score	Systolic Blood Pressure	Respiratory Rate	Coded Value
13-15	>90	10-29	4
9-12	76-89	>30	3
6-8	50-75	6-9	2
4-5	1-49	1-5	1
3	0	0	0



Time	BP	Limb Pulse	Rhythm	Resp	Effort	SpO2	Qual	CO2	GCS	Pain	Stroke Scale	PTA	RTS
09/09/2017 13:29:00	127/91	86		18	Normal	98	At Room Air		15	3		No	12
09/09/2017 13:44:00	130/91	87		18	Normal	100	At Room Air		15			No	12
09/09/2017 13:59:00	132/90	89		18	Normal	100	At Room Air		15	4		No	12
09/09/2017 14:14:00	135/90	90		18	Normal	99	At Room Air		15	4		No	12

09-09-2017 Camp County EMS
(4 GCS scores in 45 minutes)
Bates #10

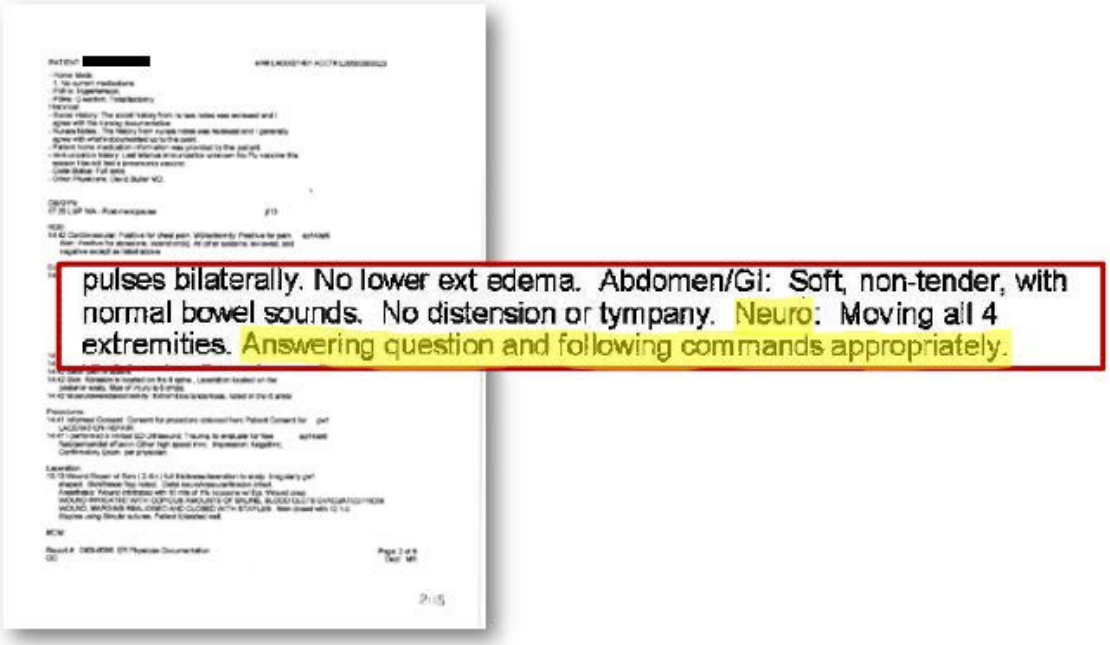


CAMP COUNTY E.M.S.

REVISED TRAUMA SCORE 12

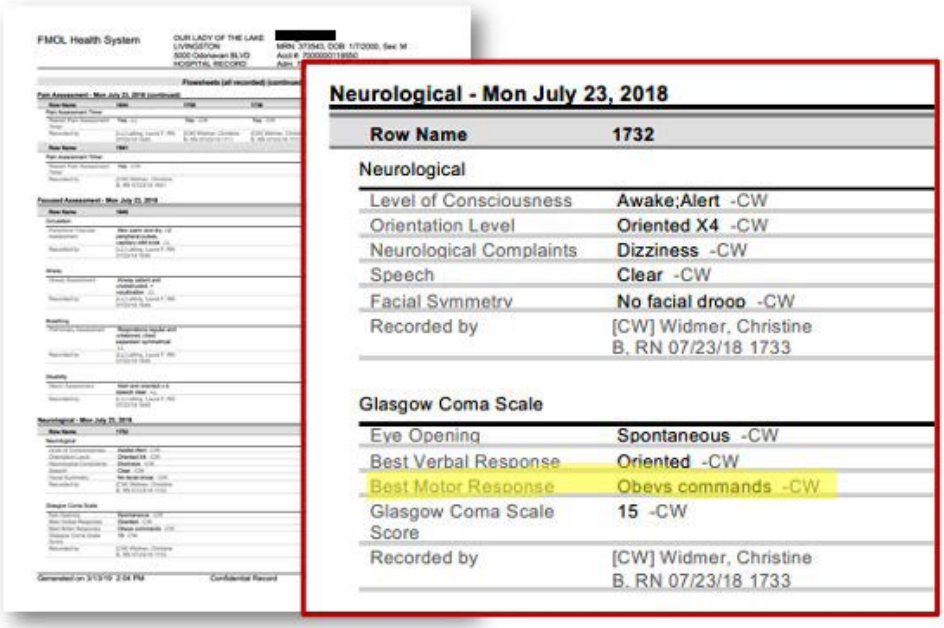
RESPIRATIONS	SYSTOLIC B.P.	G.C.S.
10 TO 29		13 TO 15
3 – 29	3 – 76 TO 89	3 – 9 TO 12
2 – 6 TO 9	2 – 50 TO 75	2 – 5 TO 8
1 – 1 TO 5	1 – 49	1 – 4 TO 5
0 – NONE	0 – NONE	0 – 3

Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✖
Abnormal Glasgow Coma Scale (GCS) Score?		✖
Abnormal Revised Trauma Scale (RTS) Score?		✖
Significant Time To Follow Commands (TFC)?		



pulses bilaterally. No lower ext edema. Abdomen/GI: Soft, non-tender, with normal bowel sounds. No distension or tympany. Neuro: Moving all 4 extremities. Answering question and following commands appropriately.

BEHAVIOUR	RESPONSE	SCORE
Best Eye Response	Spontaneously	4
	To speech	3
	To pain	2
	No response	1
Best Verbal Response	Oriented to time, place, person	5
	Confused	4
	Inappropriate words	3
	Inappropriate sounds	2
	No response	1
Best Motor Response	Obeys commands	6
	Moves to localized pain	5
	Flexion withdrawal from pain	4
	Abnormal flexion(decorticate)	3
	Abnormal extension(decerebrate)	2
	No response	1
Total Score	Best response	15
	Comatose client	8 or less
	Totally unresponsive	3



FMOL Health System

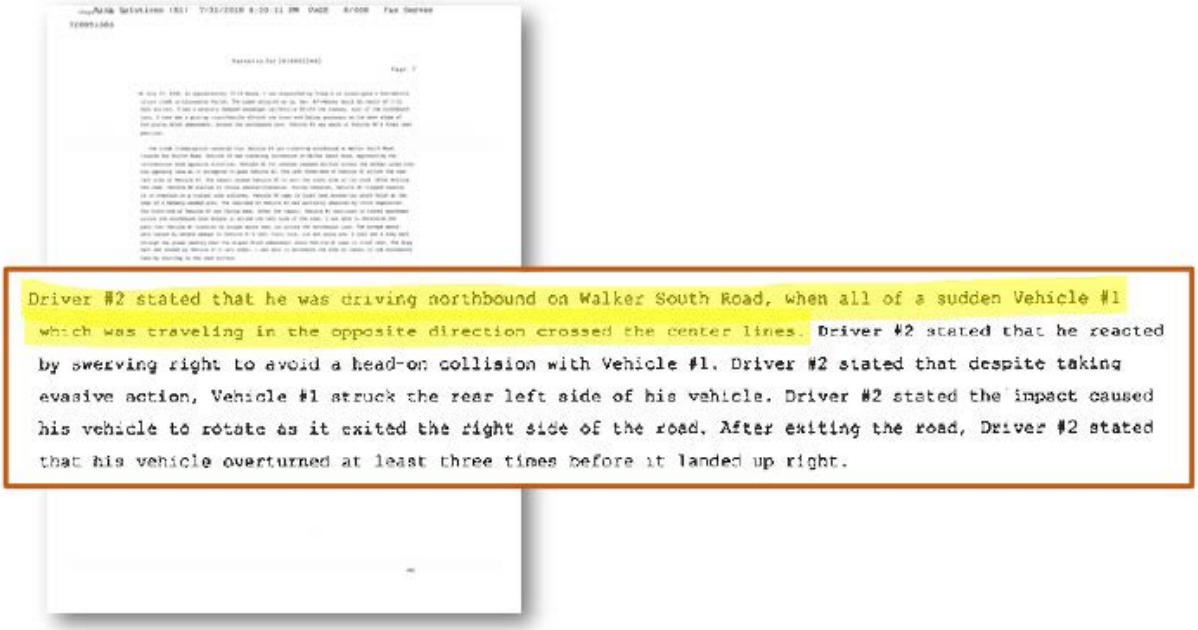
OUR LADY OF THE LAKE LIVINGSTON
5000 Oshaven BLVD
HOSPITAL RECORD

[redacted]

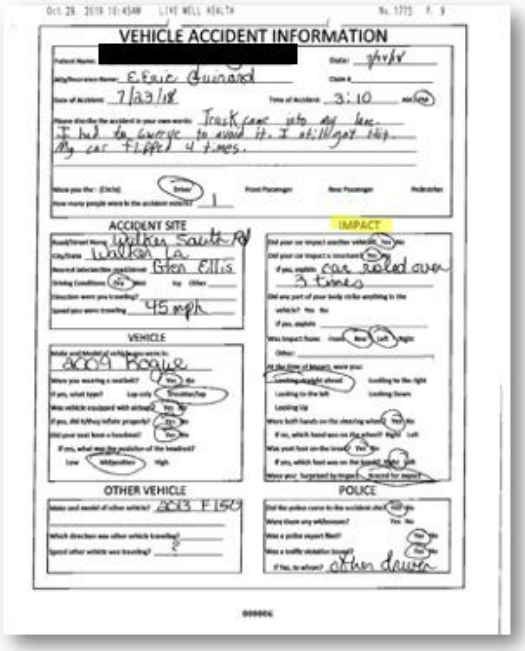
Neurological - Mon July 23, 2018

Row Name	1732
Neurological	
Level of Consciousness	Awake;Alert -CW
Orientation Level	Oriented X4 -CW
Neurological Complaints	Dizziness -CW
Speech	Clear -CW
Facial Symmetry	No facial drooo -CW
Recorded by	[CW] Widmer, Christine B, RN 07/23/18 1733
Glasgow Coma Scale	
Eye Opening	Spontaneous -CW
Best Verbal Response	Oriented -CW
Best Motor Response	Obeys commands -CW
Glasgow Coma Scale Score	15 -CW
Recorded by	[CW] Widmer, Christine B, RN 07/23/18 1733

Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		



Driver #2 stated that he was driving northbound on Walker South Road, when all of a sudden Vehicle #1 which was traveling in the opposite direction crossed the center lines. Driver #2 stated that he reacted by swerving right to avoid a head-on collision with Vehicle #1. Driver #2 stated that despite taking evasive action, Vehicle #1 struck the rear left side of his vehicle. Driver #2 stated the impact caused his vehicle to rotate as it exited the right side of the road. After exiting the road, Driver #2 stated that his vehicle overturned at least three times before it landed up right.



VEHICLE ACCIDENT INFORMATION

[redacted] Date: 7/23/18

Name: E Eric Guinard

Date of Accident: 7/23/18 Time of Accident: 3:10 am/pm

Please describe the accident in your own words: Truck came into my lane. I had to swerve to avoid it. I ot/llgot hit. My car flipped 4 times.

Were you the: (Circle) Driver Front Passenger Rear Passenger Pedestrian

How many people were in the accident vehicle? 1

ACCIDENT SITE

Road/Street Name: Walker South Rd City/State: Walker La.

Nearest Intersection: Ben Ellis

Driving Conditions: Dry Wet Ice Other

Direction were you traveling? S

Speed you were traveling: 45 mph

VEHICLE

Make and Model of vehicle you were in: 2009 Toyota

Were you wearing a seatbelt? Yes No

If yes, what type? Lap only Shoulder/lap

Was vehicle equipped with airbags? Yes No

If yes, did bag/bags inflate properly? Yes No

Did your seat have a headrest? Yes No

If yes, what was the position of the headrest? Low Middle High

OTHER VEHICLE

Make and model of other vehicle? 2013 F150

Which direction was other vehicle traveling? S

Speed other vehicle was traveling? ?

IMPACT

Did your car impact another vehicle? Yes No

Did your car impact a structure? Yes No

If yes, explain: car roled over 3 times

Did any part of your body strike anything in the vehicle? Yes No

If yes, explain

Was Impact from: Front Rear Left Right

Other:

At the time of impact, were you: Looking straight ahead / Looking to the right / Looking to the left / Looking Down / Looking Up

Were both hands on the steering wheel? Yes No

If no, which hand was on the wheel? Right Left

Was yout foot on the break? Yes No

If yes, which foot was on the break? Right Left

Were you: Surprised by Impact Braced for impact

POLICE

Did the police come to the accident site? Yes No

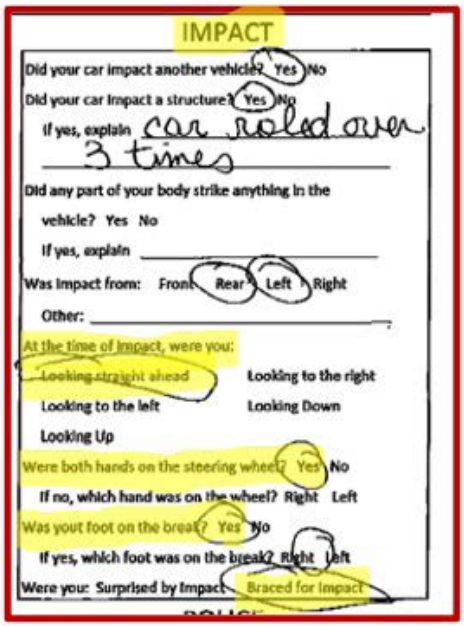
Were there any witnesses? Yes No

Was a police report filed? Yes No

Was a traffic violation issued? Yes No

If No, to whom? Other driver

000006



IMPACT

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Did your car impact a structure? Yes No

If yes, explain car roled over 3 times

Did any part of your body strike anything in the vehicle? Yes No

If yes, explain

Was Impact from: Front Rear Left Right

Other:

At the time of impact, were you: Looking straight ahead / Looking to the right / Looking to the left / Looking Down / Looking Up

Were both hands on the steering wheel? Yes No

If no, which hand was on the wheel? Right Left

Was yout foot on the break? Yes No

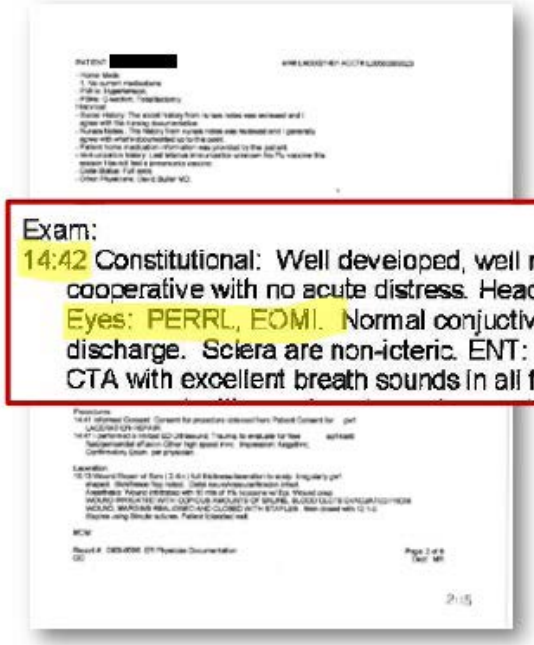
If yes, which foot was on the break? Right Left

Were you: Surprised by Impact Braced for impact

Objective Findings

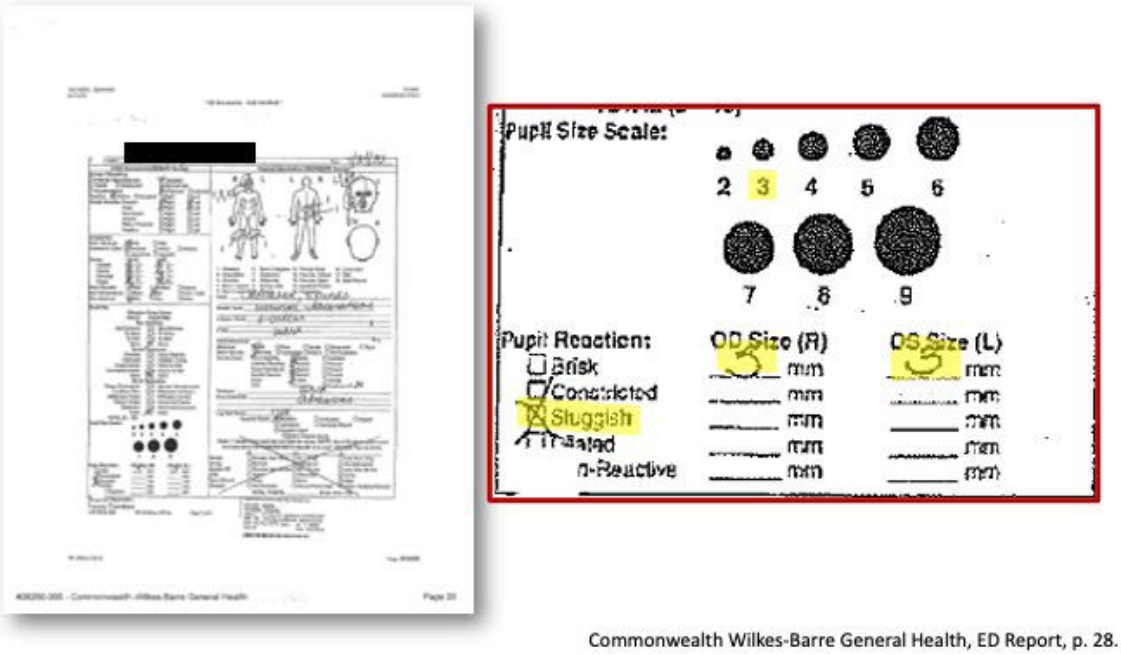
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		

Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		✗
Abnormal eye exam (blurred/double vision)?		

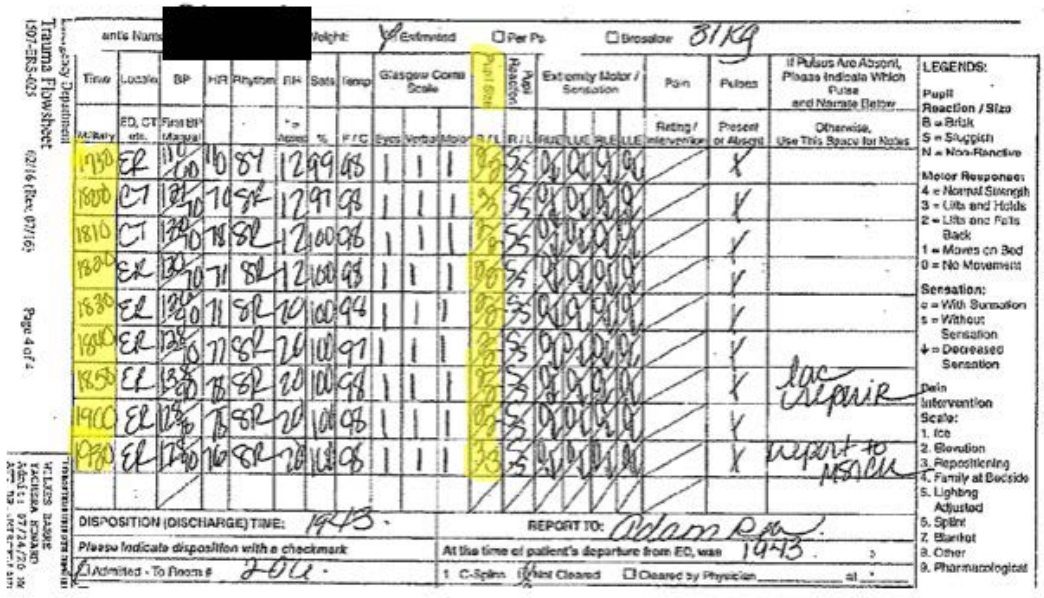


Exam:
14:42 Constitutional: Well developed, well nourished adult who is awake, alert and ap14/at6 cooperative with no acute distress. Head/Face: Normocephalic, atraumatic. Eyes: PERRL, EOMI. Normal conjuctiva with no evidence of injection or discharge. Sclera are non-icteric. ENT: Moist mucus membranes Respiratory: CTA with excellent breath sounds in all fields. Symmetrical chest wall

CHRISTUS GSMC – Longview
09-09-2017 (14:42)
Bates #205.



Commonwealth Wilkes-Barre General Health, ED Report, p. 28.



Commonwealth Wilkes-Barre General Health, ED Report, p. 30 of 678.

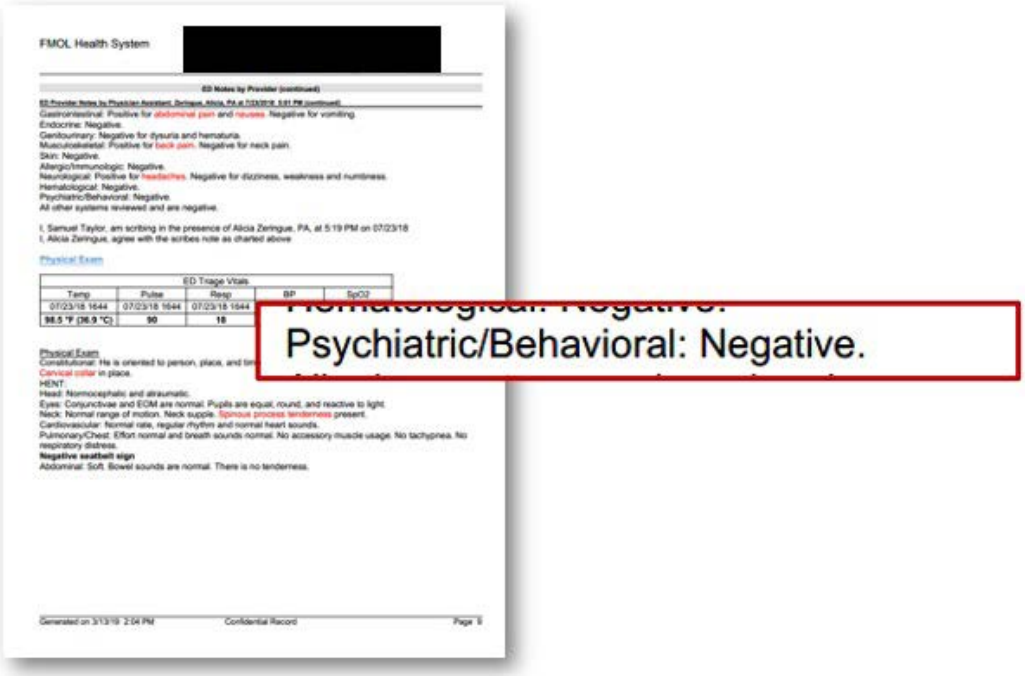
Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		✗
Abnormal eye exam (blurred/double vision)?		✗
Abnormal cranial nerve exam (CN II-XII)?		

Cranial Nerves		
Nerve	Function	Test
I. Olfactory	Smell	Identify odors with eyes closed
II. Optic	Vision	Test peripheral vision with 1 eye covered
III. Oculomotor	Eye movement & pupillary reaction	Peripheral vision, eye chart, reaction to light
IV. Trochlear	Eye movement	Test ability to depress & adduct eye
V. Trigeminal	Face sensation & mastication	Face sensation & clench teeth
VI. Abducens	Eye movement	Test ability to abduct eye past midline
VII. Facial	Facial muscles & taste	Close eyes & smile; detect various tastes—sweet, sour, salty, bitter
VIII. Vestibulocochlear (Acoustic)	Hearing & balance	Hearing; feet together, eyes open/ closed x 5 sec; test for past-pointing
IX. Glossopharyngeal	Swallow, voice, gag reflex	Swallow & say "ahh" Use tongue depressor to elicit gag reflex
X. Vagus	Swallow, voice, gag reflex	
XI. Spinal Accessory	SCM & trapezius	Rotate/SB neck; shrug shoulders
XII. Hypoglossal	Tongue mov't	Protrude tongue (watch for lateral deviation)

Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		✗
Abnormal eye exam (blurred/double vision)?		✗
Abnormal cranial nerve exam (CN II-XII)?		✗
Abnormal motor exam?		

Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		✗
Abnormal eye exam (blurred/double vision)?		✗
Abnormal cranial nerve exam (CN II-XII)?		✗
Abnormal motor exam?		✗
Abnormal sensory exam?		

Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		✗
Abnormal eye exam (blurred/double vision)?		✗
Abnormal cranial nerve exam (CN II-XII)?		✗
Abnormal motor exam?		✗
Abnormal sensory exam?		✗
Abnormal mood or affect?		


FMOL Health System [redacted]

ED Notes by Provider (continued)

ED Provider Notes by Physician Assistant: Zeringue, Alicia, PA at 7/23/2018 5:01 PM (continued)

Gastrointestinal: Positive for abdominal pain and nausea. Negative for vomiting.
Endocrine: Negative.
Genitourinary: Negative for dysuria and hematuria.
Musculoskeletal: Positive for back pain. Negative for neck pain.
Skin: Negative.
Allergic/Immunologic: Negative.
Neurological: Positive for headaches. Negative for dizziness, weakness and numbness.
Hematological: Negative.
Psychiatric/Behavioral: Negative.
All other systems reviewed and are negative.

I, Samuel Taylor, am scribing in the presence of Alicia Zeringue, PA, at 5:19 PM on 07/23/18
I, Alicia Zeringue, agree with the scribes note as charted above

Physical Exam

ED Triage Vitals

Temp	Pulse	Resp	BP	SpO2
07/23/18 1644	07/23/18 1644	07/23/18 1644		
98.5 °F (36.9 °C)	90	18		

Physical Exam
Constitutional: He is oriented to person, place, and time.
Cervical collar in place.
HENT:
Head: Normocephalic and atraumatic.
Eyes: Conjunctivae and EOM are normal. Pupils are equal, round, and reactive to light.
Neck: Normal range of motion. Neck supple. Spinous process tenderness present.
Cardiovascular: Normal rate, regular rhythm and normal heart sounds.
Pulmonary/Chest: Effort normal and breath sounds normal. No accessory muscle usage. No tachypnea. No respiratory distress.
Negative seatbelt sign
Abdominal: Soft. Bowel sounds are normal. There is no tenderness.

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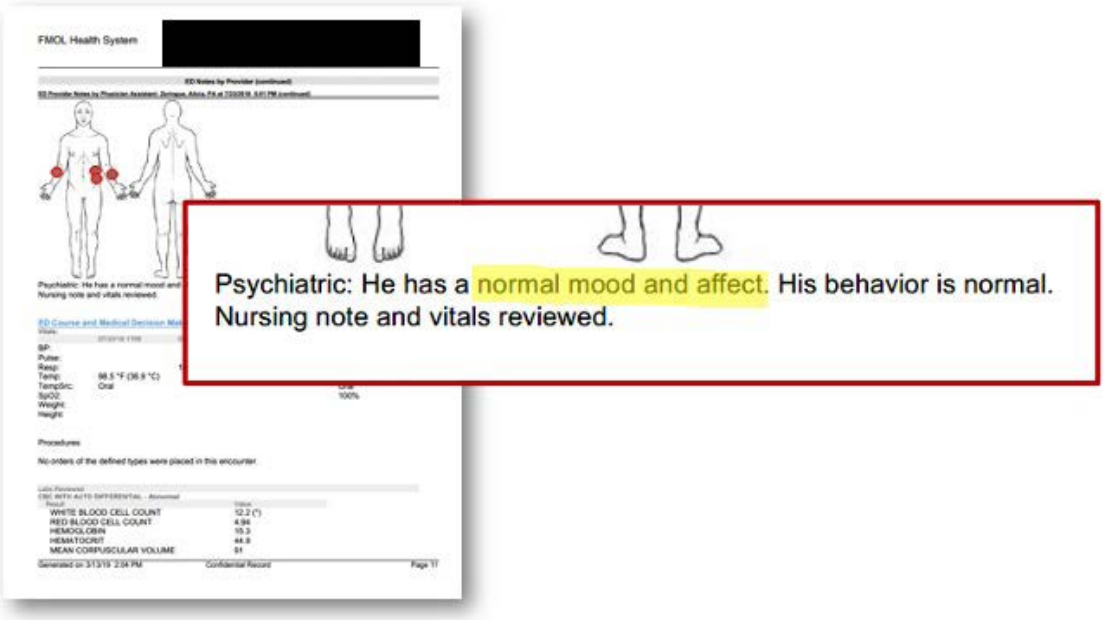
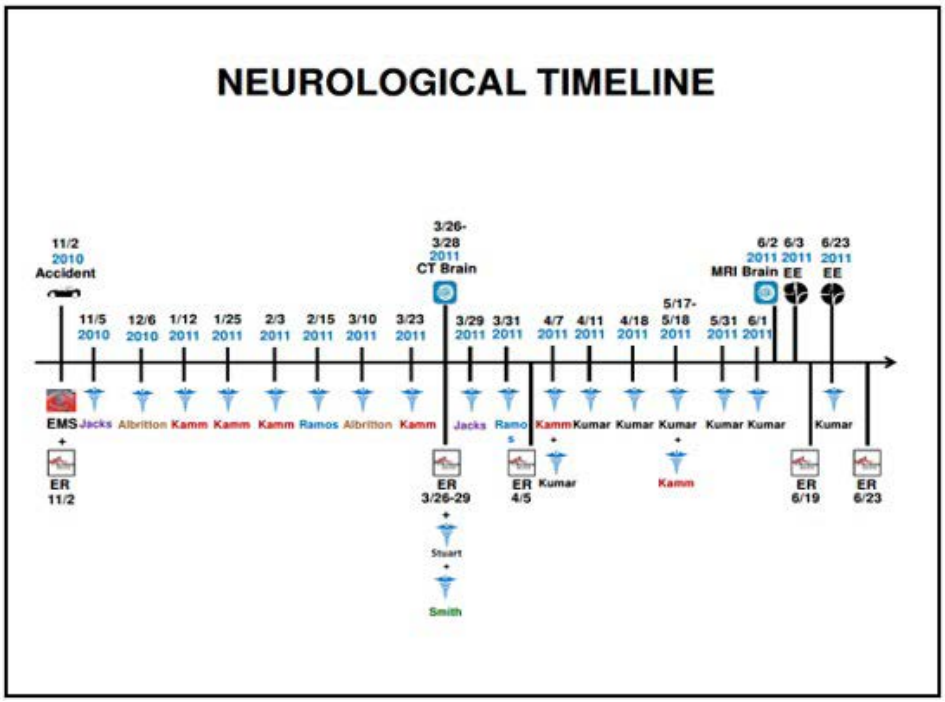
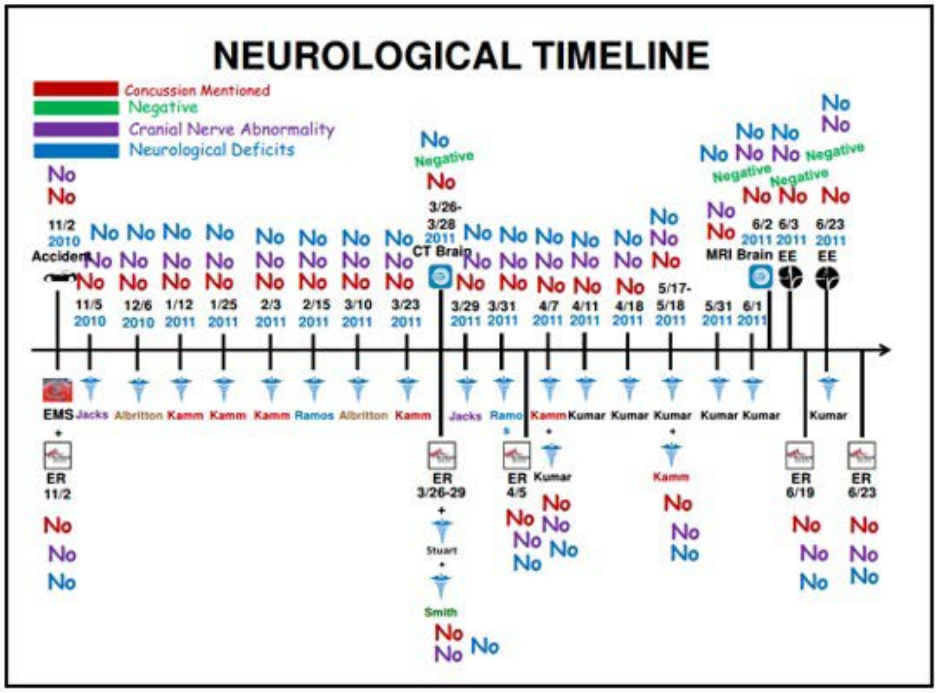
Psychiatric/Behavioral: Negative.



Objective Findings		
INJURIES	**YES**	**NO**
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		✗
Abnormal eye exam (blurred/double vision)?		✗
Abnormal cranial nerve exam (CN II-XII)?		✗
Abnormal motor exam?		✗
Abnormal sensory exam?		✗
Abnormal mood or affect?		✗
Any neurological deficits?		

Objective Findings		
INJURIES	YES	NO
Loss of Consciousness (LOC)?		✗
Abnormal Glasgow Coma Scale (GCS) Score?		✗
Abnormal Revised Trauma Scale (RTS) Score?		✗
Significant Time To Follow Commands (TFC)?		✗
Retrograde Amnesia (before accident)		✗
Anterograde Amnesia (after accident)		✗
Abnormal eye exam (blurred/double vision)?		✗
Abnormal cranial nerve exam (CN II-XII)?		✗
Abnormal motor exam?		✗
Abnormal sensory exam?		✗
Abnormal mood or affect?		✗
Any neurological deficits?		✗


NEUROLOGICAL TIMELINE
11/2 2010 Accident
11/5 2010
12/6 2010
1/12 2011
1/25 2011
2/3 2011
2/15 2011
3/10 2011
3/23 2011
3/26-3/28 2011 CT Brain
3/29 2011
3/31 2011
4/7 2011
4/11 2011
4/18 2011
5/17-5/18 2011
5/31 2011
6/1 2011
6/2 2011 MRI Brain
6/3 2011 EE
6/23 2011 EE
EMS
Jacks
Albritton
Kamm
Kamm
Kamm
Ramos
Albritton
Kamm
Jacks
Ramos
Kamm
Kumar
Kumar
Kumar
Kumar
Kumar
Kumar
ER 11/2
ER 3/26-29
Stuart
Smith
ER 4/5
Kumar
Kamm
ER 6/19
ER 6/23

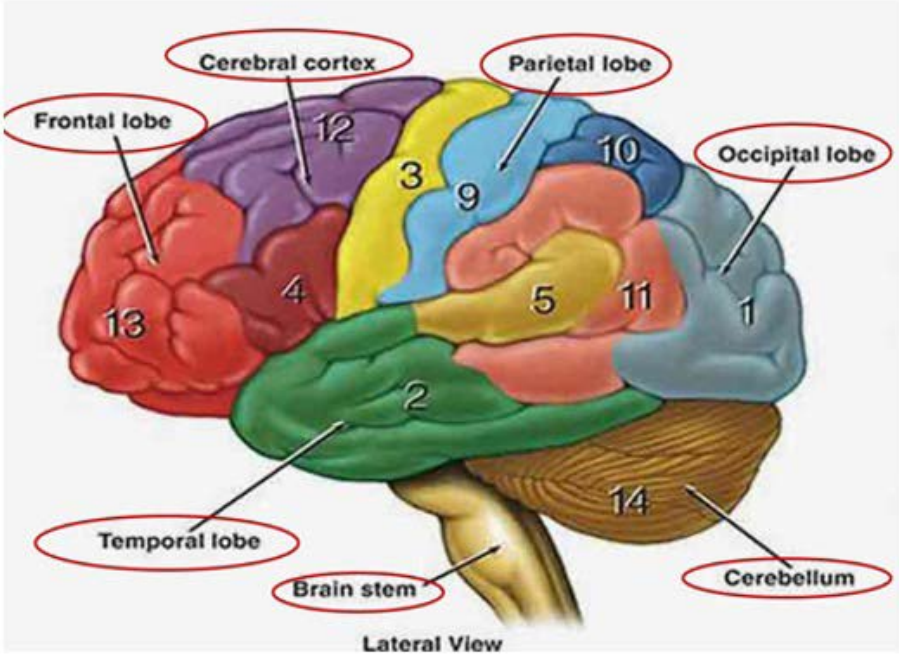

NEUROLOGICAL TIMELINE
Concussion Mentioned
Negative
Cranial Nerve Abnormality
Neurological Deficits
11/2 2010 Accident
11/5 2010
12/6 2010
1/12 2011
1/25 2011
2/3 2011
2/15 2011
3/10 2011
3/23 2011
3/26-3/28 2011 CT Brain
3/29 2011
3/31 2011
4/7 2011
4/11 2011
4/18 2011
5/17-5/18 2011
5/31 2011
6/1 2011
6/2 2011 MRI Brain
6/3 2011 EE
6/23 2011 EE
EMS
Jacks
Albritton
Kamm
Kamm
Kamm
Ramos
Albritton
Kamm
Jacks
Ramos
Kamm
Kumar
Kumar
Kumar
Kumar
Kumar
Kumar
ER 11/2
ER 3/26-29
Stuart
Smith
ER 4/5
Kumar
Kamm
ER 6/19
ER 6/23

Step 4:
ASSUME SYMTPOMS WERE CAUSED BY ACCIDENT

PATIENT'S SELF-REPORTED SYMPTOMS

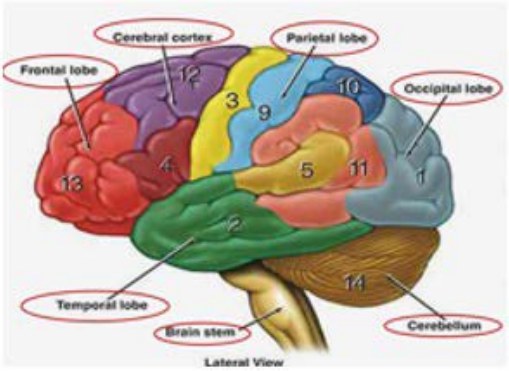
- Anger management problems
- Cognitive decline or changes
- Cognitive function problems
- Confusion
- Decreased judgement
- Difficulty following instructions
- Difficulty integrating information
- Difficulty learning new things
- Difficulty performing familiar tasks
- Difficulty with concentration
- Disorganization
- Disorientation to time and/or place
- Distractibility
- Fatigue
- Flashbacks of trauma
- Frequent Headaches
- General anxiety
- Insomnia
- Irritability
- Long-term memory problems
- Losing things
- Loss of interest in things
- Loss of motivation
- Loss of smell
- Loss of taste
- Low frustration tolerance
- Lower back pain
- Making careless mistakes
- Mood swings
- Muscle pain
- Nightmares
- Obsessive thoughts
- Panic attacks
- Performance anxiety
- Personality changes
- Problems paying attention
- Problems with abstract thinking
- Problems with language/word finding
- Right hip pain
- Ringing in ears
- Sensitivity to light
- Sensitivity to sound
- Short term memory problems
- Social anxiety
- Worry

CereScan Report PLS-002053



BRAIN INJURIES	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		✗
Brain Tissue Bruising (Contusion)		✗
Pooling of Blood (Hematoma)		✗
Macroscopic Bleeding (Hemorrhage)		✗
Abnormal Brain Volume (Atrophy)		✗
Significant White Matter Disease		✗
White Matter Hyperintensities/Scarring (Gliosis)		✗
ANY Brain Tissue (Intraparenchymal) Issues		✗

≠



Step 4:
Explain that Pesky White Matter Hyperintensity

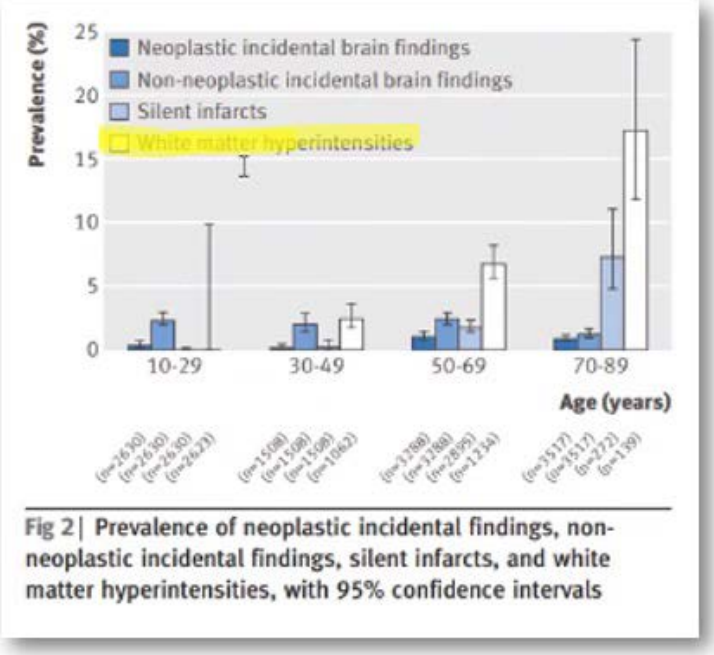
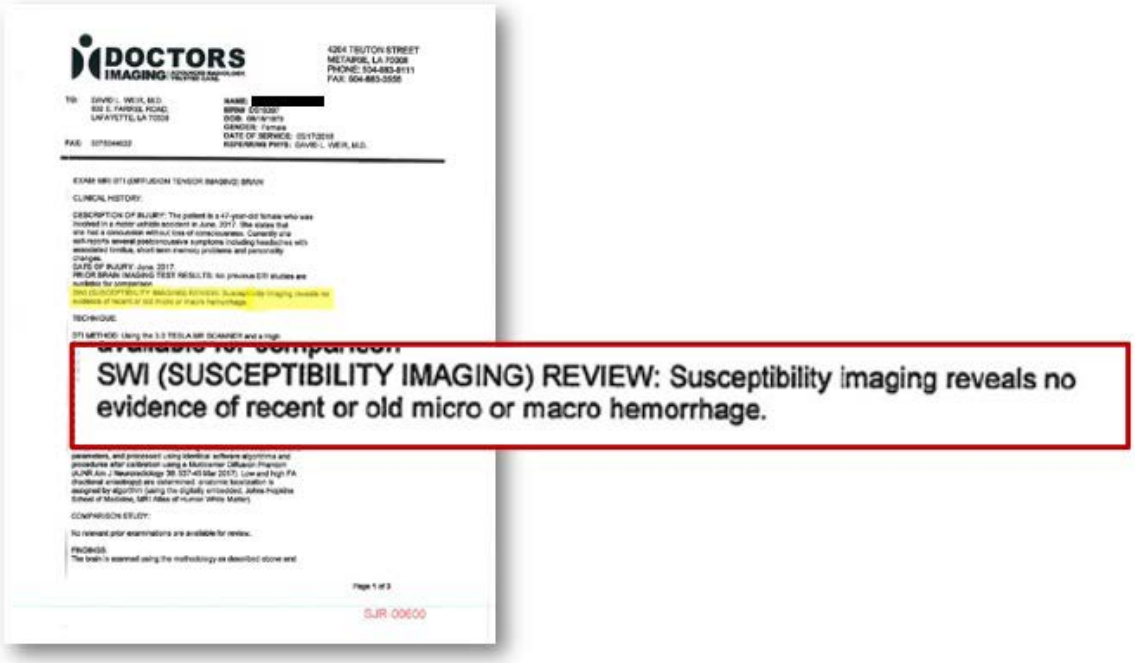


Fig 2| Prevalence of neoplastic incidental findings, non-neoplastic incidental findings, silent infarcts, and white matter hyperintensities, with 95% confidence intervals

BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		✗
Brain Tissue Bruising (Contusion)		✗
Pooling of Blood (Hematoma)		✗
Macroscopic Bleeding (Hemorrhage)		✗
Abnormal Gray-White Matter Differentiation		✗
Evidence Scarring (Gliosis)		✗

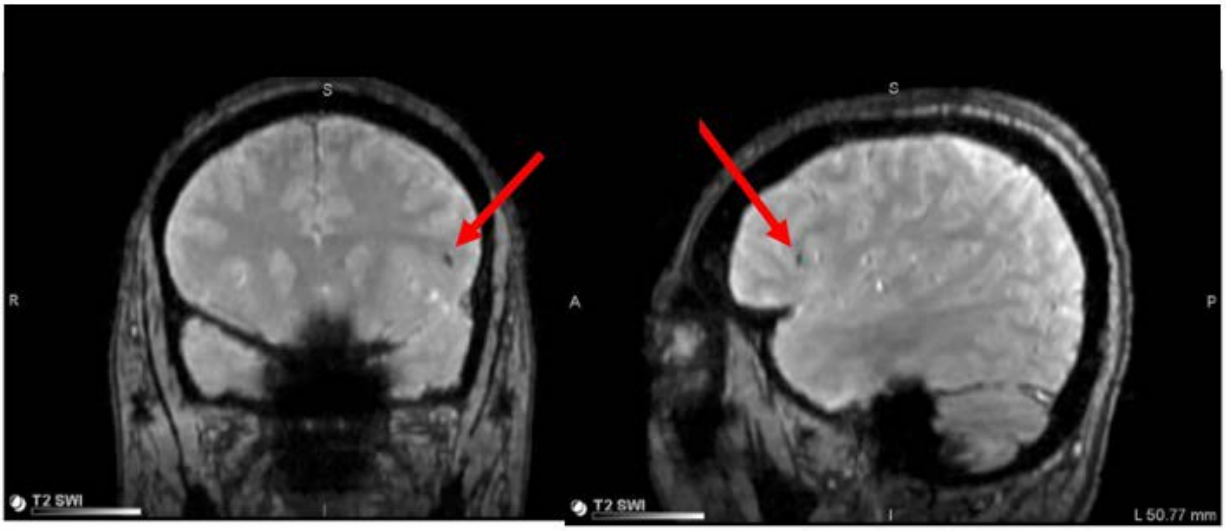
Step 5:
Search For Hemosiderin!
(Susceptibility Weighted Imaging)



DOCTORS IMAGING

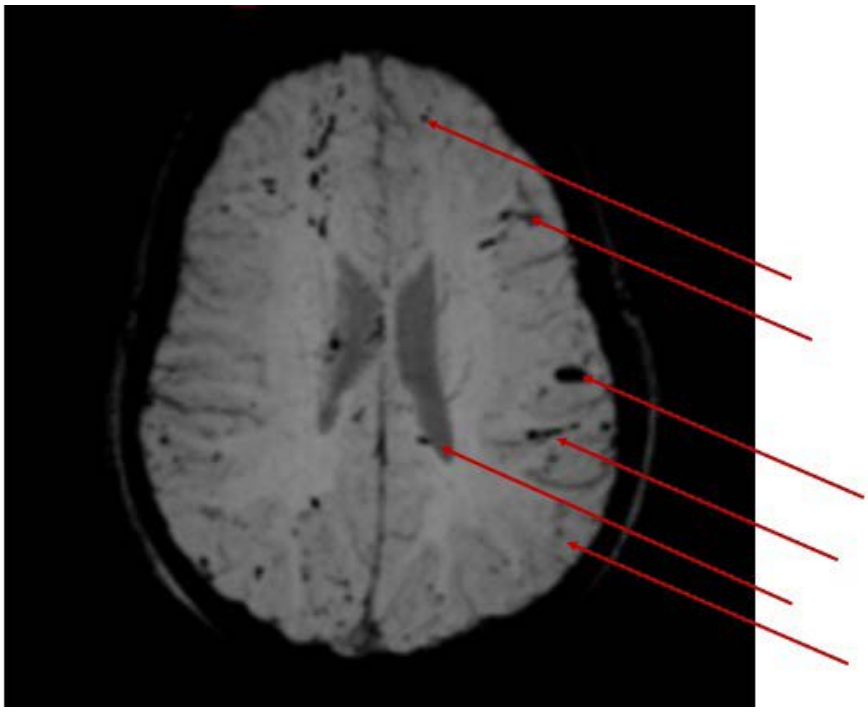
4264 TIBUTON STREET
METAIRIE, LA 70006
PHONE: 504-883-8111
FAX: 504-883-5556

SWI (SUSCEPTIBILITY IMAGING) REVIEW: Susceptibility imaging reveals no evidence of recent or old micro or macro hemorrhage.



SWI series demonstrate focus of hemorrhage in the left frontal lobe near the gray white junction, denoting hemorrhagic axonal shear injury.

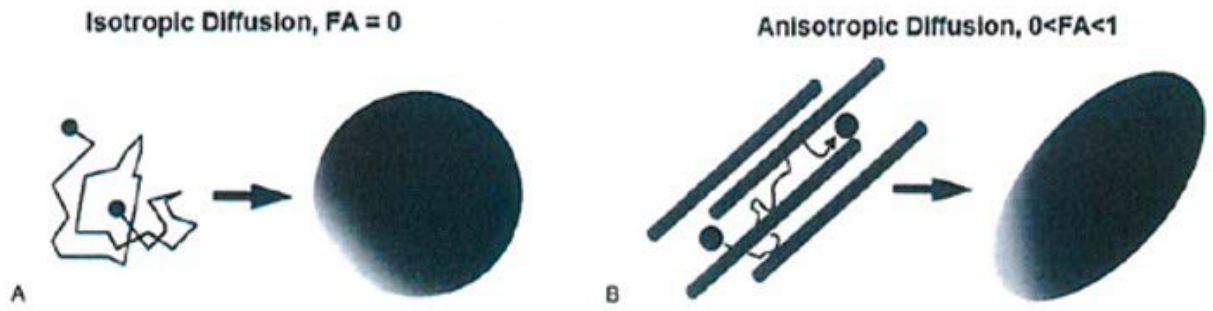
Susceptibility Weighted Imaging



BRAIN INJURIES		
	YES	NO
Brain Herniation		✗
Midline Shift		✗
Mass or Mass Effect		✗
Increased Intracranial Pressure ("ICP")		✗
Air/Gas in Cranial Cavity (Pneumocephalus)		✗
Brain Tissue Tearing		✗
Brain Tissue Swelling (Edema)		✗
Brain Tissue Bruising (Contusion)		✗
Pooling of Blood (Hematoma)		✗
Macroscopic Bleeding (Hemorrhage)		✗
Abnormal Gray-White Matter Differentiation		✗
Evidence Scarring (Gliosis)		✗
Microscopic Bleeding (Hemorrhage)		✗

Step 6:
Attack Normative Database
(DTI-MRI Results)

Diffusion Tensor Imaging
(0 to 1 Scale)



Fiber tract	FA	normal	SD
genucc	0.701588	0.698	0.002
spleniumcc	0.385494	0.728	0.03
cing R	0.332936	0.45	0.02
cing L	0.373955	0.45	0.02
ILF R	0.297509	0.41	0.03
ILF L	0.364445	0.41	0.03
UF R	0.358758	0.33	0.02
UF L	0.286475	0.33	0.02
SLF R	0.528259	0.42	0.02
SLF L	0.577834	0.42	0.02

Fiber tract	FA	normal	SD
genucc	0.701588	0.698	0.002
spleniumcc	0.385494	0.728	0.03
cing R	0.332936	0.45	0.02
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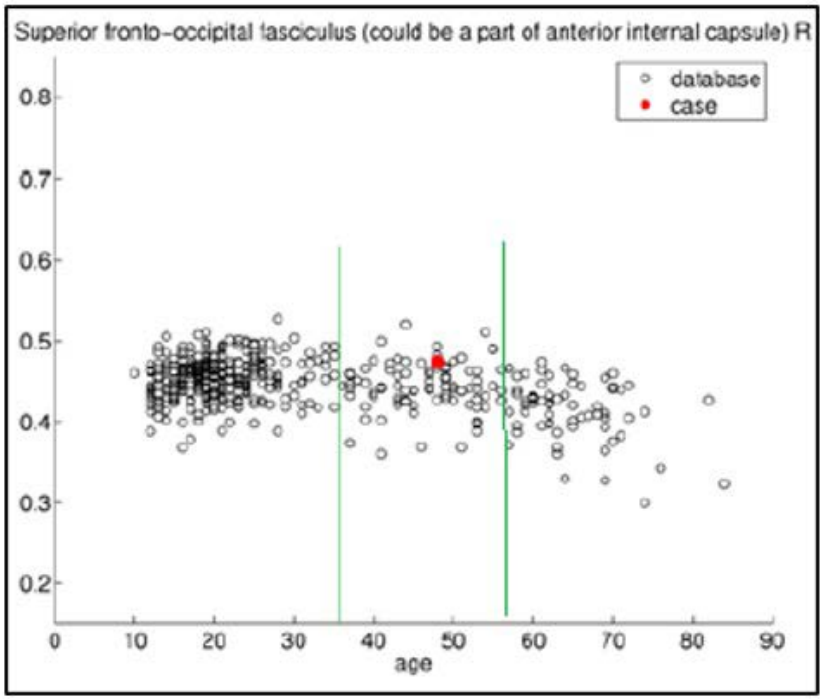
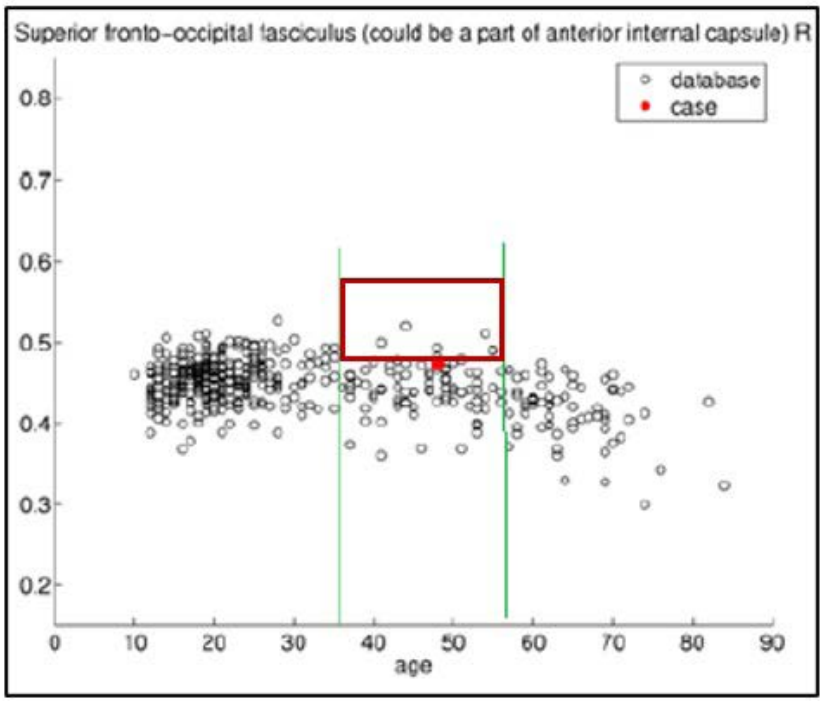
ILF L	0.364445	0.41	0.03
UF R	0.358758	0.33	0.02
UF L	0.286475	0.33	0.02
SLF R	0.528259	0.42	0.02
SLF L	0.577834	0.42	0.02

Structures	Vol ml	Vol/mTIV ratio (%)	NR Index	Z-score	Percentile
Left Pallidum	1.45	0.09	-4.42	-0.30	38.23
Caudate	7.81	0.47	6.87	0.46	67.90
Right Caudate	3.89	0.24	6.70	0.45	67.50
Left Caudate	3.92	0.24	6.65	0.45	67.38
Brain Stem	19.47	1.18	3.12	0.21	58.36
Frontal Lobe	351.93	21.34	-0.66	-0.04	48.49
Right Frontal Lobe	175.96	10.67	-0.28	-0.02	49.25
Left Frontal Lobe	175.97	10.67	-0.81	-0.05	47.82
Parietal Lobe	197.40	11.97	5.66	0.38	64.92
Right Parietal Lobe	97.44	5.91	5.32	0.36	64.08
Left Parietal Lobe	99.96	6.06	5.64	0.38	64.87
Occipital Lobe	90.84	5.51	4.08	0.28	60.89
Right Occipital Lobe	42.67	2.59	1.12	0.08	53.02
Left Occipital Lobe	48.17	2.92	5.77	0.39	65.21
Temporal Lobe	215.67	13.08	5.63	0.38	64.86
Right Temporal Lobe	108.99	6.61	5.64	0.38	64.87
Left Temporal Lobe	106.67	6.47	4.95	0.34	63.12
Cerebellum	130.29	7.90	1.56	0.11	54.22
Right Cerebellum	65.37	3.96	1.72	0.12	54.65
Left Cerebellum	64.93	3.94	1.37	0.09	53.70
CSF (+ dura)	389.19	23.60	-1.09	-0.07	47.06
Lateral Ventricle	19.59	1.19	0.05	0.00	50.14
Right Lateral Ventricle	10.24	0.62	0.64	0.04	51.74
Left Lateral Ventricle	9.35	0.57	-0.47	-0.03	48.72

Colors: orange for volumes with a percentile lower than 25% and a percentile over 75% for all ventricles and CSF.





84 "normal" Albuquerque brains

Case No. 1

Same nutrition

Same childhood & environment stressors

Same early development process

Same psychiatric and psychological issues

"Low average to borderline cognitive functioning"

?

88 "normal"
Albuquerque brains

?

Case No. 2

History of Depression
Diagnosed Generalized Anxiety Disorder
Diagnosed "sinus tachycardia caused by anxiety"
Unusual P wave on EKG
Tricuspid Insufficiency on Echocardiogram
16 years of Clonazepam
4 years of Viibryd, Lexapro, & Percocet

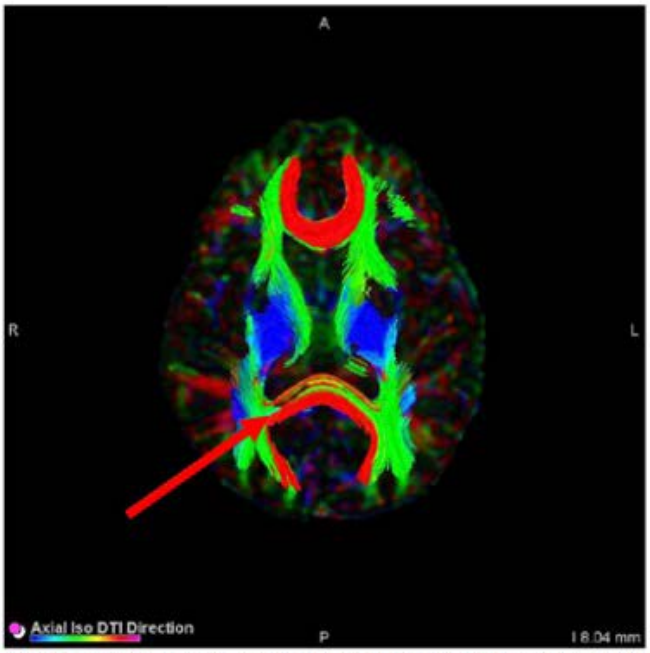
"Normal"
Brains

Similar
Brains

Case No. 3

History of Depression since 20s
Diagnosed Major Depressive Disorder
History of Cyclic Depression & Anxiety
Prozac since 2001
Prozac, Nortriptyline, & Wellbutrin during DTI (?)
Anemia
Self-Reported Learning Disorder
Born in Taiwan & English is Second Language

Step 7:
Attack Colorful Pictures of Brain



DTI and 3D tractography demonstrate asymmetric decreased white matter tract density in the corpus callosum

ANNOTATIONS

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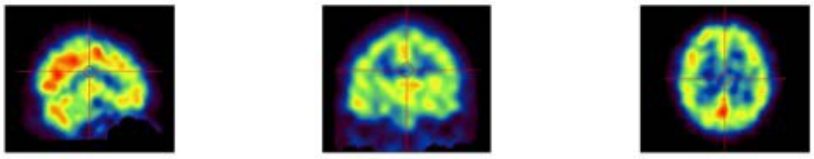
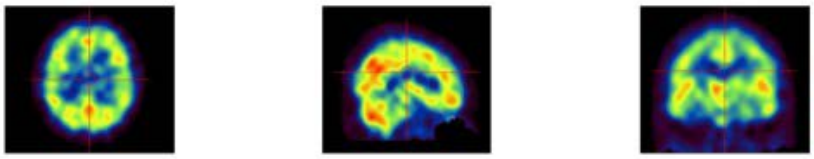
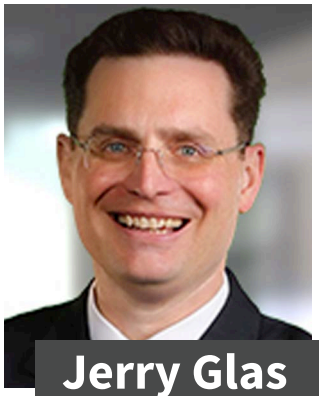


Dataset(s): Chang Brain Tomo Baseline_TRA - Processed Volume



Dataset(s): Chang Brain Tomo Concentration_TRA - Processed Volume



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Jerry Glas

Partner | Deutsch Kerrigan (New Orleans, LA)

John Jerry Glas is the Chair of the Civil Litigation Department at Deutsch Kerrigan and a Fellow of the American College of Trial Lawyers. He has tried 114 civil or criminal trials, including 76 jury trials and 38 judge trials.
Jerry has been admitted pro hac vice in 11 different states and had success on both sides of the aisle. In 2021, as lead trial counsel for the plaintiff (Lindale Pipeline, LLC), Jerry obtained a $26 million verdict in Houston. In 2012, as lead trial counsel for the defendant (TASER International, Inc.), Jerry obtained a zero verdict in St. Louis, which was listed by Missouri Lawyers Weekly as one of that year's "Largest Defense Verdicts."

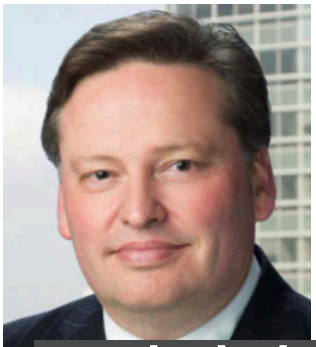
Jerry has authored three peer-reviewed book chapters for the American Bar Association's popular "From The Trenches" series on trial strategy. He is also a frequent presenter, having lectured locally and nationally on jury selection, trial strategy, expert witnesses, traumatic brain injury cases, life care plans, and qualified immunity.

Practices
- Manufacturer's Liability and Products Liability
- Commercial Transportation
- Premises Liability
- Health Care Litigation
- Appellate Litigation

Industries
- Insurance
- Manufacturing
- Transportation
- Health Care
- Retail and Restaurant

Accolades
- Fellow, American College of Trial Lawyers, 2020-Present
- Louisiana Super Lawyers List, Civil Litigation, 2015-2023
- The Best Lawyers in America©, Insurance Law, Mass Tort Litigation / Class Actions - Defendants, Personal Injury Litigation - Defendants, 2012-2023
- Best Lawyers "Lawyer of the Year," Mass Tort Litigation / Class Actions - Defendants, 2023
- Louisiana Super Lawyers, Cover & Featured Article, January 4, 2022
- Inside New Orleans Readers' Favorite Elite Lawyer, 2021
- New Orleans CityBusiness "Leadership in Law" 2012, 2017
- Missouri Lawyers Weekly, Largest Defense Verdicts, 2013
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Federal Bar Association's Camille Gravel Public Service Award, 2009
- Louisiana State Bar Association's Pro Bono Publico Award, 2009

Education
- J.D., Louisiana State University, 1996
- M.A., University of Toronto, Philosophy, 1992
- B.A., College of the Holy Cross, Philosophy, 1991 Beta Kappa Member



Blurred Lines: Product Liability or Public Nuisance?

Mark Clark
Parsons McEntire McCleary (Houston, TX)

Blurred Lines: Product Liability and Public Nuisance
Mark Clark

The lines between products liability and public nuisance have become blurred in certain mass tort litigation. This is due in large part to Plaintiffs' attempts to avoid the onerous burden of proving a products liability claim and instead relying on the more flexible construct of public nuisance.

Public nuisance, while traditionally considered a cause of action related to hazards presented by real property, has been used as a cause of action in a wide variety of mass torts over the past three decades, including cases involving tobacco, asbestos, guns, opioids, PFAS, vaping and even climate change. In these cases, Plaintiffs focus on the conduct of manufacturers in fostering dependence on products which are alleged to injure society at large, thus constituting a public nuisance.

The law of products liability is designed to measure a party's conduct and provide damages to those who suffer bodily injury or property damage caused by the negligent design, marketing or manufacturing of products. Products liability does not allow damages for pure economic loss.[1] Conversely, public nuisance in its most egregious form is concerned with subjective societal ills and seeks to impose strict liability[2] on parties for outcomes that are deemed to be harmful to social interests. The damages sought and recovered are the economic costs to society, including medical care, costs of law enforcement, unemployment benefits, addiction recovery and a plethora of other social costs.

Public nuisance is intended to be enforced primarily by governments bringing parens patriae claims seeking damages for the harms and costs to society. Such actions exponentially magnify risks to Defendants. When government actors team up with Plaintiffs' lawyers and help finance such massive actions, the outcome to private enterprise is devastating. In litigation surrounding the opioid crisis alone the estimated total of all settlements to date is $54 billion.[3]

These settlements have been paid because, even though Defendants have frequently been able to defeat public nuisance claims, there are some Courts that embrace the power of public nuisance to regulate social ills. Those Courts have in turn dramatically allowed the expansion of public nuisance as a cause of action over the past thirty years. This article discusses the evolution of the claims and defenses that have been deployed by the parties in these cases.

The Lines Between Products Liability and Public Nuisance

Products Liability
The law concerning products liability has been well established in almost every U.S. state and territory to be the "legal liability of manufacturers and sellers to compensate buyers, users and even bystanders for damages or injuries suffered because of defects in goods purchased."[4] The law of products liability dates to the common law wherein the sellers of food products were held liable for harm caused by

1 Strict products liability: recovery for damage to product alone. 72 A.L.R. 4th 12 (1989).

2 Absolute nuisance involves conduct that is "inherently injurious," and is essentially a strict liability cause of action. *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 521 (N.D. Ohio 2009), aff'd sub nom. *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496 (6th Cir. 2010).

3 https://www.opioidsettlementtracker.com/globalsettlementtracker.

4 Black's Law Dictionary (6th Edition 1990).

their "corrupt" food and drink.[5] Over the centuries, Restatements of Law along with state statutes have emerged to expand products liability to almost every product sold.[6] The statutory basis provides specific standards of proof and elements to establish liability for a defective product.

The Restatement Second of Torts § 402(a)[7] has also been accepted in many jurisdictions and provides in relevant part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

The law of products liability is well defined and the burdens on Plaintiffs to prove that a product was unreasonably dangerous are significant. As the U.S. Supreme Court has stated, the significant body of law surrounding products liability "establishes a classic and well-known triumvirate of grounds for liability: defective manufacture, inadequate directions or warnings, and defective design."[8]

Public Nuisance

Public nuisance has been described as an "ancient tort," dating back to twelfth-century England, and originated as a "criminal writ to remedy actions or conditions that infringed on royal property or blocked public roads or waterways." Originally, public nuisance was criminal in nature and brought only by the crown but was later expanded to allow private persons with a "special injury" to seek injunctive relief to stop the nuisance.[9]

Historically, public nuisance cases typically involved some form of injury caused by the Defendant's land, such as noxious odors emanating from a hog pen[10] or a private bridge that interfered with navigation on a stream.[11] Some cases acknowledged that a breach of the peace caused by activity on Defendant's land, such as an indecent performance,[12] constituted a public nuisance.

The vague laws concerning nuisance caused the famous Torts Professor and Berkeley Law School Dean William Prosser to write in 1942 in the University of Texas Law Review that:

'Nuisance,' unhappily, has been a sort of legal garbage can. The word has been used to designate anything from an alarming advertisement to a cockroach baked in a pie. Coupled with the dubious notion of "attraction," it has been applied even to conditions dangerous to trespassing children. Blackstone defined it as 'Anything that worketh hurt, inconvenience or damage, or which is done to the hurt of the lands, tenements or hereditaments of another'—which certainly is broad enough to cover all conceivable torts. There has been a deplorable tendency to use the word as a substitute for any thought about a problem, to call something a 'nuisance' and let it go at that. If 'nuisance' is to mean anything at all, it is necessary to disregard much of this as mere aberration.[13]

Prosser was the original reporter for the nuisance section of the Restatement (Second) of Torts and attempted to remedy the vagueness of public nuisance by limiting the cause of action to "a criminal interference with a right common to all members of the public" and limiting the recovery of damages to only those individuals who could satisfy the special injury rule.[14] He was overruled in 1979 when the American Law Institute defined the tort more broadly in Restatement (Second) of Torts §821B as follows:

(1) A public nuisance is an unreasonable interference with a right common to the general public.
(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

5 Comment B to Restatement (Second) of Torts § 402A (1965).

6 Id.

7 Restatement (Second) of Torts § 402A (1965).

8 Bruesewitz v. Wyeth LLC, 562 U.S. 223, 232, 131 S. Ct. 1068, 1076, 179 L. Ed. 2d 1 (2011).

9 Michelle L. Richards, Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation, 54 U. Rich. L. Rev. 405, 418 (2020).

10 Gay v. State, 90 Tenn. 645, 18 S.W. 260 (1891).

11 Carver v. San Pedro, L.A. & S.L.R. Co., 151 F. 334, 334 (C.C.S.D. Cal. 1906).

12 Fed. Amusement Co. v. State ex rel. Tuppen, 159 Fla. 495, 496, 32 So. 2d 1, 1 (1947).

13 William L. Prosser, Nuisance Without Fault, 20 Tex. L. Rev. 399, 410 (1942).

14 Richards, Pills, Public Nuisance, Parens Patriae, at 418.

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[15]

This broader definition soon opened the floodgate for increased public nuisance claims in mass tort products liability actions.

1972: Environmental Liability Cases
Even before the Restatement (Second) of Torts broadened the definition of public nuisance in 1979, governments were using the cause of action in environmental claims. In 1972, the U.S. Supreme Court recognized public nuisance under federal common law as a tool to enjoin polluters where no pollution statute was applicable. As the Court stated:

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal Courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.[16]

The matter was remanded to the District Court for further proceedings. After the Court issued its opinion, Congress created the Federal Water Protection Act of 1972. In 1981, the Supreme Court issued its second opinion in the case, noting that its opinion in the first case was no longer applicable as any nuisance claim would be preempted by the 1972 federal statute.[17]

1984 and 1987: Asbestos Alleged as a Public Nuisance in Products Liability Cases
In 1984, the City of Manchester, Rhode Island sued a maker of asbestos for costs of remediating asbestos from several schools. The Plaintiff alleged both strict products liability and public nuisance causes of action. The Court, in dismissing the public nuisance cause of action, acknowledged that "[t]he term nuisance is so comprehensive that it has been applied to almost all wrongs interfering with the rights of an individual in person, property, or comfort . . ."[18] However the Court went on to explain that "liability for damage caused by a nuisance turns on whether the Defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise."[19] Since the manufacturer had not been in control of the product since the time it was sold in this case, there was no basis to hold the manufacturer liable for the nuisance.

A subsequent products liability claim involving asbestos and alleging public nuisance proved successful in New York.[20] In 1987, Chase Bank sued the maker of asbestos fireproofing sprayed inside its bank building. Chase alleged both products liability and public nuisance in its claims. The Court found that because the asbestos fireproofing was a danger to the public at large, Chase had a valid claim for the cost of remediation based upon public nuisance. The Court noted that "a private party may sustain [a claim for public nuisance] if some special harm has been suffered different from the harm suffered by other members of the public."[21] Because Chase was required to remediate the asbestos from its property, and those damages were unique to Chase, it could recover its damages as a private actor under a public nuisance cause of action.

The Court did not discuss the fact that the product was no longer under the Defendant's control. With little analysis, the Court concluded that the product caused a public harm and allowed for recovery as a public nuisance. The Court may have glossed over the issue of public nuisance because the issue was secondary to the Plaintiff's valid products liability claim. While the case was not seminal, it is representative of the numerous public nuisance claims that arose around that time.

1994: Tobacco Litigation and Parens Patriae
In the mid 1990's, state governments began suing

15 Restatement (Second) of Torts §821B (Am. Law Inst. 1979).

16 Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 107, 92 S. Ct. 1385, 1395, 31 L. Ed. 2d 712 (1972).

17 City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981).

18 City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986).

19 Id.

20 Chase Manhattan Bank, N.A. v. T & N PLC, 905 F. Supp. 107, 125 (S.D.N.Y. 1995).

21 Id.

tobacco manufacturers on public nuisance grounds claiming that tobacco products harmed the health of the citizens of their states.

Typically, only governments have standing to bring a public nuisance claim. Private actors may only sustain a public nuisance claim if they can show a specific harm not suffered by the public at large. Therefore, in the tobacco litigation, the basis for the suits was that the state was the proper party to bring public nuisance actions for the injuries sustained by the public at large. This concept is termed parens patriae which translates to "parent of the country."[22] A state that brings such an action must set forth a sovereign or quasi-sovereign interest such as the health and well-being of its citizens.[23] Furthermore, the conduct of the Defendant must be shown to be a direct cause of the damage complained of and cannot be too remote. [24]

Unfortunately, the tobacco litigation settled for billions of dollars with very few substantive rulings on the issue of public nuisance. Nevertheless, because the tobacco Defendants settled quickly and for such large amounts, public nuisance became the cause of action du jour for mass torts involving products liability issues.

It is interesting to note that in one of the few tobacco cases that did not settle, a Court in Texas ruled that public nuisance could not be sustained by the state. As the Court noted:

[T]he State has not pled a proper claim [for public nuisance], because it has failed to plead essential allegations under Texas public nuisance law. Specifically, the State failed to plead that Defendants improperly used their own property, or that the State itself has been injured in its use or employment of its property. The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law and the Court is unwilling to accept the State's invitation to expand a claim for public nuisance beyond its ground in real property.

While the tobacco litigation did very little to establish jurisprudence that supported public nuisance as a viable cause of action, the billions of dollars paid out in settlements spoke volumes to Plaintiff's counsel everywhere. Suddenly tobacco-like litigation began sprouting up around the country.

1997 to the Present: Public Nuisance Becomes Common Place in Mass Torts

Between 1997 and present day, governmental entities have centered a vast number of mass tort cases around public nuisance causes of action, including cases involving guns, lead paint, opioids, vaping, PFAS and global warming.

The Courts that have addressed the issue of public nuisance and its role in mass torts during this time are starkly divided on the propriety of a such causes of action. While some Courts will not permit a public nuisance claim to be brought where a viable products claim exists, others allow the two causes of action to exist concurrently.

For example, Oklahoma rejected public nuisance claims in recent opioid litigation in the state. As the Oklahoma Supreme Court held:

Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids . . . Extending public nuisance law to the manufacturing, marketing, and selling of products--in this case, opioids--would allow consumers to convert almost every products liability action into a [public] nuisance claim.[25]

On the other hand, California has readily accepted public nuisance claims alongside products liability claims. In a recent mass tort case related to JUUL vaping products manufactured by the company JLI, a California Court held:

[Public nuisance] allegations here do not concern the JUUL product itself, but rather the alleged consequence of JLI's conduct. Put differently, the public nuisance claims are premised on JLI's aggressive promotion of JUUL to teens and efforts to create and maintain an e-cigarette market based on youth sales, not on any alleged defect in JUUL products.[26]

22 John B. Hoke, Parens Patriae: A Flawed Strategy for State-Initiated Obesity Litigation, 54 Wm. & Mary L. Rev. 1753, 1759 (2013).

23 Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607, 102 S. Ct. 3260, 3268, 73 L. Ed. 2d 995 (1982).

24 Id.

25 State ex rel. Hunter v. Johnson & Johnson, 2021 OK 54, ¶ 34, 499 P.3d 719, 729–30.

26 In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig., 497 F. Supp. 3d 552, 646

The Court's rationale in this case creates a legal fiction in which the harm caused by the product itself (vaping products) belongs under a products liability cause of action and is separated from marketing harms (marketing so that teens are hooked on vaping) which the Court deems to be a public nuisance.

Yet another California Court found that the marketing of opioids did not create a public nuisance and stated as follows:

Specifically, the Court finds that even if any of the marketing which caused an increase in the number, dose or duration of opioid prescriptions did include false or misleading marketing, any adverse downstream consequences flowing from medically appropriate prescriptions cannot constitute an actionable public nuisance. This is so because . . . the social utility of medically appropriate prescriptions outweighs the gravity of the harm inflicted by them and so is not "unreasonable" or, therefore, enjoinable.[27]

Not all courts agree though. In an opioid mass tort case presently pending in the Northern District of Ohio, the Court has found that pharmacies failed to notice and control red flags that legally prescribed and dispensed medication was being diverted for unlawful purposes. Finding that the pharmacies violated federal regulations which required the pharmacies to have safeguards in place for such diversionary tactics, the Court permitted public nuisance claims to proceed. While the Court allowed public nuisance claims for the cost of abatement of the nuisance, it would not allow for the cost of harm caused by the product.[28]

This disparate treatment of public nuisance as a cause of action has long been recognized as a problem by legal practitioners and scholars. As Professor Keeton and Dean Prosser stated in their text book on torts, the law of public nuisance is indeed an "impenetrable jungle."[29]

Defenses Against Public Nuisance

As one author has stated concerning the modern treatment of public nuisance: "The nub of the problem is twofold: the new public nuisance (1) violates the rule of law; and (2) is inconsistent with basic norms of democratic government."[30] Much can be written and said about the constitutionality of the judiciary assuming a regulatory role and using damage assessments as a means of correcting societal ills. An excellent argument exists that such action by the Courts oversteps the bounds of their constitutional role and violates principles of democratic government. While such arguments may have their place in legal briefs, Defendants must assert the legal defenses as they exist in the law at present. To navigate the complexities of public nuisance defenses, the following concepts should be considered by counsel:

Standing

Who is the Defendant? The general rule in almost every state is that typically only a governmental authority has standing to bring a public nuisance claim. However, the primary exception to this is that a private party may enforce a public right if the private party has incurred a "special injury" unique to the party and different from the harm suffered by the public at large.[31] Special injury standing may also be held by a group such as a fishermen's association for harm to waters that the association uses to earn a living. [32]

Property Interests

Counsel should check for any state statutes that define or create an action for public nuisance. Many states have such a statute, while some rely on Restatement of Torts §821B. Often a state's statutes limit public nuisance to those nuisances emanating from Defendant's property or nuisances interfering with Plaintiff's property rights.[33]

(N.D. Cal. 2020).

27 People v. Purdue Pharma L.P., No. 30201400725287CUBTCX, 2021 WL 7186146, at *7 (Cal.Super. Dec. 14, 2021).

28 In re Nat'l Prescription Opiate Litig., 589 F. Supp. 3d 790 (N.D. Ohio 2022). See also City & Cnty. of San Francisco v. Purdue Pharma L.P., No. 18-CV-07591-CRB, 2022 WL 3224463, at *59 (N.D. Cal. Aug. 10, 2022) (Court permitted public nuisance claim to proceed against pharmacy.)

29 W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts 616 (5th ed. 1984).

30 Thomas Merrill, The New Public Nuisance: Illegitimate and Dysfunctional, Yale Law J. Vol 132 (Feb 20, 2023).

31 See Chase Manhattan Bank, N.A. v. T & N PLC, 905 F. Supp. 107 (S.D.N.Y. 1995) (Bank could bring public nuisance claim because cause of remediation of asbestos fireproofing was a special damage that it suffered).

32 "Commercial fishermen and clam diggers in the present cases clearly have a special interest, quite apart from that of the public generally . . ." Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973).

33 "Defendants do not own the land on which the alleged nuisance occurred. Because Defendants are not landowners, Plaintiffs cannot succeed on their public nuisance claim."Indep. Cnty. v. Pfizer, Inc., 534 F. Supp. 2d 882, 890 (E.D. Ark. 2008), aff'd sub nom. Ashley Cnty., Ark. v. Pfizer, Inc., 552 F.3d 659 (8th Cir. 2009).

Control of the Nuisance

Successful arguments have been made that when a Defendant sells a product, the Defendant loses control over the product and thereby loses the ability to control or abate the nuisance.[34] In such cases, no action in public nuisance could be brought against the manufacturer. However, at least one Court has stated that a manufacturer that continues to sell its products to consumers, knowing that the consumers use of the product is creating a nuisance, has a type of control over the product. The manufacturer may simply choose to stop selling the product to such customers and thereby abate the nuisance.[35]

Statutes of Repose

In most states, a manufacturer of products cannot be held perpetually responsible for its products. Most states have a products statute of repose which prohibits any claim for products liability after a defined period of years from the date the product was placed into the stream of commerce. Courts frequently extend the statute of repose to all related claims alleging a defective or harmful product, including public nuisance.[36]

Federal Preemption

As the U.S. Supreme Court has pointed out, where a federal statute regulates the conduct complained upon, the public nuisance action is preempted by the federal statute.[37]

State Preemption

Somes Courts have held that the products liability law of the state is the sole remedy for Plaintiffs and public nuisance claims are not a viable method for seeking damages related to products allegedly causing harm. [38]

Causation and Proximate Cause

The vast nature of societal ills alleged by Plaintiffs in certain public nuisance claims involves a complex web of causes. Proving that any one Defendant or factor was the proximate cause of the harm or the condition at issue has been very difficult for Plaintiffs to prove.[39]

Public Policy Grounds

As the Oklahoma Supreme Court pointed out in the 2021 State ex rel. Hunter vs. Johnson & Johnson case cited previously, expanding public nuisance to exist along with products liability claims will allow Plaintiffs "to convert almost every products liability action into a public nuisance claim."[40] Others have asserted that public nuisance simply isn't suited to cure the alleged societal ailments.[41]

Conclusion

Notwithstanding the various defenses to public nuisance claims available to Defendants, many Courts have allowed public nuisance to proliferate as a cause of action in mass tort actions over the past few decades. The outcome for corporate America has been a parade of bankruptcies and settlements in the tens of billions of dollars. In many such cases, Defendants found themselves facing liability even though the outcomes were not foreseeable and the social ills alleged were vague at best.

As Dean Prosser stated in his 1942 law review article: "he who seeks recovery in Texas without proof of intent or negligence would do well to cast his petition in the form of an allegation of nuisance."42 Eighty years later, Plaintiffs in mass torts are apparently taking that advice to heart in every state across the country.

34 "The state's complaint also fails to allege any facts that would support a conclusion that Defendants were in control of the lead pigment at the time it harmed Rhode Island's children." State v. Lead Indus. Ass'n, 951 A.2d 428, 455 (R.I. 2008).

35 Parris v. 3M Co., 595 F. Supp. 3d 1288 (N.D. Ga. 2022) (PFAS litigation where the manufacturer knew that customer was polluting waters could have stopped selling to the customer thereby inferring control).

36 ". . . public nuisance derives from the product liability claims and are hence subject to the six-year statute of repose." Adams v. A.J. Ballard, Jr. Tire & Oil Co., No. 01CVS1271, 2006 WL 1875965, at *24 (N.C. Super. June 30, 2006).

37 City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981).

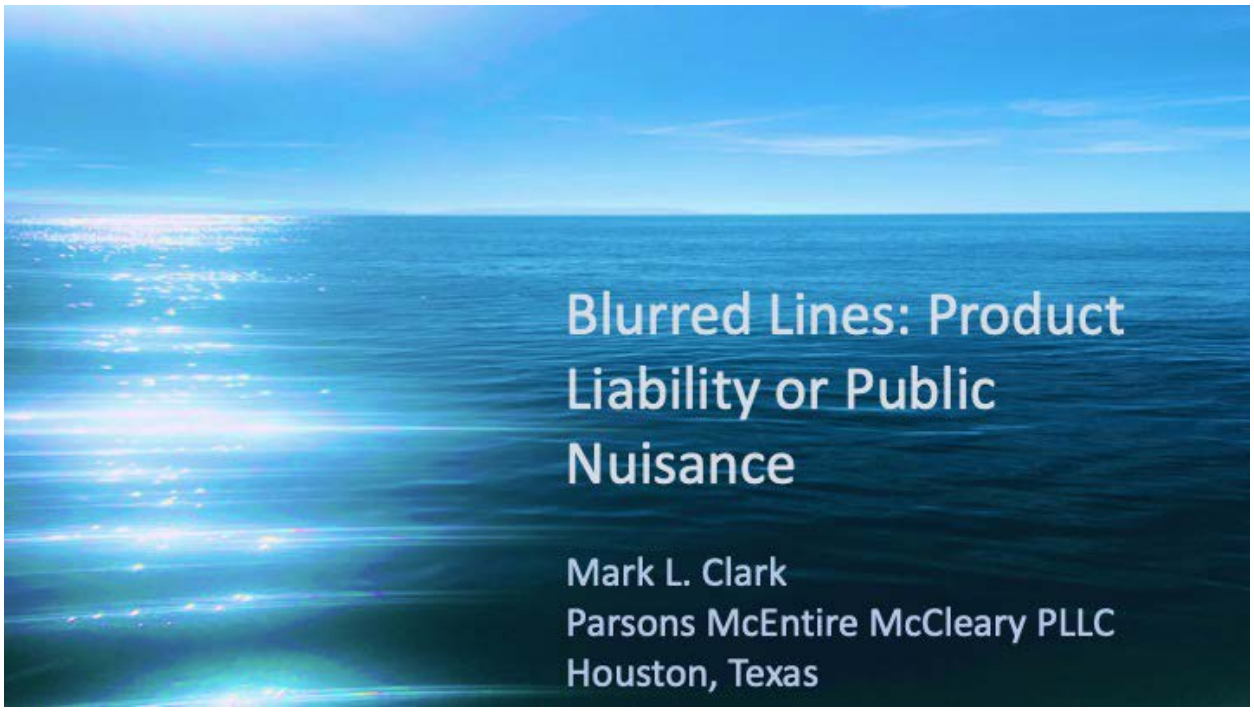
38 Texas products liability statute "bars the Plaintiffs' negligence, strict liability, fraud, misrepresentation, negligent and intentional entrustment, public nuisance, unjust enrichment, assault, and DTPA claims because they are all predicated on a product-defect theory." Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 422 (5th Cir. 2001).

39 In an opioid case against pharmacies, a Court recently found that "[a] remote cause of injury is insufficient to support a finding of proximate cause." City of Huntington v. AmerisourceBergen Drug Corp., 609 F. Supp. 3d 408, 481 (S.D.W. Va. 2022)

40 See supra, Hunter v. Johnson & Johnson.

41 Thomas Merrill, The New Public Nuisance: Illegitimate and Dysfunctional, Yale Law J. Vol 132 (Feb 20, 2023).

42 Prosser, Nuisance Without Fault at 426.



THE PROBLEM

Opioid Litigation
$54 Billion

Tobacco Litigation
$246 Billion

Climate Change Lit.
Billions Sought

PMM
LAW
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Products Liability

Origins in the Common Law
Tainted Food Products

PMM LAW
Parsons McEntire McCleary PLLC

Public Nuisance

Common Law Criminal Writ
Crown Enforces

PMM LAW
Parsons McEntire McCleary PLL

Parens Patriae

Government as "Parent of the Country"

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Parsons McEntire McCleary PLLC

Special Injury Rule

Persons with "Special Injury" Standing

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Parsons McEntire McCleary PLLC

Restatement of Torts (2nd) 1979

- Dean Prosser wanted to limit definition.
- ALI wanted to expand public nuisance.

PMM LAW
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Supreme Court Environmental Public Nuisance

Illinois v. City of Milwaukee

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Tobacco Litigation
Public Nuisance Takes Shape

Billions of dollars spoke volumes to governments and mass tort plaintiffs. Public nuisance becomes the cause *du jour.*

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Gun Litigation Strikes Out

Gun litigation faces trouble with causation and statutes protecting defendants

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Opioids Break the Mold

Many courts strike public nuisance claims. Other courts uphold such claims.

$54 Billion Collected

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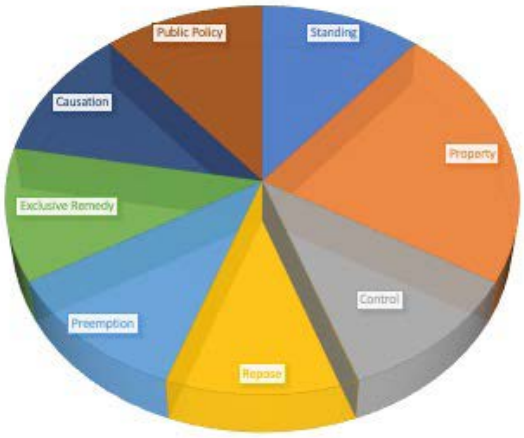
DEFENSES TO PUBLIC NUISANCE



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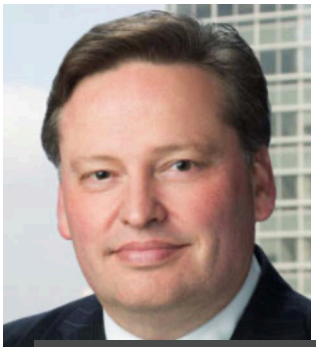

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Mark Clark has successfully provided leadership to his clients in litigated matters for over 25 years. Corporations and major insurers have consistently relied on Mark's trial skills, judgment, and tenacity in the trial and arbitration of their matters. His experience covers energy, marine, environmental spills, and clean up as well as a large spectrum of litigation in the transportation, construction, real estate, and commercial arenas.

Mr. Clark also has a broad practice in insurance coverage and contractual indemnity litigation. He has had the distinction of being the lead attorney for the Defense in In Re Larry Doiron, Inc. (2018), in which the U.S. Fifth Circuit dramatically changed maritime rules with regard to identifying maritime contracts.

Expertise

- Energy
- Environmental
- Insurance
- Admiralty & Maritime
- Commercial Litigation
- Products Liability Litigation
- Real Estate
- Transportation & Motor Vehicles
- Employment Law Litigation

Speaking Engagements and Publications

- Stop your Employees from Taking Unnecessary Risks, National Webinar Presented through Lorman Education Services, November 2021.
- Highway Accidents: A Neglected Source of Occupational Injury, National Webinar Presented Through Lorman Education Services, October, 2019.
- Houston Marine and Insurance Energy Seminar, Speaker regarding Maritime Contracts and Oil & Gas Indemnities under In re Larry Doiron, Inc., 879 F.3d 568 (5th Cir. 2018). Presented in Houston, Texas September, 2018.
- Panelist and Speaker on Discussion of Developments On the Outer Continental Shelf Lands Act, Tulane Admiralty Institute, February 28, 2018 to March 2, 2018.
- In Re Doiron: The Coming Sea Change in Maritime Offshore Contracts, Private Client Group, London, England November, 2017.
- Damages in Personal Injury; National Business Institute, New Orleans and Baton Rouge, September, 2017.
- Traumatic Brain Injury Defenses and Damage Assessment, January 2017, Thompson Coe Webinar and second presentation to Private Client group September, 2017.
- Punitive Damages for Unseaworthiness: Tabingo or McBride Which Approach Will Prevail, Private Client Group, London, England, April 2017
- Hull and P&I Coverage in the Energy Marine Context, Private Client Group, Houston, Texas, March 2017

Education

- South Texas College of Law - J.D., 1993
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Panel Discussion: 21st Century MDLs – The New Wild West

Jeff Hines
Goodell DeVries Leech & Dann (Baltimore, MD)

21st Century MDLs: The New Wild West
Jeffrey Hines, Sean Gugerty and Josh Schumacher – Perrigo Corp.

Guidance to Win MDL Showdowns

MDLs dominate the federal docket – over 60% of pending civil cases are in MDLs. Half the MDLs established in 2022 were product liability MDLs, and 37% of all pending MDLs are product liability MDLs.

MDLs are pitched as helpful for all. The idea is that proceeding in a single forum creates efficiencies: a single forum can reduce attorneys' fees and costs; there are fewer motions and less travel time for attorneys; and if the matter reaches discovery, fewer depositions and a lesser impact on the company defendant. Plus, coordination accompanying the MDL can minimize the risk of disparate rulings, and a favorable ruling from the MDL court can end or substantially narrow the entire litigation.

Advocates of the MDL process also argue that, in practice, it is an efficient means to resolve mass tort litigation while minimizing the burden and expense of trials. "The centralized forum [of MDLs] can resemble a black hole, into which cases are transferred never to be heard from again." Eldon E. Fallon, et al., Bellwether Trials in Multidistrict Litigation, 82 Tul. L. Rev. 2323, 2330 (2008). Of the 1,056,706 actions transferred to an MDL since 1968, only 17,357 have been remanded by the JPML for trial. Statistical Analysis of Multidistrict Litigation FY 2021 (https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report.pdf). All of this means that the most likely result of a case's inclusion into an MDL is settlement: judges tend to be proactive in seeking it; and the parties are already at the table.

MDLs also offer an opportunity for decisive cross-cutting rulings for defendants. In the Zantac MDL, the court held all of the plaintiffs' claims across three separate master complaints (personal injury, economic loss, and medical monitoring) were preempted as to the Generic and Store-Brand Defendants. In re Zantac (Ranitidine) Prods. Liab. Litig., 510 F. Supp. 3d 1141, 1145 (S.D. Fla. 2020); In re Zantac (Ranitidine) Prods. Liab. Litig., 548 F. Supp. 3d 1225 (S.D. Fla. 2021) Later, the Zantac MDL court struck the entirety of plaintiffs' causation experts, and therefore granted the Brand Name Defendants summary judgment: "Here, there is no scientist outside this litigation who concluded ranitidine causes cancer, and the Plaintiffs' scientists within this litigation systemically utilized unreliable methodologies with a lack of documentation on how experiments were conducted, a lack of substantiation for analytical leaps, a lack of statistically significant data, and a lack of internally consistent, objective, science-based standards for the evenhanded evaluation of data." In re Zantac (Ranitidine) Prods. Liab. Litig., No. 2924, 2022 U.S. Dist. LEXIS 220327 (S.D. Fla. Dec. 6, 2022).

But MDLs can also go very wrong for defendants. Consolidation encourages more solicitation and therefore more claims; discovery is front-loaded against defendants; plaintiffs aggressively push strong cases in state court to "ring the bell" and increase their leverage; and negative rulings become law of the case on remand.

Recent years have seen aggressive advertising from MDL plaintiff counsel on TV, radio, and social media. The resulting increase in cases provides more pressure on defendants to settle. Pressure also comes with front-loading discovery against defendants, which may include months or more

than a year of intense discovery demands on the company, with few if any demands on plaintiffs.

In the Zantac MDL, for instance, fact discovery on the defendants opened in June 2020 and did not close until January 2022. In that MDL, in addition to producing millions of documents, the defendants put up dozens of fact witnesses, and multiple 30(b)(6) witnesses on regulatory issues, marketing, storage and shipping, and adverse-event reporting and pharmacovigilance; all of which cost substantial time, energy, and money. And these demands can even come if defendants successfully obtain dismissal. In the Zantac MDL, multiple groups of defendants successfully moved to dismiss the entire action against them. The court's order, issued nearly a year and a half after the MDL started, recognized that the:

Generic manufacturer and Store-Brand Defendants, over the course of the past sixteen months, have no doubt incurred substantial costs in the form of motion practice and discovery, as well as costs associated with the Court's own administration of the MDL such as status conferences and special master fees. Juxtaposed to these significant costs, at no time have the Plaintiffs pled a claim against the Generic Manufacturer and Store-Brand Defendants that is not pre-empted and that states a claim upon which relief may be granted.

In re Zantac (Ranitidine) Prods. Liab. Litig., 548 F. Supp. 3d 1225, 1255 (S.D. Fla. 2021).

MDLs also offer plaintiffs an opportunity to play the forum "shell game" – parking their weakest claims in the MDL (where that plaintiffs' claims will not be tested) – and bringing their strongest cases in state court. Plaintiffs may do so in forums that liberally grant preferential motions (such as California or Illinois), and potentially get favorable rulings from state proceedings that are further along in the litigation than the MDL.

In all, defendant unity is key for success. Open communication and coordination is essential. MDLs often involve multiple groups of defendants. In a product MDL, it may be companies along the supply chain: suppliers, manufacturers, distributors, retailers, etc. Those parties will have different concerns, as smaller players typically seek to minimize costs and obtain an early exit, for example. Complicating the picture will be indemnity demands against your client from other defendants, or vice versa. Even similarly situated defendants may differ in case strategy. Knowing your co-defendants concerns, priorities, and prior MDL experience can foster a unified front before the plaintiffs and the court.

A special area of concern in recent years have been "census registries," in which third parties host registries where claimants provide certain case-relevant information in exchange for limitations tolling. Registries can reduce litigation costs by reducing the number of filed claims while providing defendants with the number of possible claimants. But the cost reduction is two-sided, as plaintiff counsels' cost reduction may result in inflated claimant numbers. Similarly, claimants may seek to have their cake and eat it too, by using the registry to toll limitations while also attempting to avoid adverse rulings by the MDL court. Defense counsel should be proactive regarding the terms of registries. Clear unimpeachable language in the implementation order can head off problems before they start.

21st Century MDLs
The New Wild West

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Will You Be Herded Into An MDL?

- MDLs dominate the federal docket; over 60% of pending civil cases are in MDLs.
- Half of New MDLs in 2022 were product liability MDLs.
- 37% of pending MDLs are product liability MDLs.

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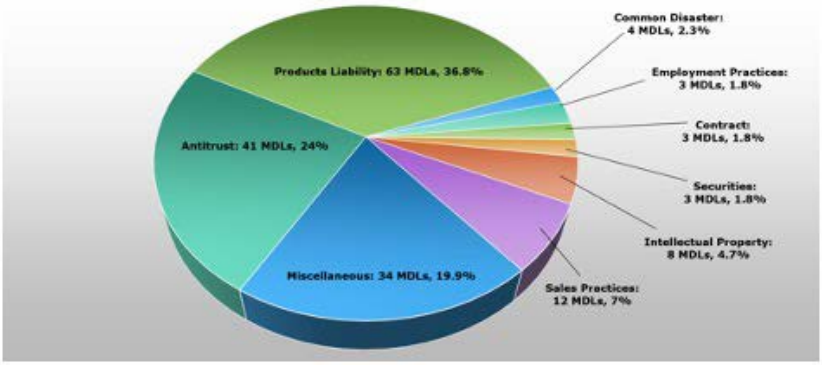
Distribution of Pending MDLs by Type (FY 2022)



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Some New MDLs Established In 2022/2023

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How Will Your MDL Turn Out?

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MDLs Are Pitched As Helpful For All…

- Proceeding in a single forum → cost efficiencies (in theory).
- Fewer depositions for employees.
- Federal-state coordination minimizes risk of disparate rulings.
- MDL court will rule on cross-cutting issues. A good ruling can end the entire litigation, or substantially narrow the liability against your client.

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The MDL "Black Hole"

"The centralized forum [of MDLs] can resemble a black hole, into which cases are transferred never to be heard from again."

Eldon E. Fallon, et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2330 (2008).

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The MDL "Black Hole"

- Of the 1,056,706 actions transferred to an MDL since 1968, only 17,357 have been remanded by the JPML for trial.
  - Statistical Analysis of Multidistrict Litigation FY 2021 (https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report.pdf)
- If your case is transferred to an MDL, settlement is the likely disposition.
  - MDL judges tend to be proactive.
  - Parties are already convened, just need dialogue.

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Decisive Rulings – Federal Preemption

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Decisive Rulings – Zantac MDL & Preemption

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: ZANTAC (RANITIDINE) PRODUCTS LIABILITY LITIGATION

MDL NO. 2924
18-MD-2924

JUDGE ROBIN L. ROSENBERG
MAGISTRATE JUDGE BRUCE E. REINHART

ORDER GRANTING THE GENERIC DEFENDANTS' RULE 12 MOTION TO DISMISS ON THE GROUND OF PREEMPTION, GRANTING THE NON-BRAND RELATED DEFENDANTS' MOTION TO DISMISS OR STRIKE CONSOLIDATED MEDICAL MONITORING CLASS ACTION COMPLAINT AND CONSOLIDATED AMENDED CONSUMER ECONOMIC LOSS CLASS ACTION COMPLAINT, AND DENYING AS MOOT THE SPECIALLY APPEARING NON-U.S. GENERIC MANUFACTURER DEFENDANTS' RENEWED MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

- *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 510 F. Supp. 3d 1141, 1145 (S.D. Fla. 2020); *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 548 F. Supp. 3d 1225 (S.D. Fla. 2021).
  - All of Plaintiffs' causes of action, across three master complaints, held preempted as to Generic Defendants.
  - Failure-to-warn-through-FDA claim preempted per *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001).
  - Plaintiffs' remaining claims preempted under *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) and *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013).

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Decisive Rulings – Zantac MDL & Preemption

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: ZANTAC (RANITIDINE) PRODUCTS LIABILITY LITIGATION

MDL NO. 2924
18-MD-2924

JUDGE ROBIN L. ROSENBERG
MAGISTRATE JUDGE BRUCE E. REINHART

ORDER GRANTING THE GENERIC DEFENDANTS' RULE 12 MOTION TO DISMISS ON THE GROUND OF PREEMPTION; GRANTING THE STORE-BRAND RETAILER DEFENDANTS' MOTION TO DISMISS OR STRIKE CONSOLIDATED MEDICAL MONITORING CLASS ACTION COMPLAINT AND CONSOLIDATED AMENDED CONSUMER ECONOMIC LOSS CLASS ACTION COMPLAINT, AND DENYING AS MOOT THE SPECIALLY-APPEARING NON-U.S. GENERIC MANUFACTURER DEFENDANTS' RENEWED MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

- MDL Court rejected purported loopholes to preemption:
  - "[C]laims that generic drug manufacturers had distributed misbranded drugs [are] pre-empted under *Mensing*." 510 F. Supp. 3d at 1158;
  - Claims based on "failure to communicate" a warning through advertising are pre-empted. *Id.* at 1154.
- Plaintiffs' own pleaded facts necessitated preemption.
  - Plaintiffs alleged ranitidine was a "unstable, ticking-time-bomb that will. . .degrade into a carcinogen." As such, their claims were "tantamount to design-defect claims" that are preempted per *Bartlett*. 548 F. Supp. at 1251.

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Decisive Rulings – *Daubert*/Rule 702

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Decisive Rulings – *Zantac* MDL & *Daubert*/Rule 702


OPINION/VIEWS & OUTLOOK

A Legal Shakedown Exposed

How Valisure tried to cash in on its dubious claims about cancer.

LAW360

Fla. Court Axes Zantac MDL Claims, Citing Lack Of Experts

- "Here, there is no scientist outside this litigation who concluded ranitidine causes cancer, and the Plaintiffs' scientists within this litigation systemically utilized unreliable methodologies with a lack of documentation on how experiments were conducted, a lack of substantiation for analytical leaps, a lack of statistically significant data, and a lack of internally consistent, objective, science-based standards for the evenhanded evaluation of data."
  - *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 2924, 2022 U.S. Dist. LEXIS 220327 (S.D. Fla. Dec. 6, 2022)

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Cross-Cutting Rulings Can Narrow Exposure

- *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166 (N.D. Cal. 2007).
  - "[T]here are no randomized controlled trials or meta-analyses of such trials or meta-analyses of observational studies that find an association between Celebrex 200 mg/d and a risk of heart attack or stroke. . . . It is thus unsurprising that most of plaintiffs' experts agree that the available evidence at 200 mg/d is inadequate to prove causation." *Id.* at 1175.

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...But MDLs Can Also Go Very Wrong

- Consolidated litigation encourages soliciting and filing more claims.
- Discovery is front-loaded against the companies.
- Plaintiffs aggressively advance strong cases in state court to "ring the bell" and increase their leverage.
- MDLs can result in large bellwether awards.

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Plaintiffs' MDL Advertising Machine

- Plaintiffs' counsel deploy sophisticated advertising machine on TV, radio, and social media to solicit claims.
  - Many new claims would never be brought without such prodding.
- The more cases, the more settlement pressure on defendants.
  - Knowing this, plaintiffs do not always do a good faith pre-suit vetting.

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Discovery Is Front-Loaded Against Defendants

- MDL fact discovery on cross-cutting issues = discovery into company documents, witnesses, 30(b)(6) corporate designees.
- MDLs frequently involve months or more than a year of intense discovery vs. the company, with few if any demands vs. Plaintiffs.

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Discovery Is Front-Loaded Against Defendants

- In the *Zantac* MDL, fact discovery on the defendants opened in June 2020 and lasted until January 2022.
- In addition to dozens of fact witnesses, defendants put multiple 30(b)(6) witnesses up on various topics, including regulatory issues, marketing, storage and shipping, and adverse event reporting and pharmacovigilance.
- Defendants collectively produced millions of documents.

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A Pending Motion To Dismiss May Not Halt Discovery

- "The Generic Manufacturer and Store-Brand Defendants, over the course of the past sixteen months, have no doubt incurred substantial costs in the form of motion practice and discovery, as well as costs associated with the Court's own administration of the MDL such as status conferences and special master fees. Juxtaposed to these significant costs, at no time have the Plaintiffs pled a claim against the Generic Manufacturer and Store-Brand Defendants that is not pre-empted and that states a claim upon which relief may be granted"
  - *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 548 F. Supp. 3d 1225, 1255 (S.D. Fla. 2021)

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The Forum "Shell Game"

- Plaintiffs park most cases in MDL, but select some of the strongest to push in state courts (often Philadelphia, CA, or IL).
- CA and IL allow "fast track" preference trials.
  - California CCP § 36
    - Plaintiffs over 70 years old, or substantial doubt will live beyond 6 months
    - Trial within 120 days
    - Some JCCP judges have held they have discretion to defer trial
  - 735 ILCS 5/2-1007.1
    - Plaintiffs over 70 years or good cause shown
    - No try-by standard

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Negative Rulings Can Drag You Down

- 3M Combat Earplugs MDL
  - Over 220,000 total plaintiffs.
  - MDL court precluded defense that earplug design parameters set by Dept. of Defense.
  - Initial 16 bellwether trials: 10 wins for Plaintiffs, over $300 million damages.
  - 3M argued its subsidiary bears sole liability. MDL court rejected argument, refused to halt MDL proceedings, and sanctioned 3M.

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Lassoing MDL Abuses – Top Tips & Strategies

1. Understand the plaintiffs' vulnerabilities;
2. Communication and coordination among defendants is essential;
3. Census registries are tempting, but subject to abuse;
4. Choose the cross-cutting issues you want to push, and make early disposition of those issues a red line;
5. Plan for the long run – MDLs can last years, and early decisions can have major implications later on.

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Understand The Plaintiffs' Vulnerabilities

- MDL plaintiffs gather and collect thousands of claims – often, relying on 3rd party financing.
- But proceeding before MDL courts is expensive:
  - Filing fees: $200 - $500/case → collectively can add up to millions of dollars;
  - May be ordered to split costs for special master, data collection and sharing, etc.
- Plaintiffs are always under pressure to keep costs down → can lead to opportunities for defendants.

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Multiple Defendants in MDLs

- MDLs often involve multiple defendants.
  - In product liability MDLs, plaintiffs often sue all companies involved in the supply chain: suppliers, manufacturers, distributors, retailers, etc.
- Differently situated defendants will have different concerns, priorities, etc.
  - "Small players" will focus on holding costs down and negotiating an early exit
  - Some defendants may have indemnity demands against your client (or vice versa).
- Even within a defense "grouping" (e.g., manufacturer defendants), individual companies/counsel will not always agree on case strategy.

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MDL Defendants – Friends or Foes?

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MDL Defendants – Communication Is Key

- Open lines of communication among defendants are crucial to a successful multi-defendant MDL.
- Learn the other defendants in the MDL.
  - What are their concerns or pressure points?
  - What are their main priorities during the pre-trial phase?
  - How much MDL experience do their counsel have?
- Coordination is time-consuming, but usually worth it – reaching a unified defense view puts you in a stronger position with plaintiffs and the Court.

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MDL Census Registries

- In recent years, MDLs have increasingly turned to "census registries" to collect claimants.
  - *In re 3M Combat Arms Earplug Products Liability Litig.*, MDL No. 2885;
  - *In re Juul Labs, Inc., Marketing, Sales, & Products Liability Litig.*, MDL No. 2913;
  - *In re Zantac (Ranitidine) Products Liability Litigation*, MDL No. MDL No. 2924.
- Generally, third parties host registries in which claimants provide certain case-relevant information (e.g., product identification, cancer type) in exchange for tolling the statute of limitations.

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MDL Census Registries – Pros and Cons

- Pros
  - Can reduce litigation costs by reducing the number of filed claims;
  - Can foster overall case resolution by providing essential data on claimants (cancer type, years of product use, type of product used, medical records, etc.)
- Cons
  - Registering claims means no filing fees + tolling of statute of limitations → can potentially incentivize collecting and registering more claims without sufficient vetting.
  - Plaintiffs can game the registry, including by failing to provide timely and adequate data, and threaten to take cases out of registry with mass filings in state court.

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MDL Census Registries – Plan For The Long Term

- Clear language in the order establishing a registry can head off problems:
  - Deadlines to provide data, and penalties for non-compliance;
  - If tolling is offered, need clear cut-off;
  - Agreement to be bound by MDL court's rulings.
- *Zantac* MDL saw a mixed registry experience.
  - Spotty compliance by plaintiffs;
  - Order governing registry allowed plaintiffs to exit freely—creating hazard of fleeing to state court if adverse MDL rulings;
  - Ultimately, court oversaw a negotiated process by which a substantial number of claimants agreed to be bound by MDL orders, and the rest were exited from the registry.

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MDL Cross-Cutting Issues

- Potential cross-cutting issues vary by MDL
- In product liability MDLs, cross-cutting issues frequently include:
  - Federal Preemption;
  - *Daubert*/Rule 702 challenges to general causation experts;
  - Whether certain defenses/arguments are permissible
    - Example: 3M Combat Earplug MDL barred defendants from arguing that design specifications of earplugs were set by the Defense Department

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MDL Cross-Cutting Issues

- A win on a cross-cutting issue could knock out the entire MDL (Zantac, Zofran MDLs)
- A loss can severely weaken defendants' trial defenses (3M Combat Earplugs MDL)

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Plan For The Long Run – Master Complaints

- Cases consolidated in an MDL ordinarily retain their separate identities.
- Parties "may elect to file a master complaint which supersedes prior pleadings." But a master complaint does not merge and supersede prior pleadings when it is "only an administrative summary of the claims brought by all the plaintiffs."
  - *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 & n. 3(2015).
- To determine if merger, appellate courts consider whether trial court and parties treat the master complaint as operative pleading.
  - *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586 (6th Cir. 2013)

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Plan For The Long Run – Master Complaints

- If you are considering a master complaint, need to carefully plan to make sure motions practice on the complaint is binding on all plaintiffs.
  - Pretrial orders can be used to clarify the parties' intent;
  - Check the master complaint itself: does it have language purporting to reserve individual character of each action?
- Master complaints often are paired with "short form" complaints (SFCs)
  - Need to carefully negotiate format of SFCs to discourage over-naming of defendants, adding spurious claims, etc.;
  - If SFCs are direct-filed in an MDL, need to guard against waiver of personal jurisdiction, choice of law, and *Lexecon* rights.

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Final Thought – Some Rules in the Wild West?

- *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55 (3d Cir. 2023)
  - Held improper to exclude expert testimony on price-fixing based on doctrines of law of the case or issue preclusion from expert's exclusion in prior bellwether trial.
  - "The district court has broad authority to structure and manage the MDL proceeding to promote efficiency and avoid unfairness. But it does not have the authority to create special rules to bind plaintiffs by the finding of previous proceedings in which they were not parties." *Id.* at 64.
  - But "a court may rely on its prior decisions as persuasive, and demand good reasons to change its mind," including through a formal show-cause process. *Id.* at 65-66.

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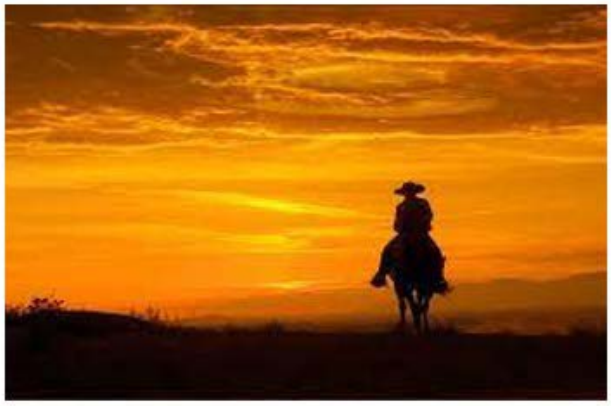
QUESTIONS/CONCERNS?



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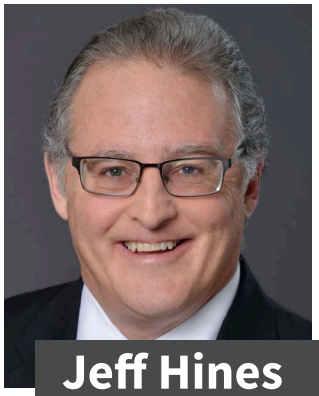

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Jeff Hines is a partner with Goodell DeVries. Prior to joining the firm in 2003, he was the managing principal of a regional law firm's District of Columbia and Virginia offices. Jeff is licensed in Maryland, the District of Columbia, and Virginia, and has represented clients in trials and appeals in all three jurisdictions. His areas of practice include professional malpractice, toxic tort and environmental litigation, pharmaceutical litigation, product liability, and commercial, securities and employee litigation. Jeff is the firm's General Counsel and serves on the three-person Executive Committee.

Practice Areas

- Product Liability
- Pharmaceutical and Medical Device Litigation
- Toxic Tort and Environmental Litigation
- Professional Liability
- Employment Litigation
- FINRA and Securities
- Accounting Malpractice

Publications and Seminars

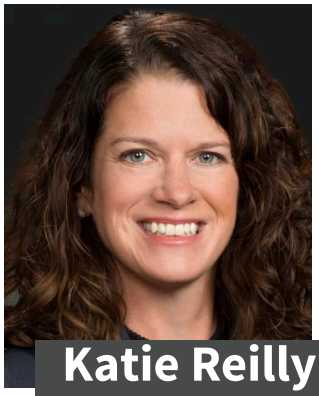
- Presenter, "Panel Discussion: 21st Century MDLs – The New Wild West," The Trial Network (April 2023)
- Jeffrey J. Hines, Esq. and Michael A. Pichini, Esq., "Silica Tort Reform – A National Overview," Harris Martin Publishing, Columns - Silica, Sept. 2005, Vol. 3, No. 12, at 2.

Honors and Awards

- Best Lawyers in America; "Lawyer of the Year" Award for Baltimore Legal Malpractice Law — Defendants (2012, 2014); "Lawyer of the Year" Award for Baltimore Mass Tort Litigation/Class Actions — Defendants (2013); Legal Malpractice Law — Defendants (2006-Present); Professional Malpractice Law — Defendants (2020-Present); Litigation - Labor and Employment (2019-Present); Legal Malpractice Law — Defendants — Legal Ethics (2011-2014); Mass Tort Litigation/Class Actions — Defendants (2013-Present); Product Liability Litigation — Defendants (2012-Present)
- Maryland Super Lawyers - Product Liability Defense (2009-2011, 2014-2023)
- AV Preeminent Rated, Martindale Hubbell (1994-2020)

Education

- University of Maryland, School of Law (J.D., with Honors, 1985)
- University of Maryland (B.S., 1981)



Spot the Risk, Reap the Reward: Top 10 Antitrust Risks to Avoid in 2023

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

Spot the Risk, Reap the Reward: Top 10 Antitrust Risks to Avoid in 2023
Katie Reilly

In July 2021, President Biden issued an executive order announcing a multi-pronged, "whole-of-government" effort to promote competition in the American economy, placing antitrust and competition issues at the forefront of the Biden administration's enforcement agenda.[1] Since then, the Federal Trade Commission (FTC) and Department of Justice (DOJ) have shifted their focus of merger enforcement by emphasizing vertical theories of harm and labor market impacts, embarked on new avenues of criminal enforcement, withdrawn decades-old guidance on information-sharing, revived enforcement efforts to curtail price discrimination, and launched significant initiatives to challenge restrictive labor practices and police interlocking directorates.

With competition issues at the forefront, state attorneys general actively pursued antitrust claims as well. While large bipartisan coalitions of state attorneys general have pursued multiple lawsuits against big tech, partisan coalitions of state enforcers have signaled a willingness to challenge climate and socially-sensitive initiatives under federal and stateantitrust laws. And individual state attorneys general have invested substantial resources in pursuing other top-of-the-mind issues like competitor agreements relating to compensation, recruitment, and hiring practices.

And, as is often the case, private litigants have followed these trends. Increased enforcement activity at both the federal and state level is likely to spawn more piggy-backing by class action plaintiffs.

This article highlights some of the most significant trends in antitrust enforcement and litigation over the last several years and offers some predictions of what's to come. In-house counsel should take note of these developments and revisit and revise their antitrust compliance programs accordingly.

Labor and Employment Practices
Competition in labor markets has been a leading antitrust concern for the last several years. The Biden administration has increasingly used the nation's antitrust laws to challenge business practices that restrict workers from competing for higher wages and improved work conditions, and both state attorneys general and private litigants have followed suit.

No-poaching and wage-fixing agreements
Federal and state antitrust authorities have targeted no-poaching, non-solicitation, and wage-fixing agreements as a primary area of concern. No-poaching and non-solicitation 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. Similarly, horizontal wage-fixing agreements have long been considered per se violations of the Sherman Act. But the last five years have seen a substantial increase in enforcement activity concerning these types of agreements, including using criminal prosecutions under the federal antitrust laws.

In October 2016, the FTC and DOJ jointly released Antitrust Guidance for Human Resources Professionals (the "HR Antitrust Guidance"), with the stated goal of alerting these professionals to potential antitrust violations related to compensation,

1 Executive Order on Promoting Competition in the American Economy, July 9, 2021.

recruitment, and hiring practices.[2] The HR 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 HR Antitrust Guidance also announced that, contrary to its historical practice of going after these agreements through civil enforcement actions, DOJ would proceed criminally against naked wage-fixing and no-poaching agreements going forward.

The DOJ has since followed through with that warning. In the past two years, DOJ filed numerous criminal cases against businesses and individuals for engaging in wage-fixing and no-poaching agreements.[3] The first of these cases to go to trial ended in back-to-back acquittals. In April 2022, a Texas jury returned a defense verdict for two health-care staffing agencies accused of fixing the rates paid to physical therapists and therapists assistants in the Dallas-Fort Worth area.[4] That same week, a Colorado jury acquitted defendants DaVita Inc. and its former CEO Kent Thiry after a nearly two-week trial regarding an alleged no poach agreement.[5] Still, the DOJ continues to prosecute other labor-related cases, and in October 2022, secured a guilty plea from a health care staffing company for conspiring with a competitor to fix wages and allocate employee nurses.[6]

DOJ has also signaled its intent to increase scrutiny of no-poach and non-solicit agreements in the civil context. In a series of filings in private lawsuits, the DOJ has taken a hardline approach on whether no-poach agreements should be subjected to per se treatment under the antitrust laws, even when they are ancillary to legitimate business collaborations (such as franchise agreements). These filings suggest the DOJ is taking a narrow view of what constitutes an "ancillary" agreement.[7]

No-poach and wage-fixing agreements are also in the crosshairs of state law enforcement agencies and private litigants. As discussed below (Risk #10), state attorneys general have actively pursued no-poaching agreements in the last several years. Private litigants have also filed a rash of putative antitrust class actions challenging no-poaching clauses, piggybacking on DOJ's indictments. A number of class action lawsuits filed against Surgical Care Affiliates and DaVita are pending in the Northern District of Illinois. Lawsuits have also been brought against Raytheon Technologies and Agilis Engineering in the District of Connecticut following the indictment of one of executives, Mahesh Patel.[8]

Non-compete agreements

In the Executive Order on competition, President Biden encouraged the FTC to "exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act (FTC Act) to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[9] The FTC has now followed through on that directive. On January 4, 2023, the FTC announced settlements with three companies and two individuals for allegedly illegal non-compete agreements imposed on workers, which marked the first time the agency took the position that noncompete restrictions constitute unfair methods of competition under Section 5 of the FTC Act.[10] The next day, the FTC issued a Notice of Proposed Rulemaking that would impose a blanket ban on non-compete agreements under the FTC Act.[11] The proposed rule broadly defines non-compete agreements as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business,

2 Dep't of Justice, Antitrust Division, & Fed. Trade Comm'n, Antitrust Guidelines for Human Resource Professional (Oct. 2016) ("HR Antitrust Guidance").

3 United States v. Manahe, 2:22-cr-00013 (D. Me. Jan. 27, 2022); United States v. Patel, No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021); United States v. Hee, No. 2:21-cr-00098 (D. Nev. Mar. 30, 2021); United States v. DaVita, Inc., No. 1:21-cr-00229 (D. Colo. July 14, 2021); United States v. Surgical Care Affiliates, LLC, No. 3:21-cr-00011 (N.D. Tex. Jan. 5, 2021); United States v. Jindal, No. 4:20-cr-00358 (E.D. Tex. Dec. 9, 2020), ECF No. 1.

4 United States v. Jindal, No. 4:20-cr-00358 (E.D. Tex. Apr. 14, 2022).

5 United States v. DaVita, Inc., No. 1:21-cr-00229 (D. Colo. Apr. 15, 2022).

6 Dep't of Justice, Antitrust Division, Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses, Press Release (Oct. 27, 2022).

7 See 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 (arguing that prior statements of interest filed by the Trump-era DOJ, which argued the per se rule likely did not apply in the franchise context, did "not fully and accurately reflect the United States' current views"); Statement of Interest of the United States of America, In re Outpatient Med. Ctr. Employee Antitrust Litig., No. 1:21-cv-00305 (N.D. Ill. Dec. 9, 2921) (arguing that no-poach agreements are per se violations); Br. of Amicus United States of America in Support of Neither Party, Aya Healthcare Servs. Inc. v. AMN Healthcare, Inc., No. 20-55679 (9th Cir. Nov. 19, 2020) (arguing for a stringent test of "reasonable necessity" in determining whether a no-poach agreement was ancillary to a procompetitive venture).

8 See note 3, supra

9 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. 14, 2023).

10 Fed. Trade Comm'n, FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), at https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers (last visited Mar. 14, 2023).

11 Non-Compete Clause Rulemaking, Fed. Trade Comm'n (Jan. 5, 2023), at https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking (last visited Mar. 14, 2023); Notice of Proposed Rulemaking, Fed. Trade Comm'n (Jan. 5, 2023) (outlining the text of the rule as will be published in the Federal Register at 16 CFR Part 910), at https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking (last visited Mar. 14, 2023).

after the conclusion of the worker's employment with the employer." According to the FTC's proposal, that definition would include:

a "non-disclosure agreement between an employer and a worker that is so broadly written that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer;" and
a "contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker."

The proposed rule would extend to all workers, whether paid or unpaid, and would require companies to rescind existing non-compete agreements within 180 days of publication of the final rule.

The DOJ has also weighed in on non-compete agreements. In February 2022, the DOJ filed a statement of interest in a Nevada state court litigation in which it argued that non-compete restrictions could be considered per se violations of Section 1 of the Sherman Act.[12] Of note, the DOJ argued the non-compete agreement at issue was a horizontal agreement between competitors because the individual workers—board certified and licensed anesthesiologists—were "actual or potential competitors of [the employer] when they agreed to the non-competes."[13] The DOJ also argued that, even if vertical or ancillary to a legitimate business venture, the agreement could run afoul of the rule of reason.[14]

No court has yet endorsed either the FTC's broad reading of the FTC Act or the DOJ's unprecedented theory under the Sherman Act. The FTC's proposed rule may still be revised in response to comments and, even if finalized as-is, will likely be subject to legal challenge. Still, both agencies' actions illustrate that non-compete agreements remain a focus of federal antitrust enforcement efforts.

Information Exchanges

On February 3, 2023, the DOJ signaled significant changes to its review of companies' information sharing practices by withdrawing three policy statements that previously provided guidance on a broad range of topics concerning healthcare markets, including its nearly 30-year-old guidance on information exchanges in the healthcare industry.[15] But while directed to the healthcare industry, companies across a wide range of industries have long relied on this guidance to assess and minimize the antitrust risk of participating in information exchanges. Withdrawal of that guidance indicates that information sharing arrangements both within and outside the healthcare industry may be subject to increased scrutiny. Companies that have shared or are continuing to share industry information based on the now withdrawn guidance should be prepared to review current information sharing practices and evaluate the potential risks under traditional antitrust principles.

Information sharing under the "safety zone"

Until their withdrawal, the policy statements provided a "safety zone" for sharing competitively sensitive information under the following conditions: (1) the information is collected and managed by a third party; (2) the collected information is at least three months old; (3) at least five entities participated in reporting data for each statistic, and no individual participant's data constituted more than 25 percent of that statistic on a weighted basis; and (4) the information is sufficiently aggregated so that data pertaining to individual participants cannot be identified.[16]

The DOJ and the FTC extended the safety zone framework established by the healthcare policy statements beyond the healthcare industry. In 2014, the FTC issued a public statement applying this safety zone framework generally.[17] The Antitrust Guidelines for Collaborations Among Competitors and the Antitrust Guidance for Human Resources Professionals, both issued jointly by the DOJ and

12 Statement of Interest of the United States, Beck v. Pickert Med. Grp., P.C., No. CV21-02092 (2d Judicial Dist., Washoe Cty. Feb. 25, 2022).

13 Id. at 6-7.

14 Id. at 11-15.

15 Dep't of Justice, Antitrust Division, Justice Department Withdraws Outdated Enforcement Policy Statements, Press Release (Feb. 3, 2023), at https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements (last visited Mar. 14, 2023).

16 Dep't of Justice & Fed. Trade Comm'n, Statement of Antitrust Enforcement Policy in Health Care 44-45 (Aug. 1996).

17 Fed. Trade Comm'n, Information exchange: be reasonable (Dec. 11, 2014), at https://www.ftc.gov/enforcement/competition-matters/2014/12/information-exchange-be-reasonable (last visited Mar. 14, 2023).

FTC, also advise that information exchanges are less likely to raise antitrust concerns if they adhere to the same conditions.[18]

Future uncertainty

There is no indication the DOJ intends to issue new guidance on information sharing. Instead, in withdrawing the healthcare policy statements, DOJ announced that it plans to take a "case-by-case enforcement approach" rather than using a blanket safety zone.[19]

The DOJ's withdrawal of the safe harbor guidelines for information sharing creates an atmosphere of uncertainty. Companies can no longer rely on rigid compliance with the safe harbor guidelines to avoid antitrust scrutiny, though continued compliance with those guidelines should at least mitigate antitrust exposure. Going forward, trade associations and others conducting information exchanges, and companies participating in them, should carefully review information sharing policies and practices to determine whether the proposed information exchange could be used to (or could be perceived to be used to) reduce competition and facilitate collusion.

Pricing Algorithms

Big data, software, and artificial intelligence are changing the way businesses make strategic decisions, including how they price products and services. Automated pricing tools have emerged as a primary focus of antitrust interest, as enforcers and litigants closely scrutinize how pricing algorithms could be used to facilitate collusion.

Cases involving Uber and RealPage, a real estate tech company, illustrate the types of antitrust claims that may arise from the use of pricing algorithms. In 2015, Uber's CEO and co-founder, Travis Kalanick, was hit with a class action lawsuit alleging he facilitated a hub-and-spoke price-fixing conspiracy among drivers through use of its pricing algorithm.[20] The lawsuit alleged that by using Uber's pricing algorithm, Uber conspired with drivers (all independent contractors, not employees) to set a standard fare and uniform surge pricing, and facilitated an agreement among drivers, who agreed to participate in the scheme by consenting to Uber's user agreement (and, thus, use of the pricing algorithm). The district court found the complaint's allegations were sufficient to survive a motion to dismiss.[21] Uber eventually succeeded in removing the case to arbitration, so the plaintiffs' theory was never tested through discovery and trial.

Last October, plaintiffs filed a class action suit against RealPage immediately after a ProPublica published an expose on the tech firm's rent-pricing software and questioned whether use of the algorithm facilitated antitrust violations by RealPage and its clients, commercial property owners and property managers. The complaint alleges the defendants conspired to use RealPage's so-called "revenue management" service to set rental prices and restrict the supply of available rental units in major metropolitan areas across the United States.[22] RealPage's software worked by collecting information from its landlord and management clients, including non-public information about the rents they charge, and feeding that information into an algorithm that recommends daily prices for available apartments.

Lawmakers and the DOJ quickly jumped on the bandwagon. A quartet of senators immediately called for formal investigations by the DOJ and the FTC, and the DOJ reportedly launched an investigation shortly thereafter.[23]

Environmental, Social, and Governance Initiatives

Due to mounting concerns over sustainability, climate change, and social justice issues over the last several years, public and private companies have been under increasing pressure from investors, stakeholders, and consumers to implement business practices and policies that are environmentally and socially sensitive. But actions taken to further these goals—commonly referred to as environmental, social, and governance, or "ESG," goals—are not

18 HR Antitrust Guidance at 5; Dep't of Justice, Antitrust Division, & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors 14-15, 21 (Apr. 2000).

19 See note 14, supra.

20 Complaint, Meyer v. Kalanick, No. 15-cv-09796 (S.D.N.Y. Dec. 16, 2015), ECF No. 2.

21 Opinion and Order, Meyer v. Kalanick, No. 15-cv-09796 (S.D.N.Y. Mar. 31, 2016), ECF No. 37.

22 Complaint, Bason v. RealPage, Inc., No. 3:22-cv-01611 (S.D. Cal. Oct. 18, 2022), ECF No. 1.

23 Jonathan Rubin, Suspected of Running a Rental House Cartel, RealPage Faces Litigation and a Federal Investigation, The National Law Review, Dec. 6, 2022, at https://www.natlawreview.com/article/suspected-running-rental-housing-cartel-realpage-faces-litigation-and-federal (last visited Mar. 14, 2023).

immune from the antitrust laws. Recently, regulators and legislators have called into question whether coordinated action to further such initiatives violates the antitrust laws. Given recent focus on this issue, it is important that businesses engaged in joint ESG activities be mindful of attendant antitrust risks.

Fueled by competing politics, ESG initiatives take center stage

In late 2019, the Trump-era DOJ launched an antitrust investigation into four automakers who signed a deal with California to meet more stringent emissions standards than those proposed by the Trump administration.[24] The DOJ quickly dropped that investigation, but regulators and legislators have revisited the antitrust implications of ESG initiatives with increased fervor over the last six months.

At the federal level, the FTC and DOJ have both reiterated that ESG initiatives remain subject to the antitrust laws, but the Biden administration seems to have little interest in pursuing ESG initiatives that are not overtly anticompetitive.

The same is not true at the state level—although state interest in enforcement is marked by a strong political divide. A number of Democratic attorneys general have expressly stated their support for ESG initiatives and the procompetitive benefits such activities offer.[25] On the other hand, numerous Republican state attorneys general have signaled their intent to aggressively pursue ESG initiatives they view as anticompetitive. In particular:

In August 2022, 19 state attorneys general wrote to the CEO of BlackRock. Among the activities cited were BlackRock's ESG activities, including its participation in Climate Action 100+, an investor-led initiative that aims to ensure that the world's largest corporate greenhouse gas emitters act on climate change. The cited concerns included the attorney general's belief that BlackRock's "coordinated conduct with other financial institutions to impose net-zero" emissions commitments could be a violation of Section 1 of the Sherman Antitrust Act.[26] In October 2022, 19 state attorneys general issued civil investigative demands to the six largest U.S. banks, seeking documents and information relating to the banks' participation in global climate change initiatives such as the Net-Zero Banking Alliance and the Glasgow Financial Alliance for Net Zero ("GFANZ") based on purported antitrust and consumer-protection concerns.[27]

Echoing this trend, five Republican U.S. senators advised dozens of large law firms to inform clients of "the risks they incur by participating in climate cartels and other ill-advised ESG schemes." The November 2022 letter emphasized that ESG initiatives could violate federal antitrust law and expressed particular concern about potential anticompetitive effects ESG initiatives may have on the energy sector.[28]

Antitrust risk from ESG initiatives

Multi-firm collaborations to further ESG goals are subject to standard antitrust principles. ESG-related activities that are most likely to create antitrust risk include collaborations that involve improper information sharing, group boycotts or concerted refusals to deal, and the use of collaborative industry initiatives as a pretext for collusion. In short, ESG initiatives raise antitrust concerns just like any other multi-firm collaboration. Companies, therefore, should remain vigilant about antitrust compliance in the context of ESG initiatives.

Interlocking Directorates

In early 2022, DOJ announced that it would aggressively enforce Section 8 of the Clayton Act, which prohibits competing corporations from sharing common directors. Since then, DOJ has announced forced resignations or the abandonment of an appointment of at least thirteen directors from ten boards.[29] Companies should expect Section 8

24 Hiroko Tabuchi and Coral Davenport, The Justice Dept. Investigates California Emissions Pact that Embarrassed Trump, New York Times, Sept. 6, 2019, at https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html (last visited Mar. 14, 2023).

25 Alison Knezvich, Democratic AGs Push Back on GOP Anti-ESG Efforts, Law360, Nov. 21, 2022, at https://www.law360.com/articles/1551384/democratic-ags-push-back-on-gop-anti-esg-efforts (last visited Mar. 14, 2023).

26 Letter from Attorney General Mark Brnovich to Laurence D. Fink, August 4, 2022, at https://www.azag.gov/sites/default/files/2022-08/BlackRock%20Letter.pdf (last visited Mar. 14, 2023).

27 Allegra Fradkin, Nineteen State AGs Launch Investigation Into Six Major Banks, Bloomberg Law, Oct. 19, 2022, at https://news.bloomberglaw.com/banking-law/nineteen-state-ags-launch-investigation-into-six-major-banks (last visited Mar. 14, 2023).

28 Letter from Senator Tom Cotton et al. to Fifty Law Firms, Nov. 3, 2022, at https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf (last visited Mar. 14, 2023).

29 Dep't of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates, Press Release (Mar. 9, 2023), at https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal (last visited Mar. 14, 2023); Dep't of Justice, Directors Resign from the Boards of Five Companies in Response to Justice Department Concerns about Potentially Illegal Interlocking Directorates, Press Release (Oct. 19, 2022), at https://www.justice.gov/opa/pr/directors-resign-boards-five-companies-response-justice-department-concerns-about-poten-

enforcement to be a continued priority for the DOJ.

Section 8 of the Clayton Act

Section 8 of the Clayton Act prohibits one person (or representatives of the same company) from serving as an officer or director for two competing corporations, if they are each above a certain size threshold and they cannot show their competitive sales do not fall within the statute's safe harbor thresholds.[30] Section 8 is a forward-looking statute that makes such arrangements per se unlawful (meaning the interlock is unlawful regardless of any potential procompetitive justifications) when the relevant jurisdictional thresholds are met and no statutory exceptions apply.[31] The DOJ and FTC have the authority to enforce violations of Section 8, and private litigants also have a right of action. The principal remedy for a Section 8 violation is the removal of the interlock, although damages are theoretically available to private plaintiffs.[32]

DOJ targets interlocking directorates

Though both the DOJ and the FTC have periodically issued warnings on Section 8 compliance, the DOJ's current enforcement efforts reflect a departure in scope and approach from the Agency's past practices with respect to Section 8 enforcement. Historically, the DOJ sought to enforce Section 8 when the interlock was discovered in the context of an unrelated antitrust investigation, most often in connection with merger enforcement. By contrast, recent resignations appear to be the result of targeted investigations by the DOJ into potential interlocks based on publicly available information and filings, independent of merger review or an ongoing antitrust investigation.

DOJ's recent enforcement activity puts corporations and their officers and directors (and investors entitled to those board seats) on notice that the Agency is reinvigorating Section 8 enforcement against interlocking directorates. Corporations should consider revisiting the roles of their own officers and directors in other corporations to determine whether they may pose an improper interlock. To discover and monitor for potentially problematic interlocks, corporations may choose to employ various strategies, such as surveying their officers and directors, compiling lists of all the companies its officers and directors serve on, and finding a manageable way to monitor what may be changing competitive dynamics in an industry.

Increased Merger Challenges

The Biden administration has prioritized aggressive merger enforcement through the advancement of novel theories of competitive harm, albeit with limited success.[33] But despite losses, such aggressive enforcement is likely to continue. Reduced competition and consumer harm caused by past mergers that were perceived to have created excessive market power—such as the merger of LiveNation and Ticketmaster in 2010, or Facebook's acquisitions of WhatsApp and Instagram—are likely to spur renewed vigor in the administration's quest to mold antitrust law to the modern era.

Novel theories of competitive harm

The FTC's and DOJ's recent enforcement efforts reflect an increased willingness to push new theories of competitive harm to thwart consolidation, particularly in the healthcare, labor, and technology sectors. New focal points include:

Impact on labor markets. The DOJ and FTC have signaled that both agencies will closely examine the impact a potential merger has on related labor markets. One of DOJ's successful merger challenges in 2022—to block Penguin Random House's acquisition of Simon & Schuster—focused on the alleged harm the merger would cause to top-tier authors, positing consolidation would allow Penguin to dominate the market and, thus, decrease competition for author book advances.[34]

Challenges to vertical mergers. Both the FTC and DOJ have shown increased interest in challenging vertical mergers and advancing vertical theories of competitive harm. For example, the FTC challenged Illumina's vertical acquisition of GRAIL on a theory of vertical foreclosure—that because

tially (last visited Mar. 14, 2023).

30 See 15 U.S.C. §§ 12(a), 19.

31 Fed. Trade Comm'n, Competition Matters Blog, "Interlocking Mindfulness" (June 26, 2019), https://www.ftc.gov/enforcement/competition-matters/2019/06/interlocking-mindfulness (last visited Mar. 14, 2023).

32 ABA Section of Antitrust Law, Antitrust Law Developments 450-51 (8th ed. 2017).

33 Bryan Koenig, DOJ, FTC Fought Mergers In 2022 And Judges Pushed Back, Law360, Dec. 21, 2022, at https://www.law360.com/articles/1560551/doj-ftc-fought-mergers-in-2022-and-judges-pushed-back (last visited Mar. 14, 2023).

34 Associated Press, Judge blocks Penguin Random House-Simon & Schuster merger, NPR, Nov. 1, 2022, at https://www.npr.org/2022/11/01/1133032238/judge-blocks-penguin-random-house-simon-schuster-merger (last visited Mar. 14, 2023).

Illumina is a dominant provider of a necessary input to the medical tests GRAIL develops, the merged company would have the ability and incentive to harm GRAIL's competitors by withholding Illumina's technology.[35]

Elimination of future competition. In challenging Meta's acquisition of a virtual-reality start-up, Within, the FTC advanced a novel theory of harm: the acquisition would reduce future competition in the nascent market for virtual-reality products.[36]

Although the agencies' have had little success with these new theories, leaders at both agencies have vowed to fight on.

New merger guidelines

In January 2022, the DOJ and the FTC announced plans to revise the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. New guidelines are expected to be released in 2023. While not binding law, Merger Guidelines shape merger enforcement more than any other mechanism because most decision-making in contested mergers occurs within the enforcement agency and parties must typically exhaust a lengthy agency review process before a judge will hear them. In keeping with the Biden administration's enforcement approach, the new guidelines are likely to cover both vertical and horizontal mergers and advance more novel theories of harm.

Price Discrimination

In late 2022, leaders at the FTC announced the agency would revive what was long believed to be an extinct enforcement tool: the Robinson-Patman Act's prohibition on price discrimination. But that is not all. The agency also announced in a separate policy statement that it would use Section 5 of the FTC Act to challenge "price discrimination" in circumstances where the conduct does not technically violate Robinson-Patman.[37] Since then, news has surfaced that the FTC has launched antitrust investigations into two leading beverage companies—Pepsi and Coca-Cola—for potential price discrimination in the soft drink market.[38]

Generally speaking, the Robinson-Patman Act prohibits a seller from discriminating in price between different buyers if the discrimination adversely affects competition.[39] But a price discrimination claim under the Act is limited by a strict set of statutory requirements. In particular, the Act applies only to sales (not leases or other arrangements) of commodities (not services or intangibles) of the same grade and quality.[40] The claim also has a competitive-injury requirement with fairly defined contours.[41]

The FTC's willingness to pursue price discrimination claims as unfair competition under the FTC Act, even when the circumstances do not meet Robinson-Patman's technical requirements, expands the scope of potential antitrust risk. And while there is no private right of action under the FTC Act, private plaintiffs may initiate tag-along litigation under state statutes prohibiting at unfair trade practices, which mirror the FTC's prohibition on "unfair competition."[42]

The FTC's new stance on price discrimination, coupled with its investigation in Pepsi and Coca-Cola, indicate that companies face yet another front for potential government investigations. Those investigations, in turn, also raise the risk of increased private litigation, which often piggy-back off of the agencies' enforcement investigations. In light of these developments, companies in a wide range of sectors—agriculture and food, healthcare products, pharma, private equity, retail, etc.—should revisit current and future pricing efforts to assess exposure to a potential price discrimination claim.

Renewed Criminal Enforcement

The DOJ continued to aggressively pursue criminal enforcement of the antitrust laws in 2022, with a renewed focus on Section 2 enforcement, continued scrutiny of restrictive labor practices, and high-profile price-fixing and bid-rigging prosecutions of firms

35 See https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter (providing overview of merger challenge) (last visited Mar. 14, 2023).

36 David McCabe, Why Losing to Meta in Court May Still Be a Win for Regulation, The New York Times, Dec. 7, 2022.

37 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202, (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf (last visited Mar. 14, 2023).

38 Josh Sisco, Pepsi, Coke soda pricing targeted in new federal probe, Politico, Jan. 10, 2023, at https://www.politico.com/news/2023/01/09/pepsi-coke-soda-federal-probe-00077126 (last visited Mar. 14, 2023).

39 15 U.S.C. § 13(a).

40 ABA Section of Antitrust Law, Antitrust Law Developments 512-22 (8th ed. 2017).

41 Id. at 523-31.

42 See, e.g., Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204.

and executives in the chicken processing industry. Companies should expect continued enforcement in these areas going forward.

Criminal Enforcement of Section 2

Section 2 expressly provides for criminal penalties for monopolization, attempted monopolization, and conspiracies to monopolize. But the last 40-plus years, criminal enforcement of Section 2 (as opposed to civil enforcement) remained dormant. Not anymore.

DOJ renewed criminal enforcement of Section 2 in 2022. In October, DOJ secured its first conviction under Section 2 since the late 1970s, when Nathan Nephi Zito, the owner of a paving and asphalt company, pled guilty to attempting "to monopolize the markets for highway crack-sealing services in Montana and Wyoming by proposing that his company and its competitor stop competing and allocate regional markets."[43] And a month later, DOJ filed an indictment against twelve individual defendants for conspiring to fix prices and allocate markets under Section 1 and for conspiring to monopolize under Section 2.[44]

The renewal of criminal enforcement under Section 2 gives the DOJ an avenue to criminally prosecute unsuccessful invitations to collude, as seen in the case of Nathan Zito. Zito pled guilty to an attempted conspiracy to monopolize. Had Zito's competitor agreed to the proposed market-allocation scheme, the conduct of both parties would have been actionable under Section 1. But in contrast to Section 2, Section 1 does not criminalize "attempts" to collude.

Anticompetitive agreements affecting labor markets

The Biden administration continues to target labor and employment practices with criminal antitrust enforcement, as discussed above.

Price-fixing and bid-rigging

Cartel conduct like price fixing and bid rigging have long been the primary source of criminal prosecutions under the antitrust laws. Highly concentrated industries and those with a history of collusion are likely to receive heightened scrutiny from enforcers.

DOJ's high-profile prosecutions of three companies and fourteen executives in the chicken processing industry demonstrate the agency's willingness to aggressively pursue criminal enforcement of price fixing and bid rigging. In 2020, DOJ indicted several high-level executives on bid-rigging charges,[45] and, in 2021, it secured a guilty plea from Pilgrim's Pride, which agreed to pay a fine of $107.9 million.[46] DOJ's track-record was less successful at trial, which resulted in two hung juries and an acquittal.[47]

DOJ has also actively pursued price-fixing and bid-rigging charges for anticompetitive conduct in the government procurement context,[48] and its prosecutions of no-poach and wage-fixing agreements has been heavily concentrated in the healthcare industry.[49]

Revival of Unilateral Refusal to Deal Cases

The right of a firm to determine with whom it will and will not deal is a long-recognized principle in antitrust law. As a general rule, the antitrust laws impose no duty on a firm to deal with its rivals (or any other business). But the Supreme Court recognized a narrow (and controversial) exception to this rule in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., holding that a monopolist may be subject to liability under Section 2 for a unilateral refusal to deal with a competitor when it unjustifiably ends a voluntary course of dealing to the detriment of the marketplace and consumers.[50]

43 Dep't of Justice, Executive Pleads Guilty to Criminal Attempted Monopolization, Press Release (Oct. 31, 2022), at https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization (last visited Mar. 14, 2023).

44 Dep't of Justice, Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border, Press Release (Dec. 6, 2022), at https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0 (last visited Mar. 14, 2023).

45 Dep't of Justice, Six Additional Individuals Indicted On Antitrust Charges In Ongoing Broiler Chicken Investigation, Press Release (Oct. 7, 2020), at https://www.justice.gov/opa/pr/six-additional-individuals-indicted-antitrust-charges-ongoing-broiler-chicken-investigation (last visited Mar. 14, 2023).

46 Dep't of Justice, One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a $107 Million Criminal Fine, Press Release (Feb. 23, 2021), at https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million (last visited Mar. 14, 2023).

47 Cara Salvatore, 5 Chicken Execs Acquitted in Denver Antitrust Trial, Law360.com, July 7, 2022, at https://www.law360.com/articles/1509643/5-chicken-execs-acquitted-in-denver-antitrust-trial.

48 See, e.g., Dep't of Justice, Military Contractor Indicted for $15 Million Big-Rigging Scheme and Conspiracy to Defraud the United States (May 20, 2022), at https://www.justice.gov/opa/pr/military-contractor-indicted-15-million-bid-rigging-scheme-and-conspiracy-defraud-united (last visited Mar. 14, 2023); Dep't of Justice, Three Florida Men Indicted for Rigging Bids and Defrauding the U.S. Military, Press Release (Apr. 12, 2022), at https://www.justice.gov/opa/pr/three-florida-men-indicted-rigging-bids-and-defrauding-us-military (last visited Mar. 14, 2023).

49 See notes 3-6, supra.

50 472 U.S. 585 (1985).

Unilateral refusal-to-deal claims have long been recognized as "at or near the outer boundary of Section 2 liability."[51] While courts have struggled to precisely define actionable claims under Aspen Skiing, they have generally limited them to circumstances in which a monopolist is alleged to have changed a prior voluntary course of dealing with a rival as part of a larger anticompetitive scheme (e.g., to drive a competitor from the market, leverage market power in an adjacent market, etc.). Courts have rejected such claims absent a showing that the monopolist's conduct was "irrational but for its anticompetitive effect"[52] or when legitimate business purposes for the monopolist's action were evident from the face of the complaint.[53]

Notwithstanding these recognized limitations, a couple of recent cases suggest that pleading a unilateral refusal-to-deal claim may not be as difficult as once thought, particularly as to the anticompetitive nature of the alleged conduct.

In Viamedia, Inc. v. Comcast Corp, 951 F.3d 429 (7th Cir. 2020), the Seventh Circuit held the district court erred by dismissing a refusal-to-deal claim at the pleading stage.[54] The district court granted the defendant's motion to dismiss because the plaintiff did "not allege or explain how [the defendant's refusal] to deal . . . has no rational procompetitive purpose."[55] The district court further reasoned that the action alleged "offers potentially improved efficiency."[56] The Seventh Circuit disagreed. The court rejected the pleading standard applied by the district court and concluded that, instead, a plaintiff pleading a refusal-to-deal claim need only plausibly allege that the defendant's refusal to deal was "predatory" or anticompetitive.[57] The court expressly declined to provide a "precise delineation of the requirements of a refusal-to-deal pleading."[58]

And in Altitude Sports Entertainment v. Comcast Corp., Judge William Martinez denied a motion to dismiss Altitude's refusal-to-deal claim, concluding it sufficiently alleged Comcast had an anticompetitive purpose when taking a hard bargaining position in failed contract negotiations.[59] In particular, the court explained that Altitude alleged Comcast "has suffered short-term losses" by alleging that its "negotiating tactics with Altitude have directly contributed to increased cord-cutting" and, thus, a loss of subscribers.[60]

In both cases, the court rejected defendants' arguments that the plaintiffs' refusal-to-deal claims should be dismissed because the complaint itself reflected procompetitive justifications for the defendant's refusal to deal. Both courts concluded the mere existence of a legitimate business justification for a refusal to deal did not defeat the claim at the pleading stage. Whether a refusal to deal in fact qualified as anticompetitive exclusionary conduct, the courts concluded, must be addressed at the summary judgment stage, not on a motion to dismiss.[61]

Should it gain broader traction, the pleading standard adopted in Viamedia and Altitude Sports will make it more difficult for defendants to obtain dismissal of a refusal-to-deal claim at the pleading stage and, thus, to avoid expensive discovery and prolonged litigation. Defendants seeking dismissal will not be able to point to a procompetitive justification to achieve that goal but, instead, will need to show the complaint pleads no plausible anticompetitive purpose—a more difficult standard.

The Rise of Active State Attorneys General

Big tech. As of January 2023, state attorneys general have filed multiple lawsuits against Google and Facebook:

In December 2020, a bipartisan coalition of attorneys general from forty-eight states sued Facebook for using anticompetitive means to maintain its monopoly power.[62]

51 Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 409 (2004).

52 Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1071, 1075 (10th Cir. 2013) (Gorsuch, J.).

53 See ASAP Paging Inc. v. CenturyTel of San Marcos, Inc., 137 F. App'x 694, 698-99 (5th Cir. 2005).

54 951 F.3d at 450.

55 218 F. Supp. 3d 674, 698 (N.D. Ill. 2016).

56 Id.

57 951 F.3d at 462-63.

58 Id. at 463.

59 No. 19-cv-3253, 2020 WL 8255520, at *10-11 (D. Colo. Nov. 25, 2020).

60 Id. at *11.

61 Viamedia, 951 F.3d at 460 ("[B]alancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings, at least where the plaintiff has alleged conduct similar to that in Aspen Skiing."); Altitude Sports, 2020 WL 8255520, at *11 n.17 (agreeing with Viamedia).

62 New York v. Facebook, Inc., No. 1:20-cv-03589 (D.D.C. Dec. 9, 2020).

Also in December 2020, a bipartisan group of attorneys general from thirty-five states, the District of Columbia, and the territories of Guam and Puerto Rico sued Google for illegal monopolization over general search engines and related general search advertising markets.[63]

In July 2021, a bipartisan group of attorneys general from thirty-six states and the District of Columbia sued Google for alleged antitrust violations in connection with its Play Store on Android.[64]

In January 2023, eight state attorneys general joined DOJ in suing Google over alleged antitrust violations in the digital advertising market.[65]

No-poaching agreements. 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.[66]

ESG Initiatives. As noted above, some state attorneys general have questioned the potential anti-competitiveness of ESG initiatives and appear eager to launch antitrust investigations, particularly in conservative jurisdictions with fossil fuel interests. There has been a sharp uptick in chatter and enforcement-related activity in the last six months, and companies should expect such scrutiny to continue for the foreseeable future.

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The last several years have seen a resurgence of antitrust enforcement at both the state and federal level that is likely to continue for the foreseeable future. Companies should take note of recent developments and monitor future trends, as well as revise and update their antitrust compliance policies to account for these dynamics.

63 Colorado v. Google LLC, No. 1:20-cv-03715 (D.D.C. Dec. 17, 2020).

64 Utah v. Google LLC, No. 3:21-cv-05227 (N.D. Cal. July 7, 2021).

65 United States v. Google LLC, 1:23-cv-00108 (E.D. Va. Jan. 24, 2023).

66 See, e.g., Attorney General Raoul Files Lawsuit Against Staffing Agencies for Use of No-Poaching Agreements, June 6, 2022, at https://illinoisattorneygeneral.gov/press-room/2022_06/20220606.html (last visited Mar. 14, 2023); 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. 14, 2023); 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. 14, 2023); 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. 14, 2023).


Spot the Risk, Reap the Reward:
Top 10 Antitrust Risks to Avoid
in 2023
Katie Reilly
The Trial Network
Lakeside Litigation SuperCourse
4/28/2023
Wheeler Trigg O'Donnell LLP
TRIALS. LITIGATION. APPEALS.


Top 10 Antitrust Risks
1. Labor and Employment Practices
Primary targets:
• No-poaching agreements
• Wage-fixing agreements
• Non-compete agreements
Wheeler Trigg O'Donnell LLP
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Top 10 Antitrust Risks

2. Information Exchanges with Competitors

- Price lists
- Cost information
- Supply plans
- Salary Surveys
- Customer lists

Top 10 Antitrust Risks

3. Pricing Algorithms

- Expect increased scrutiny
  - May facilitate collusion
  - May facilitate information sharing
- Recent cases
  - **Uber** – class action alleging hub-and-spoke conspiracy to use Uber's pricing algorithm to fix prices
  - **RealPage** – class action and DOJ investigation over use of pricing software that uses non-public pricing data from competitors (RealPage's clients)

Top 10 Antitrust Risks

4. ESG Initiatives

- Not immune from antitrust laws
- Scrutiny by state AGs on the rise, particularly in conservative jurisdictions with energy interests
- Particular areas of concern include:
  - Collaborative efforts and industry initiatives
  - Sharing competitively sensitive information
  - Group boycotts

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Top 10 Antitrust Risks

5. Interlocking Directorates

- Same "person" cannot serve on the boards of competing companies (subject to jurisdictional thresholds and safe harbors)
- Applies only to corporations, but the DOJ and FTC have signaled willingness to expand concept to other entities.
- Aimed at preventing exchanges of competitively sensitive information

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Top 10 Antitrust Risks

6. Increased Merger Challenges

- New merger guidelines expected
- Increased merger litigation
  - Challenges to vertical mergers
  - Novel theories of harm to competition
  - Scrutinizing anticompetitive effects in new areas (e.g., labor markets, unionization levels)
- Past mergers may cause future scrutiny
  - Meta
  - Google
  - Live Nation/Ticketmaster

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Top 10 Antitrust Risks

7. Price Discrimination

- FTC investigating Coca-Cola and Pepsi – first enforcement action in decades
- Robinson Patman Act
  - Prohibits anticompetitive price discrimination involving the same goods
  - Applies to commodities
  - Applies to sellers *and* buyers
- Several affirmative defenses available

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Top 10 Antitrust Risks

8. Renewed Criminal Enforcement

- Section 2 – first criminal charges in over 40 years
  - Attempted monopolization
  - Conspiracy to monopolize
- No poaching and wage-fixing
  - Continued to be enforcement priority
  - Several cases involve healthcare industry
- Bid rigging and price fixing (broiler chickens)
  - Pilgrim's Pride agreed to $107.9 million fine
  - Trials resulted in hung juries or acquittal

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Top 10 Antitrust Risks

9. Revival of Refusal-to-Deal Cases

- "Outer limits" of liability for unilateral conduct
- *Aspen Skiing* defines contours
  - Monopolist terminated pre-existing, voluntary course of dealing
  - Conduct reflected willingness to forego short-term profits to achieve anticompetitive end
- Recent cases to survive dismissal may signal resurgence:
  - *Viamedia Inc. v. Comcast Corp.*
  - *Altitude Sports & Entertainment LLC v. Comcast Corp.*

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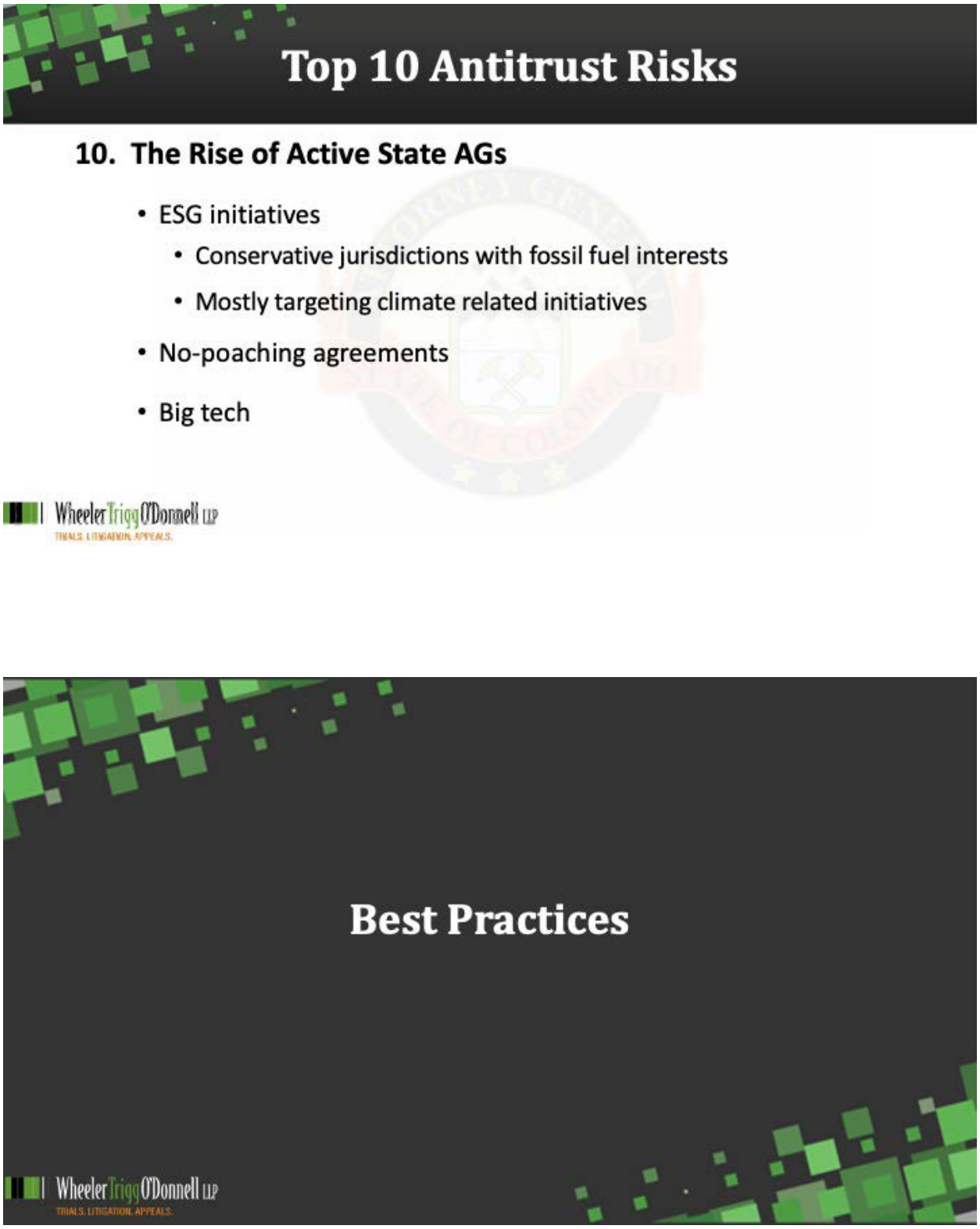
Top 10 Antitrust Risks
10. The Rise of Active State AGs
• ESG initiatives
• Conservative jurisdictions with fossil fuel interests
• Mostly targeting climate related initiatives
• No-poaching agreements
• Big tech
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Best Practices
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Top 10 Antitrust Risks

- ✓Examine employment agreements for antitrust risk
- ✓Avoid sharing competitively sensitive information
- ✓Expect heightened scrutiny in targeted areas
  - ✓Labor markets and employment practices
  - ✓ESG initiatives
  - ✓Pricing algorithms
- ✓Revisit pricing efforts to assess price discrimination risk
- ✓Consult with antitrust counsel and develop a detailed training and compliance program

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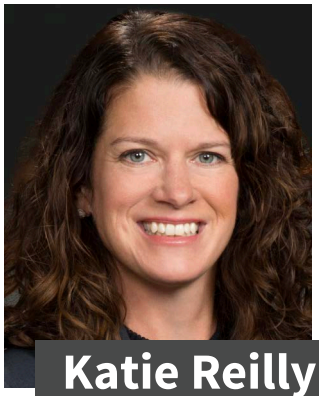

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Katie Reilly

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Katie 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.

Katie's additional commercial litigation experience includes successfully representing clients in business disputes at both the trial and appellate levels. Her experience includes contract disputes, business divorces, consumer fraud, and business tort claims. Katie has extensive healthcare industry experience, as well as real estate, energy, aviation, manufacturing, sports, and telecommunications. Katie also represents municipalities in high-stakes and often contentious disputes involving other municipal entities.

Practice Areas
- Commercial Litigation
- Antitrust & Competition
- Class Actions
- Investigations & Compliance
- Appellate

Industries
- Healthcare
- Telecommunications
- Real Estate
- Consumer Products & Services
- Cannabis

Representative Clients
- Denver International Airport
- Expedia Group
- Lumen Technologies - National Trial Counsel
- SCL Health
- Xcel Energy

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

The Devil Went Down to Georgia: What Makes a State a Judicial Hellhole?

Terry Brantley
Swift Currie McGhee & Hiers (Atlanta, GA)

The Devil Went Down to Georgia: What Makes a State a Judicial Hellhole?
Terry O. Brantley, David M. Atkinson and Joseph J. Angersola

Most people enjoy a good list. The Top Ten Best Movies. The Top Twenty Restaurants. The Top Ten Books. The Top Twenty-Five Basketball Teams. The Top Ten Best Beaches. Lawyers like lists also. The Top 10 Law Firms. The 50 Fifty Lawyers. The Top 10 Frivolous Lawsuits. There is a list for everything.

Each year, tort lawyers across the nation debate another list: the ranking of "Judicial Hellholes" published by the American Tort Reform Foundation (ATRF). According to its website, "The ATRF is a District of Columbia nonprofit corporation, founded in 1997. The primary purpose of the Foundation is to educate the general public about how the American civil justice system operates; the role of tort law in the civil justice system; and the impact of tort law on the private, public and business sectors of society."[1] The ATRF defines a "Judicial Hellhole" as a place "where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner, generally to the disadvantage of defendants."[2] "The goal of the [Judicial Hellhole] program is to shine a light on imbalances in the courts and thereby encourage positive changes by the judges themselves and, when needed, through legislative action or popular referendum."[3]

In 2022, the ATRF designated Georgia as the No. 1 Judicial Hellhole in the United States, up from No. 3 in 2021. For some, this designation came as a surprise. Isn't Georgia a red state in the Deep South known for its conservative values? Why is there no tort reform in a state controlled by Republicans for many years? Why do judges appointed by Republican governors impose discovery sanctions, affirm huge verdicts and invalidate tort reform measures? How did Georgia get ahead of such notorious jurisdictions as California, New York, Philadelphia, or Cook County, Illinois? For others, the designation was flawed and misleading. Plaintiff's lawyers in Georgia called the designation "nonsense" and responded by citing Area Development magazine's ranking Georgia as the number one state for business for the ninth consecutive year.[4]

Is Georgia a Judicial Hellhole? It depends on who you ask. This paper is not going to try to answer that question, but we hope to give you something to think about, not only as it relates to Georgia but to other jurisdictions around the country.

Nuclear Verdicts

One term that appears repeatedly in the ATRF report is "nuclear verdicts." It is unclear when this term first began to be used in connection with civil lawsuits, although it seems to have been around for a few years. The term was trademarked in 2021 by a California civil defense law firm that touts its ability to defend against such verdicts. According to the law firm's website:

Nuclear Verdicts® are jury awards that surpass $10 million. These excessive verdicts are driven by juror anger at defendants and typically include a noneconomic damages award that is grossly disproportionate to the economic damages awarded in the case. Nuclear Verdicts seek to "make an

1 Https://www.judicialhellholes.org/about.

2 Judicial Hellhole 2022-23, American Tort Reform Foundation (2022), at Preface.

3 Id.

4 Mason Lawlor, "Absurd Nuclear Verdicts" Cited as Georgia Ranks No. 1 Judicial Hellhole for 2022," Fulton County Daily Report, December 6, 2022.

example" of the defendant. Fueled by the "Reptile Theory," jurors use excessive damages awards to punish defendants and ostensibly "send a message" with the intent of preventing the type of harm in the case from recurring. Unfortunately, this does not result in justice…for anyone![5]

The U.S. Chamber of Commerce Institute for Legal Reforms published a report in September 2022 on nuclear verdicts, which defined a "nuclear verdict" as a jury verdict in excess of $10 million.[6] The report, authored by two lawyers with Shook, Hardy & Bacon LLP, analyzed 1,378 reported nuclear verdicts in personal injury and wrongful death cases between 2010-2019. The authors ranked Georgia as the No. 8 state per capita for nuclear verdicts, concluding that the median verdict was $21 million.[7] Verdicts for the final two years of the study pushed Georgia into the top five states for nuclear verdicts.[8] The report noted large premises liability verdicts, mostly stemming from negligent security cases, as well as verdicts against the trucking industry.[9]

How Does a State Become a Judicial Hellhole?

Georgia did not appear on the Judicial Hellhole list before 2016, although the Georgia Supreme Court received a "Dishonorable Mention" in 2007 for decisions that invalidated certain statutes enacted as part of tort reform efforts passed in 2005.[10] The Georgia Supreme Court was placed on the "Watchlist" in 2016, and the state began to work its way up the list:[11]

2016-17	Watchlist (Georgia Supreme Court)
2017-18	Watchlist
2018-19	Watchlist (Georgia Supreme Court)
2019-20	No. 6
2020-21	No. 6
2021-22	No. 3 (Georgia Supreme Court)
2022-23	No. 1

Rather than list the state as a whole, or particular counties within the state, several of the lists prior to 2021 ranked the Georgia Supreme Court as a jurisdiction to watch. When the ATRF listed the Georgia Supreme Court as the No. 3 Judicial Hellhole in 2021, it noted decisions that eliminated apportionment of fault in certain claims, expanded bad faith liability for insurers, and adopted a broad view of jurisdiction Georgia's courts have over out-of-state businesses.[12] Then, in 2022, Georgia reached the top.

In its 2022 report, the ATRF described Georgia as follows:

A new #1 Judicial Hellhole burst onto the scene in 2022. The litigation climate in Georgia has deteriorated for years and in 2022 it reached fever pitch. Georgia replaced California on the top of this year's list thanks in no small part to a massive $1.7 billion nuclear verdict that can charitably be called concerning. Georgia state courts issued some of the country's largest nuclear verdicts in state and superior courts, as personal injury lawyers cash in on plaintiff-friendly judges that benefit greatly from trial lawyer campaign contributions.[13]

The ATRF also discussed the Georgia Supreme Court:

Additionally, the Georgia Supreme Court refused to modernize the state's seatbelt gag rule, precluding a jury from hearing evidence about whether an occupant wore a seatbelt at the time of the crash. The Court also declined to expressly adopt the apex doctrine, a framework that Courts across the country have adopted to protect high–level corporate employees from unnecessarily being deposed. To make matters worse, the Court issued a ruling that will force defendants to potentially pay double the plaintiffs' attorneys' fees when they are unsuccessful trial.[14]

Noting the Supreme Court's deference to the Legislative branch, the ATRF addressed work to be done in the Georgia legislature:

5 https://www.tysonmendes.com/nuclear-verdicts/

6 "Nuclear Verdicts - Trends, Causes, and Solutions" U.S. Chamber of Commerce Institute-for Legal Reform, p. 2 (September 2022).

7 Id. at 21.

8 Id.

9 *Id.* at 21-22.

10 Judicial Hellholes 2007-2008. American Tort Reform Foundation.

11 Judicial Hellholes, 2016-17 – 2022-23. American Tort Reform Foundation.

12 Judicial Hellholes 2021-22, American Tort Reform Foundation (2021), at 24-29.

13 Judicial Hellholes 2022-23, at 4.

14 Id.

The Georgia Supreme Court points to the Georgia General Assembly as the appropriate branch to handle growing policy concerns. The General Assembly has responded in years past, but much work remains to be done to address the lawsuit abuse sweeping across the state. Until state leaders focus on the many abuses bogging down the state's economy and burdening small businesses, Georgia will be firmly affixed atop the Judicial Hellholes list.[15]

In addition to Georgia at No. 1, the other jurisdictions on the 2022-2023 list of top (worst) 8 Judicial Hellholes, were (2) the Supreme Court of Pennsylvania and the Philadelphia Court of Common Pleas, (3) California, (4) New York, (5) Cook County, Illinois, (6) South Carolina asbestos litigation, (7) Louisiana, and (8) St. Louis.[16] On ATRF's "Watch List" this year are the Florida legislature, New Jersey, and the Texas Court of Appeals for the Fifth District.[17] ATRF does not employ a standard set of objective criteria to arrive at its rankings (more on this below), but some of the characteristics that Judicial Hellholes have in common include (1) nuclear verdicts, (2) huge spending on advertising by plaintiffs' lawyers, (3) liberal venue rules that allow forum shopping, (4) acceptance of novel legal theories, (5) liability-expanding appellate decisions, (6) allowing junk science in the courtroom, and (7) discovery abuse. Most of these are present in Georgia.

Several reports note that Georgia is one of the few states that has codified a rule allowing plaintiffs' lawyers to ask juries to award any amount of damages that they see fit for pain and suffering, no matter how large.[18] As the ATRF concluded:

The recent dramatic rise in nuclear verdicts can be attributed to several factors, including the state's allowance of "anchoring" tactics by plaintiffs' lawyers. Anchoring is a tactic that lawyers use in order to place an extremely high amount into jurors' minds to start as a base dollar amount for a pain and suffering award. While some states have laws that prevent or limit this tactic's use in a courtroom, Georgia is one of a few that has a specific state statute allowing the practice.[19]

The 2022 Judicial Hellhole report included a lengthy discussion of the $1.7 billion verdict awarded in a product liability case against Ford Motor Company by a Gwinnett County, Georgia, jury in August 2022.[20] When the case initially went to trial in 2018, the original trial judge granted the plaintiffs' motion for a mistrial and awarded sanctions, including an order striking liability defenses. On retrial four years later, the jury awarded $24 million in compensatory damages for the wrongful death of the two plaintiffs, including $8 million for pain and suffering. The jury then awarded $1.7 billion in punitive damages.

The report also noted a number of other large Georgia verdicts[21]:

2022 - $75 million medical malpractice verdict (DeKalb County)
2022 - $77 million wrongful death verdict (DeKalb County)
2021 - $113.5 million wrongful death verdict (N.D.Ga – Bench Trial)
2021 - $200 million wrongful death verdict (Rabun County)

Is it accurate to label a jurisdiction a Judicial Hellhole?

It is instructive to consider the source of the Judicial Hellhole list. The term is trademarked by the American Tort Reform Association (ATRA), a 501(c)(6) nonprofit formed in 1986.[22] Critics assert that the ATRA's members are largely Fortune 500 companies "with a direct financial stake in restricting lawsuits."[23] The ATRF uses the term "Judicial Hellholes" under license from the ATRA, and has published its annual list of Judicial Hellholes since 2002.24 As you might expect, the Judicial Hellhole List has been criticized over the years as being biased and for employing flawed methodology.25

15 Id. at 4.5.

16 Id. at 1.

17 Id. at 2.

18 O.C.G.A. § 9-10-184 ("In the trial of a civil action for personal injuries, counsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury….").

19 Judicial Hellhole 2022-23, at 5.

20 Id. at 5-7.

21 Id. at 7.

22 https://www.judicialhellholes.org/about.

23 Fact Sheet: American Tort Reform Association. The Center for Justice & Democracy. https://centerjd.org/content/fact-sheet-american-tort-reform-association.

24 https://www.judicialhellholes.org/about.

25 Poking Holes in "Judicial Hellholes," ATRA's Annual Fake News Story, Center for Justice and Democracy (2016) (criticizing the list as "little more than whining by industries that have been hauled into court for hurting or killing people, and who have direct financial state in

After the list was published, a prominent Georgia plaintiffs' attorney stated: "The ATRA exemplifies the pervasive dishonesty that poisons political discourse in our current culture" and described the list as "nonsense." [26] In a subsequent article, Georgia civil defense lawyers disagreed as to whether Georgia deserved the ranking. According to one lawyer: "I think it's been a long time coming, and it is a black mark the Legislature, the judiciary and the plaintiffs' bar have earned in the state."[27] In contrast, another defense attorney stated he was "very surprised" by the ranking and that he viewed Georgia as "generally a good place for corporate defendants for products liability and other defendants."[28]

In a 2017 article, the New York Times described the Judicial Hellholes report as "a collection of anecdotes based largely on newspaper accounts. It has no apparent methodology."[29] The American Association for Justice has criticized the Judicial Hellhole report for using as sources "newswires" owned by the U.S. Chamber of Commerce Institute for Legal Reform and for citing "opinion pieces dressed up to look like news, and written not by journalists but by ATRA affiliates and insurance executives[.]"[30]

This paper is not going to resolve the dispute as to whether the Judicial Hellhole list is valid or if Georgia deserves its current spot at the top of the list. Whatever criticisms might be levelled at the ATRF for its methodology or the motivations behind the list, juries did award the verdicts listed and appellate courts did issue the opinions cited. Those are facts. The reasons for those verdicts or appellate decisions is a matter for debate.

As lawyers who primarily represent corporate defendants, we have seen the impact the Judicial Hellhole list has on the day–to–day reality of trying to resolve tort lawsuits. No plaintiffs' lawyer is going to publicly agree that Georgia should be considered a Judicial Hellhole. However, we frequently hear the term in private settlement negotiations. And whether you agree or disagree with the term "nuclear verdicts," such verdicts are frequently cited in settlement negotiations. The ripple effect of the Judicial Hellhole designation is that lawyers ask juries to award bigger and bigger verdicts, and settlement demands become more and more unreasonable (to the defense). Abusive discovery requests have become the new normal and sanctions motions are filed in almost every case. Why? Because it works.

Is Georgia a Judicial Hellhole? It depends on who you ask. But whatever label is applied, there is no question that verdicts in Georgia, like verdicts around the country, are trending upward in tort litigation. This creates a challenging environment for defendants and their counsel. To quote another song title: Welcome to the Jungle.

restricting lawsuits").

26 Mason Lawlor, "Absurd Nuclear Verdicts" Cited as Georgia Ranks No. 1 Judicial Hellhole for 2022, Fulton County Daily Report, December 6, 2022

27 Everett Catts, Civil Defense Lawyers have Mixed Views on Georgia's Judicial Hellholes Top Ranking, Fulton County Daily Report, December 13, 2022 (quoting John E. Hall, Jr.).

28 Id. (quoting Evan Holden).

29 Adam Liptak, "The Worst Courts for Businesses? It's a Matter of Opinion," New York Times, December 24, 2007.

30 Poking Holes in "Judicial Hellholes," ATRA's Annual Fake News Story, Center for Justice and Democracy (2016), at 2.

THE DEVIL WENT DOWN TO GEORGIA:

What makes a State a Judicial Hellhole?

Terry O. Brantley

swift / currie

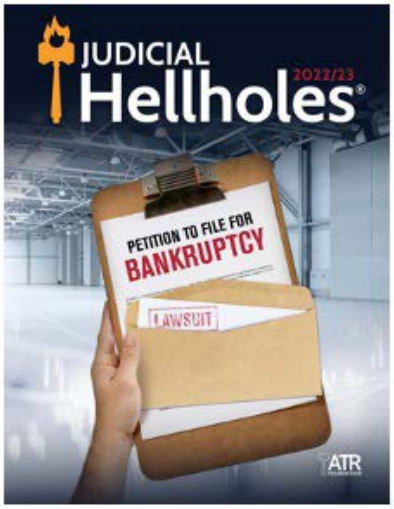
Atlanta Braves – 2021 World Series Champions

S/C

University of Georgia Bulldogs – 2021 and 2022 National Champions

S/C

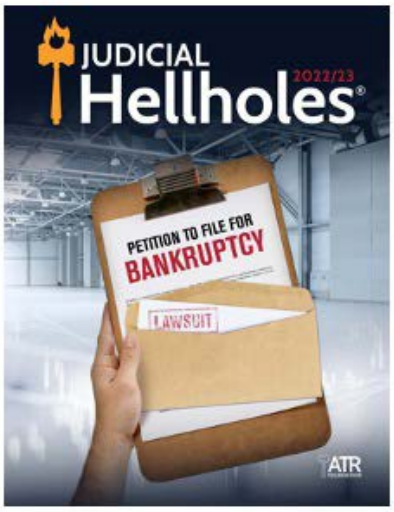
American Tort Reform Foundation 2022-2023



1. Georgia
2. Supreme Court of Pennsylvania / Philadelphia Court of Common Pleas
3. California
4. New York
5. Cook County, Illinois
6. South Carolina Asbestos Litigation
7. Louisiana
8. St. Louis

S/C

ATRF's View of Georgia During Last 10 Years



- 2012-2015 (not ranked)
- 2016-2017 (Watchlist – GA Supreme Court)
- 2017-2018 (Watchlist)
- 2018-2019 (Watchlist – GA Supreme Court)
- 2019-2020 (#6)
- 2020-2021 (#6)
- 2021-2022 (#3 – GA Supreme Court)
- 2022-2023 (#1)

s/c

Reliability of ATRF

- In a 2017 article, the *New York Times* described the Judicial Hellholes report as "a collection of anecdotes based largely on newspaper accounts. It has no apparent methodology."
- The American Association for Justice has criticized the Judicial Hellhole report for using as sources "newswires" owned by the U.S. Chamber of Commerce Institute for Legal Reform and for citing "opinion pieces dressed up to look like news, and written not by journalists but by ATRA affiliates and insurance executives[.]"
- Adam Liptak, "The Worst Courts for Businesses? It's a Matter of Opinion," *New York Times*, December 24, 2007.
- *Poking Holes in "Judicial Hellholes," ATRA's Annual Fake News Story,* Center for Justice and Democracy (2016).

"The ATRF exemplifies the pervasive dishonesty that poisons political discourse in our current culture"

Jim Butler

s/c

What Makes Jurisdictions Judicial Hellholes?

- Pretrial Rulings
- Application of Evidentiary Rules
- Expert/Opinion testimony
- Jury Instructions
- Excessive Damages
- Loosely worded statutes
- Pinning societal problems on manufacturers
- Expansion of damages

s/c

WHY?

s/c

Georgia

- Georgia Supreme Court Expands Product Liability
- Losers Pay Twice
- Third-Party Litigation Financing
- Georgia Supreme Court Refuses to Expressly Adopt Apex Doctrine
- Future of State's Seatbelt Gag Rule
- From January through August 2022, lawyers spent $39.2 million on 567,000 local television advertisements

s/c

Georgia (continued)

- Nuclear Verdicts – from 2010 to 2019, 53 nuclear verdicts reported totaling more than $3 billion

- More Recent Nuclear Verdicts in Georgia:
  - 2022 - $1.7 billion punitive damage award (seeking $549-$606 million in fees plus $500k in costs) (Gwinnett County)
  - 2022 - $75 million medical malpractice verdict (DeKalb County)
  - 2022 - $77 million wrongful death verdict (DeKalb County)
  - 2021 - $113.5 million wrongful death verdict (N.D. of Ga – Bench Trial)
  - 2021 - $200 million wrongful death verdict (Rabun County)

s/c

What Does it Mean to Georgia (and Other States?)

- Anchoring
- Medical Expenses- Paid vs. Charged
- Discovery
  - Sanctions Orders
- Evidentiary Rulings/Standards
  - Other Incidents
- Attorney's Fees and Punitive Damages
- Judges (elected)

s/c

Elected Judges

Friends and Colleagues,

I write to you today in support of my good friend and recently appointed Court of Appeals Judge Ben Land and to invite you to a reception in his honor on **March 22, 2023 from 5:30 PM – 7:30 PM at the home of Elizabeth and Andy Ausband, 1030 Habersham Road, NW, Atlanta, Georgia 30305.** I hope you can join us at that time and show your support for Judge Land's campaign to retain his seat on the bench in the 2024 election.

While there is currently no opposition, that has not stopped an outpouring of support from people all over Georgia who are committed to helping Judge Land's campaign and who are ready to get involved now. The names on this letter represent just a small sampling of those supporters from the Atlanta legal community. Judge Land's credentials are exemplary. His character is beyond reproach, and he is fully committed to the rule of law. From his strong academic background to his many accomplishments as a trial lawyer (representing both plaintiffs and defendants in civil matters for over 25 years) to his service on the Superior Court bench and now the appellate bench, Judge Land's career has been marked with distinction and characterized by excellence. Stated simply, he is someone we should all support.

At Judge Land's request, there is no minimum required contribution for attending this reception, no "giving levels," and nothing else required of you. He only asks that you consider his qualifications and support his campaign as best suits you. Statewide campaigns are expensive, and we hope you will generously support this one. If you wish to join us in this worthy cause, please visit www.judgeland.com for an easy-to-use link for online contributions or mail a check to the address below.

Thank you for your consideration, and we hope to see you on March 22.

Sincerely,

Harold D. Melton

Host Committee

Cordially Invite You to the Campaign Kickoff Reception in Support of

JUSTICE ANDREW

PINSON

SUPREME COURT OF GEORGIA

Thursday, March 30 | 5:30 - 7:30 PM

The Peachtree Club
999 Peachtree Street | Atlanta

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S/C

What Does it Mean to Georgia (and Other States?)

- Social Inflation:
  - Result of changes in the attitudes of society leading to larger jury verdicts than in the past.
  - Geneva Association Report - Verdicts of $20 million+ has risen by 300% from the annual average between 2001 to 2010.
  - In 2020, the estimated tort tax for Georgia was $1,111.28 paid per resident resulting in 117,809 jobs lost every year. *Economic Benefits of Tort Reform,* December 2021. (The Perryman Group)

S/C

What Does it Mean to Georgia (and Other States?)

- Impact on resolving "nuclear" claims
- Impact on resolving "non-nuclear" claims
- Increased cost of litigation
  - Discovery
  - Motion Practice

s/c

How to Address?

- While the damages sought and verdict amounts have increased, many times the nuclear verdicts have an underlying story.
  - Extremely tragic injuries and deaths (typically children, sympathetic people, and suffering);
  - Bad documents or witness testimony that inflame juries;
  - Unique law;
  - "Unique" application of law; and
  - Trial strategies

s/c

Strategies

- Location, location, location
  - Opposing counsel
  - Judge
  - Jury
- Unique law
- Documents
- Witnesses
- Mongoose Method

s/c

404.888.6160
terry.brantley@swiftcurrie.com

Terry Brantley

Partner | Swift Currie McGhee & Hiers (Atlanta, GA)

Terry O. Brantley is licensed to practice in Georgia and South Carolina, and his civil litigation practice focuses on defending clients facing a broad range of disputes. He serves as a valued business partner and litigation counsel for corporate entities, individuals and insurers. His clients include international auto manufacturers, Fortune 500 retailers, national insurance providers, preeminent consumer and commercial product manufacturers, national restaurant and hospitality companies, and trucking and logistics services companies.

Terry's clients entrust him with their high-exposure cases, and he has served as lead trial counsel in some of Georgia's most significant matters. Leveraging his diverse trial background, along with experience from his colleagues across the firm, he provides effective counsel and ensures businesses succeed when legal challenges arise.

Terry is an ultra-marathoner, competing in trail races from 31 to 100 miles. He is also a longstanding volunteer with the National Multiple Sclerosis Society and is a member of the organization's MS Leadership Class of 2010.

Practice Areas

- Catastrophic Injury & Wrongful Death
- Environmental Law
- Premises Liability
- Products Liability
- Professional Liability
- Sexual Abuse/Sexual Assault
- Trucking and Transportation Litigation

Awards/Recognitions

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- America's Top 100 High Stakes Litigators®
- The Best Lawyers in America©, 2020-Present
- Premier 100 Designation, American Academy of Trial Attorneys, 2015
- Premises Liability Attorney of the Year in Georgia, Global Law Experts, 2015
- Premises Liability Attorney of the Year in Georgia, Corporate Intl Magazine, 2014-2015
- MS Leadership Class of 2010

Education

- Walter F. George School of Law at Mercer University
- Jacksonville University

Never Off the Grid: How to Find and Use Electronic Location Data in Litigation

Todd Williams
Corr Cronin (Seattle, WA)

Never Off the Grid: How to Find and Use Electronic Location Data in Litigation
Todd Williams

Digital location information is ubiquitous in our lives - and is on its way to becoming ubiquitous in litigation. From cell phones and computers to fitness trackers and social media accounts, trial lawyers can use location data to support a claim or theory, demonstrate a different version of events, bolster or discredit a witness, or establish third-party culpability.

Location and timing data can be recovered from computers and tablets, mobile devices, cell phone towers, fitness trackers, cars, apps, photographs, social media accounts, smart home devices like Alexa, thermostats, security systems, refrigerators, and other household appliances, and more. Amazon and other website order history reports can reveal a person's location at the time of ordering. Internet of things (IoT) data from home smart devices can show activity history and if someone was at the same location as the device.

Location Information in Litigation

Digital location information has become prevalent in a wide variety of legal matters.

Law enforcement agencies can use location data to track suspects and build a case against them. For example, location data from a suspect's phone can be used to show that they were at the scene of a crime at the time it was committed. Law enforcement used location information in the recent high-profile University of Idaho student homicide case, in which cell phone location data along with video and DNA evidence were used to identify the suspect. Idaho police affidavits documented that during the attack, a phone belonging to the suspect pinged to a cell phone tower near the victims' location.

Similarly, in this year's Murdaugh murder prosecution, location data from the defendant and his family (and victims') phones and cars played a key role in the trial. The data gathered went beyond cell phone tower pings and GPS coordinates - location-adjacent data points like steps recorded and searches by location were also mined and utilized as evidence. In another instance, fitness tracking data was published by the app's developer, giving away the location of secret US Army bases and posing a threat to national operational security.

The use of digital location information is not limited to criminal cases. In civil litigation, location data can provide evidence to support a claim. Geolocation data from fitness tracking devices have been used as evidence in cases where the plaintiff alleged inability to leave their home due to serious, permanent physical injuries. Upon analysis, the data can demonstrate an individual's level and locations of physical activity before and after an accident or injury. See, e.g., Jalowsky v. Provident Life & Accident Ins. Co., 2020 WL 4814286, at *2 (D. Ariz. Aug. 17, 2020) (granting a motion to compel information relating to fitness tracking devices as relevant to the issue of plaintiff's alleged injuries).

Location data has been used in divorce and custody cases to show a person's whereabouts and activities. For example, location data from a spouse's phone can be used to show that they were not where they claimed to be during a certain time.

In cases where intellectual property is at stake, location data can be used as evidence of

infringement. Location data from a smartphone app could show that a competitor is using a patented technology without permission.

Employers can use location data to monitor employee behavior and enforce workplace policies. For example, location data from a company vehicle can show that an employee was not using the vehicle for work-related purposes as required. See, e.g., Sanchez v. M&F, LLC, 2020 WL 4671144, at *7 (M.D. Fla. Aug. 12, 2020), (FLSA overtime wage dispute where GPS location data was relevant to arguments relating to time worked).

Location data has also been used to establish personal jurisdiction. In copyright cases where the identity of the defendant is unknown, plaintiffs have successfully argued for early targeted discovery to internet service providers to establish the location of the defendant in order to obtain jurisdiction. Strike 3 Holdings, LLC v. Doe, 2019 WL 1778054, at *3 (D.D.C. Apr. 23, 2019).

Best Practices for Obtaining, Storing, and Accessing Location Data

With its ubiquitous nature, sources of potentially high value location data are not always obvious. When location is critical to a case, make it a priority to seek discovery on all types and sources of data available. In pre-discovery conferences, identify geolocation data sources as a topic and subject of discovery.

Follow up by determining through targeted discovery requests the various sources that may be available and the location of the data storage. This can vary by device and service provider, as data is sometimes stored on the device itself and other times stored on company servers. In addition, data may be retained for a limited amount of time. Data extraction methods vary as well and may require assistance from forensic IT experts.

Because location data can be ephemeral, evidence preservation notices with specific reference to location data is advisable. Such letters can lay the groundwork for spoliation arguments later if the data is important and is no longer available.

If location data is held by a third-party service provider, a subpoena alone may be insufficient, and the consent of the subscriber may be required. The Stored Communications Act, 18 USC 121, §§ 2701-2712, outlines the circumstances under which electronic communication and location data can be disclosed by a third-party provider with or without the subscriber's consent. In particular, 18 U.S.C § 2702(b) and (c) allow for the voluntary disclosure of customer communications or records "with the lawful consent of the customer or subscriber".

The Federal Rules of Civil Procedure contemplate the obligation to provide information not only in one's "custody" but also in one's "control." Fed. R. Civ. P. 34(a)(1). Courts have found that information held by a provider subject to the Stored Communications Act is within the "control" of the subscriber for purposes of responding to discovery requests. Mintz v. Mark Bartelstein & Associates, Inc., 885 F. Supp. 2d 987, 994 (C.D. Cal. 2012); Flagg v. City of Detroit, 252 F.R.D. 346, 354 (E.D. Mich. 2008).

If the subscriber will not consent, consider seeking a court order to obtain compliance. See, e.g., O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1446, 44 Cal. Rptr. 3d 72, 88 (2006), as modified (June 23, 2006) ("Where a party to the communication is also a party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions.").

Additionally, 18 U.S.C § 2702(b)(4) allows disclosure by a third-party provider of the contents of communications "to a person employed or authorized or whose facilities are used to forward such communication to its destination." Consider whether corporate entities (e.g., employers) may be willing to assist by requesting data pursuant to this subsection if the contents of the communications are relevant.

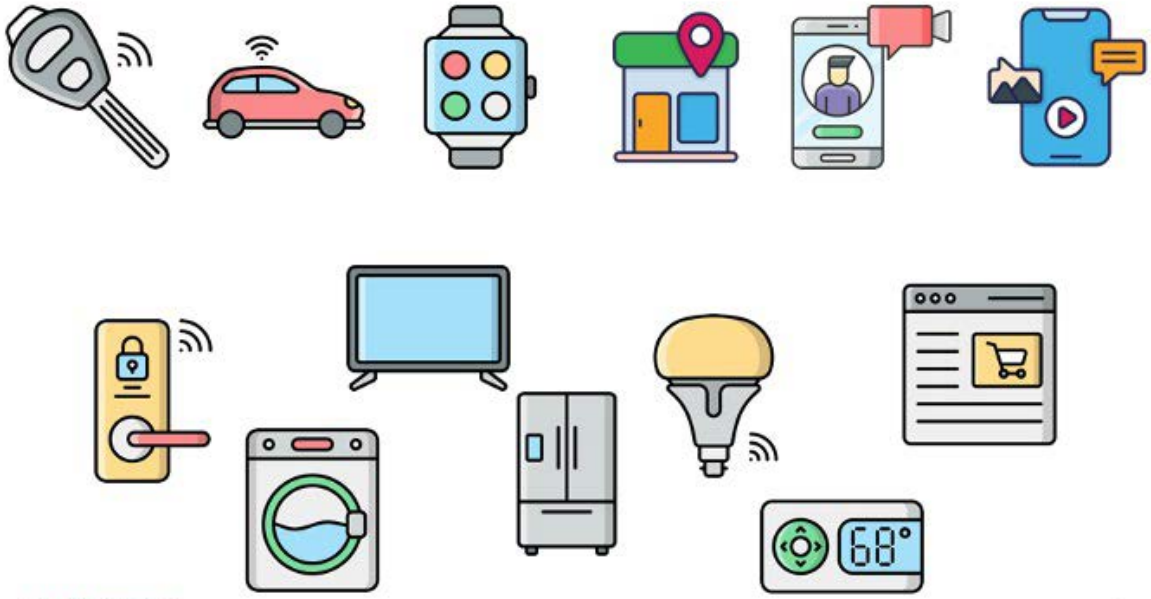
Once location data is identified, it must be stored and accessed appropriately. Often location data contains personal and/or sensitive information that may justify the entry of a protective order governing its use and disclosure. Finally, keep in mind that even after obtaining location data, forensic expertise may be necessary to extract it into useful information for presentation to the trier of fact. And because

location data is still a novel concept, its use is often subject to legal challenges and privacy concerns.

As it becomes increasingly prevalent in our daily lives, electronic location data will be increasingly important in litigation. Exploring and investigating potential sources and uses of this data, as well as the laws governing its disclosure and storage, can help trial lawyers to effectively use electronic location data to bolster their cases with reliable and often times dispositive evidence. By being thorough in their investigation and practice, trial lawyers can harness the power of electronic location data to achieve the best possible outcomes for their clients.

Never Off the Grid: How to Find and Use Electronic Location Data in Litigation

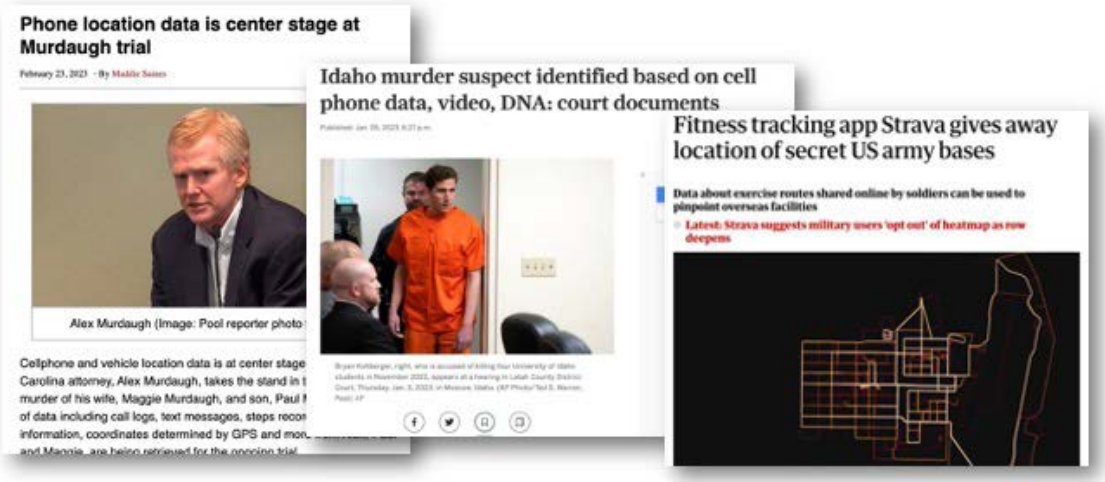
Todd Williams
April 27, 2023



Location data in litigation

- Support a claim or theory
- Show a different version of events
- Discredit a witness
- Prove third-party culpability
- To exculpate or exonerate

Location data in criminal litigation



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gpsworld.com/phone-location-data-is-center-stage-at-murdaugh-trial/
oregonlive.com/crime/2023/01/idaho-murder-suspect-identified-based-on-cell-phone-data-video-dna-court-documents.html
theguardian.com/world/2018/jan/28/fitness-tracking-app-gives-away-location-of-secret-us-army-bases

Location data in civil litigation

- Workers' compensation, personal injury
- Divorce and custody
- Intellectual property, trade secrets
- Employee activity and policy adherence
- Personal jurisdiction

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6

When location is critical to a case

- Seek discovery on all types and sources of data available, and their storage locations
- Send evidence preservation notices
- In federal cases, identify geolocation data sources as a topic in Rule 26(f) conferences
- Account for data retention time limits and extraction methods

Stored Communications Act: Permitted disclosure of customer records

- 18 U.S.C § 2702: "With the lawful consent of the customer or subscriber"
- Fed. R. Civ. P. 34(a)(1) "in the responding party's possession, custody, **or control**."

Courts have required parties to consent to disclosure

- "Where a party to the communication is also a party to the litigation, it would seem within the power of a court to require his consent to disclosure on pain of discovery sanctions." *Mintz v. Mark Bartelstein & Associates, Inc.*, 885 F. Supp. 2d 987, 994 (C.D. Cal. 2012).

Location data storage and access

- Consider protective order if data includes personal or sensitive information
- Forensic expertise may be necessary to extract useful information from data
- Beware of legal challenges and privacy concerns

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Todd Williams

Partner | Corr Cronin (Seattle, WA)

Todd is a partner with the firm. Todd's practice focuses on high-stakes litigation involving complex commercial and business disputes in trial and appellate courts. He regularly represents clients in cases concerning trade secrets, securities litigation, regulatory compliance, employment litigation, fraud, professional negligence, and business contract disputes. Todd has experience representing professionals and consumers in cryptocurrency and blockchain-related disputes. Todd also represents individuals and companies involved in government investigations and enforcement actions. Todd has significant civil trial experience in state and federal courts in Washington and around the country. Todd has been named a "Rising Star" every year since 2016 by Washington Super Lawyers. Todd was recognized in Best Lawyers as "One to Watch" from 2021 to 2023.

Prior to joining Corr Cronin, Todd was an associate at Paul Hastings LLP in New York where his practice focused on government investigations, securities litigation, and internal corporate investigations, including compliance with the Foreign Corrupt Practices Act. Prior to entering private practice, Todd served as International Law Research Fellow for the Public International Law and Policy Group where he provided legal and policy advice to foreign government officials on matters including anti-corruption policies and political decentralization. He also worked as an investigator for the New York City Civilian Complaint Review Board where he investigated allegations of misconduct against the NYPD.

Featured Cases

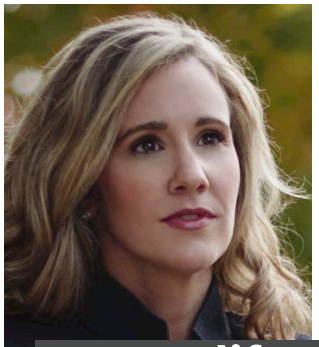
- Project Thunder v. TNS (King County Superior Court) – Represented telecommunications company against multi-million-dollar claims of breach of contract and wrongful termination stemming from an acquisition; obtained favorable settlement at trial.
- McKibben v. Colacurcio Jr. et. al. (King County Superior Court) – Represented former business owner against claims of breach of contract and breach of fiduciary duty. Obtained a complete defense verdict after a two week trial.
- Municipality of Anchorage v. ICRC et al. (U.S. District Court, District of Alaska) – Successfully defended engineering firm against claims of professional negligence in connection with $500 million development project.
- Somerset v. Wall to Wall (U.S. District Court, Western District of Washington) – Represented corporate executives against allegations of securities fraud; obtained favorable settlement after trial.
- Business Sale Litigation – Successfully prosecuted breach of contract action seeking hundreds of thousands of dollars owed following sale of business. Obtained complete victory and award of attorney's fees following three-day arbitration hearing.

Presentations and Publications

- WSBA Corporate Counsel Section: "Bouncing Back from a PR Moment: Rebuilding, Regaining Trust, and Making the Most of a Bad Situation"; February 28, 2019.
- "Fighting Ghosts: Defending Against Anonymous Online Short Attacks", August 2, 2018, New York, NY, Litigation Management in a New York Minute – 2018 Edition.
- "Data Breaches Pressure Companies to Protect Personal Information," Puget Sound Business Journal, Aug. 23, 2013.

Education

- J.D., with Honors, University of Washington School of Law - Moot Court Honor Board, Vice President
- M.A. International Studies, Jackson School of International Studies, University of Washington
- B.A., Government and Legal Studies, Bowdoin College



Break-Out A: Banning Non-Competes in a Post-COVID Workplace

Mary Clift Abdalla
Forman Watkins & Krutz (Jackson, MS)

Banning Non-Competes in a Post-COVID Workplace
Mary Clift Abdalla

Historical Application and Post-Covid Questions

It is estimated that one in five American workers have signed a non-compete agreement.[1] Historically, these restrictive covenants were aimed at preventing an employee from competing with the employer once the relationship between the two ended. The majority of these agreements were initially implemented for higher-level executives with substantial knowledge of material company information, including potential trade secrets. Often, the non-competes were enforceable if they were reasonable in both time and geographical scope and if they were narrowly tailored in restricting future employment. However, through the years, mandatory non-competes have trickled down to all levels of employment. As such, when COVID-19 struck in March 2020, millions of Americans were bound by non-competes and simultaneously threatened with job insecurity due to economic instability. While it is indisputable that COVID-19 had a substantial impact on the economy and labor market, perhaps an unexpected outcome of the "Covid years" is an evolving pressure on what were once standard safeguards for most American businesses.

Remote Work Complications

Over the years, non-competes were considered "narrowly tailored" when their purpose was to protect legitimate employer interests in many areas, but most often to protect confidential information. As many Americans have transitioned to working remotely, the opportunity for confidential information and/or trade secret disclosures has heightened as employees are working from home offices without typical security measures often located in employers' physical offices.[2] These changes, accelerated under COVID-19's extreme circumstances, made it incredibly difficult for employers to properly maintain the security of their propriety information. A well-written, narrowly tailored non-compete could potentially deter the distribution of confidential information that employees might now maintain on their personal devices and in their homes. It is not far-fetched to argue that if an employee working remotely decides to start a new business or go to work for a competitor, the employee likely possesses confidential information outside the secure confines of an office. In such situations, the employers' most logical recourse might be preventative measures contained within a non-compete agreement.

Another emerging complication stemming from remote work is the now difficult-to-enforce geographical limitation that is included in most non-compete agreements. For decades, state law has determined the enforceability of non-compete agreements, with many courts determining that a non-compete is enforceable if it is reasonable in both time and geographical scope. However, with employees moving and working remotely across the country, new problems have arisen with the enforcement of non-competes. Former employees can essentially work from anywhere in the country, and some are now arguing that these geographical limitations are useless.[3] Litigation resulting from geographical limitations contained in non-competes has essentially placed the burden on the employer

1 Andrea Hsu, Many Workers Barley Recall Signing Noncompetes, Until They Try to Change Jobs (National Public Radio, Jan. 13, 2023), archived at https://www.npr.org/2023/01/13/1148446019/ftc-rule-ban-noncompetes-low-wage-workers-trade-secrets.

2 Ruofei Xiang, Enforcing Non-Compete Clauses in the Post-COVID Era (Lawyer Monthly, Mar. 31, 2022), archived at https://www.lawyer-monthly/2022/03/enforcing-non-compete-clauses-post-covid/.

3 Id.

to comply with multiple states' laws when an employee works remotely in another state, and "courts have relaxed geographic restrictions for former employees working remotely if their new employer is located outside the restricted area."[4]

Increased Litigation and Reduced Enforcement of Non-Competes

Historically, states mandated the enforcement of non-competes, yet recently many states have moved to make enforcement a much stricter burden to satisfy.[5] For those monitoring Covid-related litigation, a new trend is emerging regarding non-competes. As Covid hindered businesses and the economy, many employers were forced to terminate or lay off employees. As these layoffs occurred, hundreds of suits were filed on behalf of former employees seeking to declare their non-competes unenforceable. Even those states who historically favor businesses and non-competes are trending in a different direction when ruling on non-competes for those employees terminated due to Covid-related economic stressors.

Several of these suits have been filed in Texas, a state that has traditionally favored enforcement of non-competes. For example, in Garcia v. USA Indus., Inc.,[6] Mr. Garcia filed suit against his former employer, USA Industries, Inc., seeking injunctive relief, a temporary restraining order, and declaratory relief in regard to his non-compete. Mr. Garcia was a salesman for the defendant for twelve years when he was terminated due to economic hardships related to COVID-19. Once he found subsequent employment with a competitor, Mr. Garcia and his new employer received a cease-and-desist letter from USA Industries, after which Mr. Garcia's new employer terminated him. The court granted a TRO in Mr. Garcia's favor, finding that the non-compete clause was unreasonable and greater than necessary to protect his employer's interests and that it was not supported by sufficient consideration. Mr. Garcia's other claims are still pending.[7]

Could The FTC Render This Moot?

In 1914, Congress passed the Federal Trade Commission Act ("Act"), which established the Federal Trade Commission ("FTC") to regulate monopolies, eliminate unfair competition, and prevent the use of unfair or deceptive business practices.[8] Pursuant to Section 5 of the Act, the FTC has the authority to prohibit "unfair methods of competition in or affecting commerce."[9] Through this enforcement authority under Section 5, the FTC is "empowered and directed to prevent" businesses "from using unfair methods of competition in or affecting commerce . . . ."[10]

In his July 2021 Executive Order, President Biden compelled the FTC to "curtail the unfair use of noncompete clauses" and noted that non-compete agreements negatively impact a worker's mobility.[11] On July 9, 2021, the FTC withdrew its 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the Act ("2021 Statement").[12] Here, the FTC rescinded its previous "rule of reason" application to Section 5, opting instead to exercise its standalone authority even "if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm."[13] The 2021 Statement demonstrated the FTC's present-day commitment to enforcing the "text, structure, and history of Section 5" and "use its expertise to identify and combat unfair methods of competition."[14]

On November 10, 2022, the FTC released its new Policy Statement ("2022 Statement") regarding the scope and meaning of "unfair methods of competition"

4 Julie Levinson Werner & Jessica I. Kriegsfeld, Remote Work and the Impact of Employee Mobility on Noncompetes (N.Y.L.J., July 28, 2021), archived at https://www.law.com/newyorklawjournal/2021/07/28/remote-work-and-the-impact-on-noncompetes/. "Employers should be aware that courts have not rigidly enforced the geographic restrictions in noncompete agreements when employees work remotely within the area prohibited by the agreement."

5 Andrea Hsu, Millions of workers are subject to noncompete agreements. They could soon be banned (National Public Radio, Jan. 5, 2023), archived at https://www.npr.org/2023/01/5/1147138052/workers-noncompete-agreements-ftc-lina-khan-ban. "A handful of states including California and Oklahoma already ban noncompetes, and a number of states including Maryland and Oregon have prohibited their use among lower-paid employees."

6 Garcia v. USA Indus., Inc., 2021-cv-09178 (Harris Cty. Ct., Feb. 12, 2021).

7 Lori N. Ross, The Time Is Now: A Call for Federal Elimination of Non-Competes Against Low-Wage and Hourly Workers in the Wake of the Pandemic, 14 Wm. & Mary Bus. L. Rev. 111, 146-48 (2022), https://scholarship.law.wm.edu/wmblr/vol14/iss1/4.

8 See Federal Trade Commission Act of 1914 (establishing the FTC).

9 15 U.S.C. §45(a)(1).

10 15 U.S.C. §45(a)(2).

11 Clifford Atlas, et al., President Biden Issues Executive Order Calling on FTC to "Curtail Unfair Use" of Non-competes and Other Restrictive Covenants, JD Supra (July 12, 2021), https://www.jdsupra.com/legalnews/president-biden-isssues-executive-order-5364419/.

12 Policy Statement, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Fed. Trade Comm'n, July 9, 2021), archived at https://www.ftc.gov/legal-library/browse/statement-commission-withdrawal-statement-enforcement-principlesregarding-unfair-methods.

13 See Part I.

14 Id. at 1.

under Section 5, setting forth its view of its enforcement authority beyond federal antitrust laws, and announcing its intention to aggressively "stop[] unfair methods of competition in their incipiency based on their tendency to harm competition."[15] The 2022 Statement superseded all previous statements and reflected a significant departure from the FTC's previous 2015 Statement.[16]

On January 5, 2023, based on its broadened position regarding Section 5, the FTC set its rulemaking crosshairs on non-compete clauses, announcing its proposed rule that "would ban employers from imposing noncompetes on their workers" as an unfair method of competition and sought comments on the proposed rule from the public.[17] While non-competes are routinely used by countless industries to ensure employees will not use information learned during employment to start a competing business or work for competitors, according to the FTC:

"Research shows that employers' use of noncompetes to restrict workers' mobility significantly suppresses workers' wages—even for those not subject to noncompetes, or subject to noncompetes that are unenforceable under state law," said Elizabeth Wilkins, Director of the Office of Policy Planning. "The proposed rule would ensure that employers can't exploit their outsized bargaining power to limit workers' opportunities and stifle competition."

The evidence shows that noncompete clauses also hinder innovation and business dynamism in multiple ways—from preventing would-be entrepreneurs from forming competing businesses, to inhibiting workers from bringing innovative ideas to new companies. This ultimately harms consumers; in markets with fewer new entrants and greater concentration, consumers can face higher prices—as seen in the healthcare sector.[18]

The FTC estimates that the new rule would increase wages for employees by nearly $300 billion per year and expand career opportunities for approximately 30 million Americans.[19] The public and employers had until March 20, 2023, to submit a formal comment to the FTC about the proposal and as of April 18, 2023, we are still awaiting a final rule based on the FTC's review of such comments and further analysis of this issue.[20]

The Far-Reaching Implications of a Ban on NCCs by the FTC.

The scope of the FTC's proposed ban on non-competes is extraordinarily broad. As currently proposed, the rule would apply not only to future non-compete agreements, but also to current and past non-compete agreements. Employers would be required to notify all current and former employees that their non-compete agreements are no longer binding. The proposed rule defines a non-compete as "any contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." Notably, the proposed rule prohibits an employer from "representing to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause."

If enacted, this proposed rule would upend many current business operations and require a great deal of time and expense on behalf of employers to comply with the rule. There is no doubt that if enacted, the rule will face multiple challenges in courtrooms across the country.[21]

The Reintroduction of the "Workforce Mobility Act of 2023"

In addition to pending state and federal court decisions determining the enforceability of non-competes and the looming ban on non-competes proposed by the FTC, other factors also have the future of non-competes hanging in the balance. A group of bi-partisan Senators has reintroduced the

15 Policy Statement, The Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (Fed. Trade Comm'n, Nov. 10, 2022), archived at https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmtKhan-SlaughterBedoyaStmt.pdf.

16 Id. at 1.

17 Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (FTC, Jan. 5, 2023), archived at https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

18 Id.

19 Id.

20 Id.

21 See West Virginia v. EPA, 2022 WL 2347278 (2022) (applying the "major questions doctrine" that holds an agency may not create a rule or regulation that has a major social, political and/or economic impact unless Congress explicitly grants an agency the authority to do so).

"Workforce Mobility Act of 2023." This proposed bill "would largely ban the use of employer non-compete agreements as a matter of federal law."[22] Previously introduced in 2019 and 2021, the Workforce Mobility Act of 2023 offers a few protections which are not afforded in the proposed FTC ban. For example, the Workforce Mobility Act would not apply retroactively, so businesses with non-competes currently in place would still be afforded those protections. If passed, the Workforce Mobility Act would prohibit agreements that restrict working for another employer for a specific period of time or in a specific geographical area or in a job that is similar to current employment, however with a few exceptions. These exceptions include an allowance of non-competes "in connection with the sale of certain interests in a business or the dissolution of, or disassociation from, partnerships."[23]

Ironically, even if the FTC does not enact its proposed ban on non-competes, the Workforce Mobility Act would authorize the FTC, the federal Department of Labor, state attorneys general, and individual employees to bring actions against employers who violate the Act.[24]

Conclusion

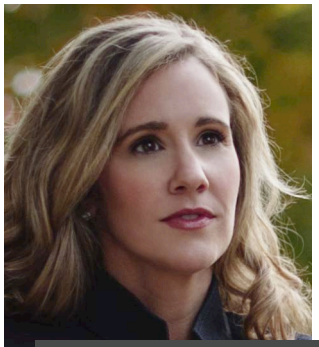
Although relied upon by businesses and corporations across the country, there is no doubt that the future of non-compete agreements is currently highly uncertain. Not only are businesses facing an uphill battle to enforce non-competes in courtrooms across the country, but there is great momentum by the federal government to ban non-competes or at the very least to severely limit their applicability. There will undoubtedly be litigation surrounding non-competes in the future, and in the meantime, employers must examine other safeguards to protect their businesses, workforce, and propriety information. Employers should be knowledgeable of applicable state laws and current mandates regarding non-competes and should look into alternative restrictive covenants in lieu of boilerplate non-competes, such as confidentiality agreements/ non-disclosure agreements and/or non-solicitation agreements.[25]

22 Clifford R. Atlas, Erik J. Winton, Justin E. Theriault, Bipartisan Bill to Ban Most Non-Compete Agreements Reintroduced in U.S. Senate, Nat'l L. Rev., Volume XIII, Number 34.

23 Id.

24 Id. ("Failure to comply with the Act could result in "penalties, damages, injunctions, and other relief.").

25 Lori N. Ross, The Time Is Now: A Call for Federal Elimination of Non-Competes Against Low-Wage and Hourly Workers in the Wake of the Pandemic, 14 Wm. & Mary Bus. L. Rev. 111 (2022), https://scholarship.law.wm.edu/wmblr/vol14/iss1/4. "Unlike non-competes, non-disclosure agreements are enforceable even in jurisdictions where anti-competition clauses are precluded." Id. at 121.



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Partner | Forman Watkins & Krutz (Jackson, MS)

Going straight into law school from undergrad, Mary Clift was determined to immediately exercise her love for reading and writing, as well as her intense work ethic. Now, as an attorney and a mother, each day is an opportunity for her to do both. Creative and hard-working, Mary Clift is driven by the daily challenges that come with practicing law. To her, work is an opportunity to learn, each day offering her a chance to work harder and be better. As an avid football fan, Mary Clift understands the importance of strategy and approaches her cases with innovative concepts and solutions. When working with Mary Clift, a client can expect to receive exceptional effort from a lawyer who counts every day as a blessing and takes great delight in working hard for her family and her clients.

Important Litigation Involvement

- Represented a large premises defendant before the South Carolina Workers' Compensation Commission against claims that hundreds of former plant workers developed neurological, cardiovascular, and/or pulmonary injuries as a result of alleged workplace chemical exposure. After a two week trial, our team received extremely favorable rulings. The Commissioner completely zeroed out the claimants in nine of the thirteen cases and found another defendant completely responsible for a tenth case. As cases were pending on appeal, the parties reached a global settlement for the entire inventory of hundreds of pending claims.
- Represented a commercial real estate company in federal court in a case involving the flooding of a shopping center and involving a FEMA Letter of Map Revision. Plaintiff sought compensation related to the flood damage and for the store's closure for 10 months in the amount of approximately $2.5 million. Our team filed a motion for summary judgment, which was granted by the Court; all claims against the client were dismissed, and subsequently the client obtained an award of a portion of costs and fees.

Speaking Engagements

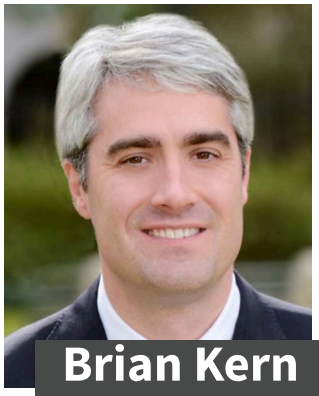
- "Suspicious Minds: The Practical Effects of Daimler and Other Jurisdictional Rulings," Network of Trial Law Firms, October 2018, San Mateo, California

Professional Recognition

- Top 10 Honoree, Top 50 Under 40 Business Leader, Mississippi Business Journal (2020)
- Top 50 Leading Lawyers selected by the Mississippi Business Journal
- Selected to Mid-South Rising Stars (2015-2022)
- The Best Lawyers in America® since 2019: Product Liability Litigation – Defendants

Education

- University of Mississippi School of Law, J.D., cum laude
- University of Mississippi, B.A., summa cum laude



Break-Out B: Best Practices for Using Mock Trial/Jury Consultants

Brian Kern
Hood Law Firm (Charleston, SC)

The How, When, and Whys of Mock Trial/Jury Consultants
Brian Kern and Virginia Floyd

Trial lawyers sometimes find themselves fielding questions from clients about what how a jury might view their case. Most of the time, experienced lawyers can offer a reasonably accurate assessment of what they think will or won't resonate with a jury. No individual can guarantee how a jury will react to evidence introduced at trial, but engaging in jury research during case development can offer valuable insight into significant issues identified by client and counsel. The phrase "jury research" refers to any type of research or information gathering conducted by a party in conjunction with a consultant.

Research exercises can take a variety of forms, each of which may be tailored to fit the goals, objectives, and investment of the party. This article is presented to provide an overview of what exercises may be available to you and to address their potential benefits, drawbacks, and other considerations. Consultants for jury research should interest both client and lawyer because the consultant will bring a wealth of experience that can help counsel pursue an exercise designed to optimally achieve its objectives. A consultant may be engaged purely for purposes of conducting an exercise or for both research exercise(s) and to assist in the selection of the actual jurors at the eventual trial of the case.[1]

Preliminary Considerations and Planning with the Client

There are a variety of goals and objectives available to guide parties toward various research exercise formats. These can include a desire to find out which types of jurors respond most favorably to your client's position; to see how a jury would value the case; to test how a jury reacts to certain evidentiary issues; or to present and receive feedback on different or even competing potential case themes. There is always room during the planning process when flexibility is desired to accommodate exercise adjustments on the fly.

It is important to identify the limitations of the exercise. The most common limitation is cost – in-person exercises can vary in expense depending on the number of jurors who participate in the exercise. Other limitations may relate to time, scope, and the degree to which anonymity is needed.

It may not be possible to test all the issues or achieve all the objectives a party may want to in a single exercise. For example, the time needed to conduct a time test of damages – how good or how bad might a verdict be – might not also permit a party to test discrete factual issues. In cases involving a large number of issues a party wishes to test, a more effective strategy may involve first selecting a smaller number of issues to investigate and then conducting additional work with the research consultant to develop an alternate structure for the inquiry. Another strategy may include developing multiple exercises directed toward different objectives. For example, a party may benefit from engaging in a research exercise designed to help with theme development and then build a second exercise which uses the lessons from themes to "try" damages.

Jury research also provides an excellent opportunity for the client to directly participate in the development of the case and to learn how parties outside of

1 The use of a consultant is essential to shroud the valuable feedback required from the exercise in the work product protection. A client's independent surveying, polling, or other activities may be subject to discovery, which is inadvisable.

itself and its counsel appreciate and respond to the issues. Lawyers may identify the need for a research exercise early on in their handling of a matter. A client may not. In that situation, we recommend at least informally discussing the possibility of conducting a research exercise with the client soon after the need is identified and well before any major deadlines in a case such as mediation, dispositive motions, or trial. This allows an opportunity to have a conversation educating the client on what might be gained from a research exercise and for counsel to understand the client's particular objectives and limitations for a research exercise to develop expectations and a plan.

With a high-level concept in mind, counsel is better able to solicit proposals from research firms that are designed to best meet the needs of the case, test the key issues, and comply with any limitations on size and cost. Keep in mind that proposals are not set in stone – many consulting firms are willing to adjust their exercise's structure and schedule to best achieve the research objectives.

A note on cost: the cost of a research exercise will largely turn on three variables: (i) the number of mock jurors recruited to participate in the exercise; (ii) the overall number of individuals needed to conduct the exercise; and (iii) the amount of technology and support needed do conduct the exercise. In one recent experience, the cost of a one-day, in-person exercise consisting of 20-35 mock jurors with appropriate videography, recording, and other technical support ranged from $75,000 to $110,000, plus ancillary expenses such as travel.

The World is Your Oyster – Specific Types of Research Exercises

Once the client and consultant are on board with pursuing a research exercise, the next step is time spent considering the exercise strategy needed. This section provides an overview of the common types of exercises and deliberative processes that can be used to conduct jury research, including comments on potential benefits and drawbacks of each.

First, there are a variety of formats through which mock jurors can receive information about the case:

In-Person Research Exercise Using Evidentiary Presentations

The most traditional form of jury research is gathering mock jurors together in person to receive and consider prepackaged evidentiary presentations (sometimes called "clopenings"). These presentations usually follow a basic orientation and opinion polling conducted by the consultant. At regular intervals throughout the day, mock jurors are invited to share their feedback and reactions and may even be asked to deliberate to the point where they collectively decide which party should prevail.

This form of exercise is anecdotally most advantageous for:

> Cases that do not have significant disputes of fact, but rather are more focused on fighting liability or damages.
>
> Cases in which liability has been admitted, and the only question is the scope and extent of damages.
>
> Cases in which a plaintiff's actual damages are largely uncontested, but may involve an issue of how much a jury might be willing to award in punitive damages.
>
> Cases that do not have significant questions or contingencies as to the admissibility of evidence at trial; and
>
> Cases that a client is interested in trying to "win" and wishes for a dry run to see if a "win" is possible.
> Benefits:

This form requires almost all materials used on the day(s) of the exercise to be prepared and finalized in advance. This allows for involvement from clients who wish to review and have input on the material being presented.

Presentations can be made by either the consultant or the attorneys themselves. If the consultants make the presentations, this permits counsel to attend the exercise as an active listener and to discuss the mock jurors' reactions live with the client (who may also be in attendance).

This form allows for not only surveying, polling, and breakout discussions at regular intervals, but also is best suited to active polling during the presentations themselves through the use of hand-held devices. This form often feels the most like an actual trial, and the mock jurors' reactions to the order of the presentations will most closely track the reactions of an actual jury. There may be clients who will benefit from seeing a truncated version of their case unfold and experiencing the ebb and flow of the mock jurors' reactions.

If the trial attorneys are giving the presentations (rather than the consultant), this also provides an opportunity for the client to see the attorneys' trial abilities and, conversely, an opportunity for the attorneys to showcase their oratory abilities.

Drawbacks:

Since almost all materials used on the day(s) of the exercise must be prepared and finalized in advance, it is more difficult to adjust the materials while the exercise is in progress.

Since almost all materials used on the day(s) of the exercise must be prepared and finalized in advance, there may be questions or comments from mock jurors that the pre-packaged presentations will not answer.

Some jurors may have difficulty accepting the limitations of the exercise and may express an unwillingness to side with one party or the other in the absence of a response to a question they think is important, though there may well be an answer in the actual case.

In-Person Research Exercise Focused on Issues or Increasingly Expanded Scope

A second form of jury research is gathering mock jurors together in person to receive and consider a general overview of the case followed by shorter presentations on more discrete legal or factual issues. As with other in-person research exercises, the case-specific information will usually follow a basic orientation and opinion polling conducted by the consultant. Throughout the day, mock jurors are invited to share their feedback and reactions either in a large or small group setting. However, because the presentations may be focused on more discrete issues rather than the whole case, mock jurors might now be asked to deliberate to the point where they collectively decide which party should prevail.

It is also possible to structure smaller presentation modules to provide a preliminary presentation from both sides and then add increasingly attenuated facts which may be admitted at trial. For example (this is not a real case), if a BP tractor trailer was involved in an oil spill on an interstate in Arkansas, attorneys might want to test the liability issues on the facts directly related to the spill on the interstate. However, the plaintiff may attempt to introduce evidence of the 2010 Deepwater Horizon spill in the Gulf of Mexico, which could profoundly impact the jury's perception of BP as a party. An attorney representing BP in the Arkansas case could structure a research exercise to first address the discrete liability issues and then, in a second series, permit the mock plaintiff to discuss the Gulf spill and offer a defense to the same.

An issues-focused research exercise can be more fluid in the sense that counsel and the client are better able to define the issues on which they wish to focus and determine how much of the day(s) should be spent on each issue. With more direction and a narrower focus, it is often easier to prevent mock jurors from becoming too fixated on an issue that is extraneous to the objective of the exercise (for example, something which has been tested previously or which the exercise will not address by design).

An experienced jury consultant will be equipped to keep an issues-oriented exercise on track and to help educate the jurors about the exercise's objectives without influencing their responses. In our law firm's experience, we have found that mock jurors are receptive to and even appreciative of the objectives and limitations of an issues-based exercise when these are explained from the outset. An early explanation can also help mock jurors to stay focused on what is being presented in a particular segment without having to confront whether the information changes which side they think should "win."

For an issues-based exercise to be successful, it is important that the consultant, or anyone taking a speaking role during the day, has a good working knowledge of both the whole case and the specific issues being tested. These forms of exercise often require more open question and answer with mock jurors or require the discussion moderator to steer the conversation back into the areas of focus which requires deeper knowledge of the case.

This form of exercise is most advantageous for:

> Cases that have discrete issues of fact, liability or damages or even witness credibility which would benefit from a targeted or isolated evaluation.
>
> Cases that have significant questions or contingencies as to the admissibility of evidence at trial. It may be possible to structure the exercise to work through other issues or even a general synopsis of the case, without the potentially inadmissible materials, and then after some discussion or deliberation bring the mock jurors back together for a section that asks them to consider how their perception of the case changes after the additional materials are added to the mix.

Benefits:

An issues-focused research exercise is more dynamic and often allows for a greater volume of information to be gathered from mock jurors on the specific issues being tested. There is less of a chance of jurors' deliberative sessions progressing off-topic as the topics are more focused.

The greater flexibility of an issues-based exercise permits for a more detailed presentation on discrete issues, even if these are not the only issues in the case. Where an issue requires more of a knowledge foundation or involves a higher volume of factual minutiae, an issues-based exercise allows for sufficient time to be allocated to these areas without the pressure of feeling that the case must still be presented to allow for an accurate deliberation on who "wins" or "loses."

As with the more traditional exercise, this form also requires the exercise's materials to be prepared and finalized in advance. However, with potentially shorter presentation segments and more breaks for deliberation, there may be opportunities to adjust the information the jurors receive later in the day to respond to their feedback.

Like the more traditional exercise, presentations can be made by either the consultant or the attorneys themselves. If attorneys will be speaking to mock jurors, the consultant is better positioned as a true neutral who can provide the initial orientation and case discussion and then moderate the discussion while maintaining a degree of separation from the client and the attorneys in the mock jurors' eyes.
If the trial attorneys are giving the presentations, this also provides an opportunity for the client to see the attorneys' speaking abilities and case delivery and allows an opportunity for the lawyers to impress the client.

Drawbacks:

The issues-based exercise often requires a greater degree of coordination with the consultant in advance of the exercise. If the consultant is too busy to have several longer conference calls or even participate in a "dress rehearsal" of the different presentations on the issues, there may be missed opportunities on the day(s) of the exercise to elicit the information the client or attorneys are seeking during the consultant-led deliberative portions of the program.

Almost all materials used on the day(s) of the exercise must be prepared and finalized in advance; however, since there are often more breaks and deliberations, it is somewhat easier to adjust the materials for future sections or modules while the exercise is in progress. If this seems like a possibility, having the team members responsible for the presentation scripts and associated demonstratives attend the exercise in person is beneficial.

This form is not well-suited to active polling during the presentations themselves as there is less of a focus on which side should win or lose.

In recent months, a Hood Law Firm team conducted an issues-based exercise in which they structured the exercise to encompass (1) a brief neutral overview of the case by the consultant; (2) a lengthier "plaintiff's" case presentation; and then (3) six shorter

presentations designed to test potential defense themes. Through polling and moderated discussion following each segment, the lawyers were able to gain valuable insight into how the defense should posture and present certain issues without layering in the detailed and complex damages issues which the case also presented. While an issues-oriented research exercise might not be right for every case, it can be extremely effective when strategically deployed.

Research Not in Person

The state of modern technology is creating new opportunities to pursue less formal research without bringing a group of people together in a conference center or other large common space. At least one consulting company[2] offers a jury research option through an online platform without any in-person involvement. Where a cost-conscious client is still interested in pursuing jury research, or where there is less need for an in-person evaluation of credibility or solicitation of live feedback, this new frontier may be a good option.

In one recent experience, the lawyers set up an online research exercise in which potential mock jurors from a certain geographic area were invited to participate in opinion polling. Rather than a cash fee for their time, participants were compensated with online subscription credit or even online shopping retail credit. Once qualified within their age and geographic area, mock jurors were provided first with a general opinion poll directed at issues involved in the case and then given a series of short narratives related to the case. After each narrative, the mock jurors provided feedback through a survey form that included the same type of polling questions often used during in person exercises in addition to open ended questions allowing for unrestrained feedback. The online research exercise was made available for ten days within the same geographic area from which the jurors in the actual case would be drawn. Roughly 300 individuals completed the exercise in its entirety, and the cost for the exercise was roughly $7,500.

There are limitations on this type of exercise – most notably that all participants must opt in to participate (making the sample reasonably analogous to the actual jury pool's composition as opposed to representative). The online platform lends itself to a younger median age of participants than may be impaneled on a jury, as well as a group that must all have the resources to access the internet for the duration of the exercise. The consultant offering this type of exercise also provided very helpful information on how to best structure the exercise to avoid participants simply dropping off when too dense or lengthy – the average person may not be willing to read more than 2,500 words in exchange for the type of reward being offered.

Despite these limitations, the feedback received was quite valuable. It would otherwise be overwhelming or impossible to bring together 300 individuals for an in-person research exercise, and the large participant base provided better statistics to discuss with the team. There was also no chance of one strong-minded mock juror influencing the opinions of others or dominating an in-person discussion, meaning every participant's voice carried equal weight. Additionally, the large sample size permitted the team to gather a valuable survey on how a jury would value the plaintiff's claims, and the mock jurors were provided an opportunity at the end of the exercise to make an award of actual damages. These statistics were helpful in valuing the client's exposure and the strength of the juror's feelings on fundamental case issues.

The World is Still Your Oyster – Forms of Deliberation
Hopefully each reader of this article now appreciates that there are a variety of ways through which information can be obtained from mock jurors during research exercises. Some common methodologies are discussed here.

Livestream Reaction Polling

For in-person exercises, many consulting firms have hand-held devices which permit jurors to indicate in real time whether they believe a particular aspect of a presentation is helping or hurting the position of a party. Clients, consultants, and lawyers can review the changes in the real time feedback (either live or in a recording of the exercise) and consider the areas of each presentation that had the most impact on jurors and which were most persuasive.

2 American Jury Centers

This type of reaction polling is particularly helpful for the more traditional form of in-person exercise focused on evidentiary presentations from both sides in the pattern of an anticipated trial.

Polling and Surveying at Regular Intervals

Throughout the day(s) of in-person exercises, jurors can and should be asked for their opinions and reactions to the information they receive. This can be done through the completion of simple survey questions such as "do you think defendant should be required to pay for plaintiff's damages? Yes, or no?".

There is also an opportunity for open-ended survey questions to be provided to jurors. Questions could ask what the mock juror thought was the most persuasive or helpful piece of information they heard during the presentation, what they did not like, or even what they wish had been discussed.
Technology can increase the effectiveness of mid-exercise polling and surveying. In prior decades, much of this information was gathered through the completion of pre-printed surveys. Now, contemporary consultants can conduct these portions of the exercise with tablets. The tablets can be synced so that viewers (clients and attorneys) possess the ability to review each juror's feedback instantaneously. The survey questions can also be modified or added to as the exercise progresses with contemporaneous update on each juror's device. This can lead to a more expensive research exercise, but the real-time feedback afforded by these technologies can allow for more effective presentation adjustments.

Breakout Groups for Discussion or Deliberation

It can be helpful for jurors break into small groups to discuss their reactions to the presentations. These small group discussions come the closest to true deliberations in the jury room. The discussions can be enlightening and provide valuable insight into how a jury might interpret the issues of a case in the context of their own personal experiences.

Breakout discussions are often moderated by the consultant's team and can be guided to focus on specific issues that were raised during the presentations. However, if a true deliberation is desired, the consultant's team may choose to simply give the mock jurors a mock charge and then send them to deliberate on their own.

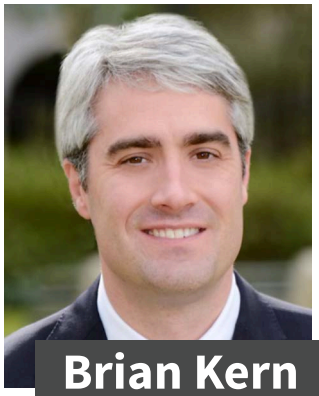
Moderated Large Group Discussion

It may also be possible to conduct a larger group discussion with moderation by the consultant. It may not be recommended to attempt this for groups of more than 25 mock jurors as it can result in some individuals dominating speaking time. However, where a consultant has a good working knowledge of the case and its global issues, larger group discussion can be effective for eliciting feedback on specific questions and conducting informal group polling based on a question or comment made during the discussion.

In one recent exercise, a moderated large group format was particularly helpful during for an issues-based exercise precisely because of the off-the-cuff opinion polls. For example, the moderator was able to receive a comment from a juror about what he still thought needed to be answered and then quickly ask the larger group who agreed with that sentiment. If most hands were raised in the affirmative, the team tried to work that information into a later segment.

Conclusion

Jury research provides an excellent opportunity to test the issues in a case without running the risk of an adverse verdict or ruling in the actual case. There are clearly many ways to structure research exercises. By working with a consultant and developing a plan to target the specific needs of your case and the exercise objectives, it is possible to obtain valuable information which can help both attorneys and clients evaluate their case and trial strategy from voir dire through to closing arguments.



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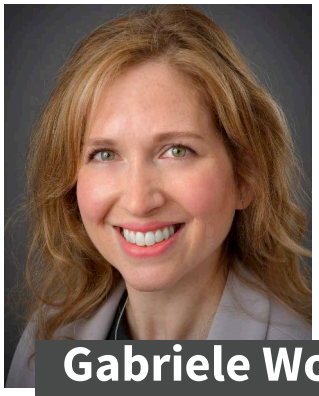
Practice Areas

- Medical malpractice defense
- Premises liability
- Insurance law
- Products Liability
- Admiralty
- General negligence

Education

- J.D., Charleston School of Law, 2009 - Federal Courts Law Review, Member; Student Bar Association, Member
- B.S., Clemson University, 2002 - International Association of Defense Counsel Trial Academy Stanford University, 2015



Break-Out C: Avoiding the Pitfalls and Liabilities of Cyber-Fraud

Gabriele Wohl
Bowles Rice (Charleston, WV)

Avoiding the Pitfalls and Liabilities of Cyber-Fraud
Gabriele Wohl

Cyberattacks and data breaches are risks faced by every business, and the legal and financial consequences of these risks are expanding exponentially.

In the 1990s, computer hacking was largely considered to be a pastime of rebellious teenagers showing off their tech skills in their parents' basement. As our network technology and reliance grew, cybercrime became more sophisticated and pervasive and has since caused trillions of dollars in damage.

Over the last decade, cybercrime has evolved to include mass-scale information theft, extortion, fraud, identity theft, and major system disruptions. As schemes have grown more sophisticated, criminals have become harder to catch due to jurisdictional challenges and technology that can make identification difficult to nearly impossible. Fortunately, as cybercrime has advanced, so has cybersecurity. Cybersecurity has been both proactive and reactive to emerging threats, and has become an essential component to every business.

Whether you are a small business that keeps limited customer information on a local network or a financial institution that uses cloud technology, ensuring protection against the threat of cyberattacks and data breaches is as intrinsic to operations as having an employee handbook or locks on the doors. Those businesses that approach cybersecurity asking when they will be compromised will be far better off than the businesses wondering if an attack will occur.

The impact and aftermath of a cyberattack or data breach can be staggering. First, there are the costs of responding to the attack, repairing systems, recovering data, and notifying customers. Next, you could be liable for customer losses, identity theft, and related class action lawsuits. Finally, there are regulatory and legal obligations with respect to cybersecurity, and if an attack exposes violations of those obligations, you could be facing state and federal civil penalties.

In 1999, Congress passed the Gramm-Leach-Bliley Act (GLBA), which regulates the way financial institutions handle customer information. Basically, every company that offers financial services must develop practices and policies securing and outlining the use of their customers' private information. Large financial institutions like major banks are obviously covered by the GLBA, but there are countless small-to-medium businesses that fall under the financial services umbrella that often do not anticipate the GLBA requirements. The Act applies broadly to any business that provides financial products or services. There is no strict list specifically defining the types of companies under the purview of the GLBA, and depending on the type of data accessed and services provided, the list can include accountants, ATM operators, real estate companies, car rental companies, credit unions, debt collectors, financial advisors, certain retailers, and education institutions.

The GLBA regulates the collection of personal information as well as requires proactive security practices to safeguard personal information. The use and protection of personal information must be clearly communicated to customers, and customers must be provided an opportunity to opt out of any data sharing the business may engage in. The Act is

very prescriptive in that it requires a robust security program—more than just an antivirus program and a good firewall.

The Department of Justice's 2021 announcement of its Civil Cyber-Fraud Initiative confirmed the agency's commitment to holding companies accountable for failing to follow cybersecurity standards. When organizations that receive federal funds are the subject of a digital attack or information breach, they could be liable for flawed or deficient security measures.

The government has promised to use the False Claims Act and whistleblowers to expose and prosecute government contractors and grant recipients for cybersecurity weaknesses and risks. This initiative will go after organizations who: (1) fail to comply with cybersecurity requirements; (2) misrepresent their cybersecurity practices; and (3) fail to monitor and timely report data breaches.

The DOJ's Cyber-Fraud Initiative is indicative of a larger shift in how cyber-fraud and security are viewed. Although shareholders of public companies are already seeing success in derivative lawsuits over internal controls against cybercrime, the Securities and Exchange Commission has proposed rules setting out specific requirements for cybersecurity measures, oversight, and reporting. These rules will further empower shareholders to hold companies accountable for exposure and response to attacks.

All businesses should take heed of this change in expectations in the DOJ's Initiative and SEC's proposed rules: If you are a victim of a cyberattack or data breach, law and regulatory enforcement agencies will not only go after those behind the crime, but they (as well as consumers and shareholders) will shine a spotlight into your own practices and precautionary measures and determine whether you share any blame for making your company vulnerable to attack.

This shift is reflected in the growing demand for cybersecurity insurance. In the last five years, there have been a number of major lawsuits and court opinions addressing whether traditional general liability policies cover cyberattacks and data breaches. The results have been mixed: where data breaches have compromised customers' financial information, some courts have held that there were tangible losses (i.e., credit cards) which fell under "property damage" under companies' commercial coverage. Other courts have examined situations where a company has suffered losses stemming from a cyberattack and found that there was no coverage where a deceptive email tricked employees into transferring funds. This uncertainty has led insurers to limit and clarify their policies to exclude this kind of coverage and has given rise to separate cyberinsurance policies.

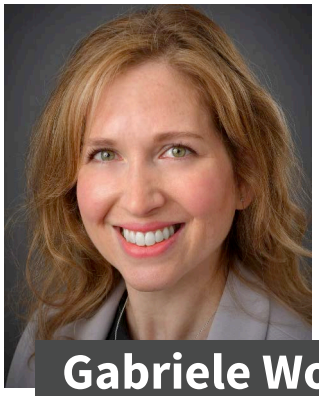
Businesses should examine their traditional commercial policies envisioning potential cybersecurity breaches and their likely damages, and determine if there are provisions—such as computer fraud and errors and omissions—that are written to cover damages resulting from cybercrime. Although cybersecurity insurance policies are becoming more prevalent, many are written narrowly to exclude coverage for damages that do not directly result from computer fraud, such as an employee's response to a phishing scheme. However, cybersecurity policies will typically cover costs associated with cybercrime that do not qualify as "property damage" under general liability insurance. These costs include notifying customers about data breaches, recovering data, and repairing systems.

Regardless of coverage and legal requirements, all business must take proactive measures to build resilience against cybercrime and safeguard confidential information. Organizations should designate specific individuals or a team to develop a detailed plan for security control. The plan should identify risks and outline processes and procedures for storing, accessing, and transferring confidential information. They should provide employees regular training on avoiding trending fraud schemes and how to protect against compromised passwords and unsecured networks.

If your business uses third party vendors, focus on what types of information those vendors have access to and how they are securing your data. The security plan should be continually reviewed and adjusted to respond to emerging trends and threats. Major companies that rely heavily on a

large network may consider hiring a third party to conduct an independent evaluation and test the strength of the security plan.

In summary, businesses must be familiar with the legal and regulatory frameworks that apply in the event they fall victim to cyberattacks or data breaches, be aware of their related insurance obligations, and tailor a response plan to quickly and effectively mitigate any such attack and make all required disclosures.



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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
- Appellate Advocacy
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- 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)

Break-Out D: The Rise - and Risks - of Artificial Intelligence in the Hiring Process

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The Rise – and Risks – of Artificial Intelligence in the Hiring Process
Lauren E. Fisher White

With unemployment numbers hitting a new low of 3.4%[1] as 23 states increased their minimum wages to $12.00 or even $15.00 an hour and[2] increased competition for line employees, employers (such as fast service restaurants) are looking for new and innovative ways that can help it to meet its hiring goals.

Fortunately, Artificial Intelligence can be a partner in a company's efforts to quickly obtain sufficient staffing, as it can dramatically increase efficiency in hiring. Using AI in the recruitment and hiring process is not without risk, though. This article will provide an overview of AI's use in the hiring process and will identify what employers can do to reduce the risks of AI, which include discrimination claims.
Artificial Intelligence in Hiring: a History and Context
Artificial Intelligence (AI), as used in the context of the employee recruitment process, refers to the use of technology to "learn" or problem-solve as a person would, enabling the employer to automate certain steps that would otherwise require a human touch. The use of AI in hiring is not a new concept, and indeed resume screening for keywords has been used by employers for decades. The development of AI accelerated during the COVID-19 pandemic, when remote interviews became the norm.

What follows are some potential applications of AI in employee recruitment, to automate high-volume tasks and standardize candidate selection:

Content Generation involves the use of AI to create job descriptions, marketing emails, LinkedIn posts, etc.

Screening Software analyzes an applicant's electronic data such as resumes, questionnaires, and tests, and identifies which applicants meet the criteria identified by the employer ("prequalification"). This can be particularly helpful with high-volume applications.

Standardized Job Matching analyzes a candidate's experience and matches that candidate with the appropriate position best matching their experiences.
Targeted Advertising enables companies to target their advertisements for a position to those who are qualified for it. The hiring company can select specific demographics it wishes to advertise to, or can provide the advertising company (including Facebook, Indeed, and LinkedIn) with the job description or posting and ask that the company target its ads accordingly.

Chatbots are computer programs that simulate and process human conversation. Most websites that employ a "chat" functions utilize chatbots, not human employees, enabling the company to be available to answer questions every hour of the day, around the world. In the recruitment context, chatbots can answer questions about next steps in the job process. They can even conduct screening interviews.

Asynchronous Video Interviews (AVI) are interviews conducted via an online platform, not in real-time, and generally only require the attendance of one human: the candidate. The candidate is provided a standard set of interview questions, in a standard sequence, and standard time to respond. The candidate's

1 See https://blog.dol.gov/2023/02/03/january-2023-jobs-report-more-strong-steady-growth#:~:text=Today%2C%20the%20Bureau%20of%20Labor,rate%20since%20May%20of%201969.

2 See https://qz.com/us-states-minimum-wage-increases-2023-1849943768.

responses—as well as their word choices, speech patterns, and facial expressions—can be analyzed and compared to assess the candidate's potential fit for the role and the organization's culture.

Benefits of the Use of AI in Hiring

The benefits of AI in the hiring process are substantial. Certainly AI can make the hiring process more efficient. After an algorithm is established, screeners, rather than people in entry-level human resources positions, can review and analyze resumes to ensure that candidates meet basic qualifications. By using asynchronous video interviews, the interview process is entirely standardized such that no candidate is given easier or harder questions, provided additional time to answer, or provided additional time to make small talk or otherwise connect with interviewers. Limiting these inconsistencies in the interview process could ensure that each applicant is provided with the same opportunity.

Additionally, because such videos are asynchronous, AVI can enable candidates who are currently employed to interview without missing any work at their current job. Additionally, AI can reduce the impact of human implicit bias. All humans have implicit biases, meaning they subconsciously prefer one group of people or group of characteristics over others. While people can attempt to reduce that bias as much as possible—by focusing on credentials rather than personal characteristics, blinding resumes, and attempting to standardize interviews[3]--humans are not machines and it seems this bias can never be truly eliminated. Finally, targeted advertisements for positions, whether on platforms like Indeed or LinkedIn or social media sites such as Facebook or Instagram, can help to ensure that a job advertisement is seen and considered by top candidates. Certainly, the use of AI is extremely appealing to employers.

The Risks of Automation in the Hiring Process

While the use of AI in hiring is very attractive for many hiring entities, it is not without legal risk if not carefully employed. For example, algorithms may be skewed against a particular demographic, as Facebook has come under fire for targeting jobs based on an employees sex and age. One lawsuit alleged that Facebook ads for some of the highest-paying "blue collar" jobs, such as trucking, reached an audience that was 99% male and under the age of 55.[4] One group, in an effort to test Facebook's algorithm, chose to permit Facebook's algorithm to target four job advertisements to the people the algorithm deemed most likely to click on them. It found the following results:

96% of the people shown the ad for a mechanic job were men;
95% of those shown an ad for nursery nurses were women;
75% of those shown the ad for pilot jobs were men; and
77% of those shown the ad for psychologist jobs were women.[5]

If the algorithm was designed to predict who might buy a certain product, this would not be problematic, but when it results in jobs being advertised based on criteria including membership in a protected class, this could result—and has resulted—in discrimination claims.

AI companies also sometimes engage in screening that, if conducted by a human, would run counter to typically accepted HR practices. One vendor's interview chatbot[6] purports to save HR time by, among other things, assembling an applicant profile based on demographic information and then assigning the applicant to a single interviewer who is best matched with the applicant based on skill sets and experience. While the company's website states that the chatbot will "eliminate the possibility of human error," the very act of assigning candidates to interviewers based on their demographics (including name, picture, gender, date of birth, and interests) could perpetuate an interviewer's implicit biases and preference for hiring people who look and act like the interviewer, rather than hiring the best candidate for the position.[7]

3 See https://hbr.org/2017/06/7-practical-ways-to-reduce-bias-in-your-hiring-process.

4 See https://www.marketplace.org/2022/12/20/female-truckers-say-facebooks-algorithms-may-be-steering-job-ads-away-from-women-older-workers/.

5 See https://www.globalwitness.org/en/campaigns/digital-threats/how-facebooks-ad-targeting-may-be-in-breach-of-uk-equality-and-data-protection-laws/?utm_source=hootsuite&utm_medium=twitter_.

6 See https://hellotars.com/chatbot-templates/hr-recruitment/HJwMBF/interview-chatbot.

7 See https://www.hbs.edu/recruiting/insights-and-advice/blog/post/actively-addressing-unconscious-bias-in-recruiting.

Similarly, another company offers a "brief survey built on decades of research" that "will predict which candidates will be most successful in a company's open positions."[8] This survey, which tests for aptitude and learning style, personality and work style, and work culture preferences, cannot predict the future. Instead, if provided with sufficient data, it could determine the attributes shared by successful employees, and then rank applicants according to who best conforms to that "model" employee image. Stocking the employee pool with new hires that are similar to established employees sounds favorable, but could result in a sex or race imbalance that does not reflect the applicant pool, or the rejection of candidates with disabilities who could perform the essential functions of the job with accommodations.

In May of 2022, the Equal Employment Opportunity Commission (EEOC) published guidance advising employers of the risks associated with using software, algorithms, and artificial intelligence to evaluate applicants and employees protected under the Americans with Disabilities Act ("ADA").[9] According to the EEOC, the use of certain AI may disadvantage applicants and employees, as software relying on algorithmic decision-making (or "machine learning") may violate the ADA. For example, a screener or chatbot might be programmed with an algorithm that instructs it to screen out applicants with gaps in their employment. As an employee may have been unable to continue employment during extensive cancer treatment, and the screener or chatbot would not provide the applicant with the opportunity to explain this resume gap, the algorithm could result in the rejection of the candidate related to their cancer. Similarly, if after a digitized interview screeners are employed to score an employee's "response speed" through the rate at which an applicant speaks or types, people with certain disabilities will be disparately impacted. For example, people with ADHD may have slower processing speed or reaction times.[10] Individuals with stutters or who must use talk-to-text transcription will necessarily take longer to respond. Because the protected class of applicants with disabilities is so varied, it is nearly impossible to test an algorithm to determine whether it disparately impacts certain people with disabilities.

Finally, the ADA requires that employees and applicants be provided with reasonable accommodation, if necessary, to enable them to do the job or participate in the interview process. In an AI interview, when an employee is speaking with software, the software may not be programmed to approve a break in the middle of the interview, or to ask questions more slowly. A chatbot may not even recognize a request for an accommodation—which rarely includes the words "request" or "accommodation"—and may fail to refer it to a human in human resources. This problem is significant, as nimble responses to requests for accommodations are required so as to not prejudice employees with disabilities in the job application process.

Reducing risks

Companies seeking to harness the efficiency of AI without compromising their compliance with Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the ADA, among others, must not rely on the general representations made by AI vendors or advertisers that such technology does not result in discrimination or have a disparate impact on employees with disabilities. Rather than applying a pre-established algorithm to a job search, employers should be involved in building the algorithm, carefully considering what elements are essential for the position and what can be done to test whether an employee has the characteristics that will enable them to succeed, without disparately impacting employees within protected classes.

Vendors can and should perform testing to determine whether members of certain demographic groups fare better or worse when undergoing testing and screening, attempting to determine whether a rejected candidate might have a "disparately impact" claim based on their membership in a protected class. This is simple for age, where there are only two classes: over 40 and under 40. It becomes more complicated when a protected class can have innumerable potential iterations, such as disability, and employers must carefully consider whether such screening is truly necessary or could instead result in the arbitrary rejection of employees, potentially

8 See https://affintus.com/employers/.

9 See https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.

10 See https://psychcentral.com/adhd/adhd-and-slow-psychomotor-speed-adults.

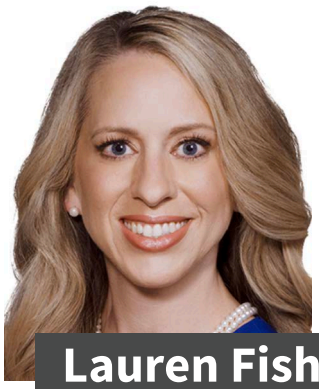
disparately impacting those with disabilities. For example, an AI vendor may advertise that it can test for an employee's response times by measuring how quickly employees can consider and answer certain multiple choice questions and rejecting candidates that score below the 50th or 25th percentile. An employer considering the use of this test should consider first whether fast response times are actually necessary for the position. While quick thinking is required of paramedics, most healthcare providers would prefer to hire an applicant who is marginally slower than others, but more frequently chooses the correct treatment. That employer could work with the AI vendor to balance speed with accuracy, rather than using a response time test that could result in the rejection of well-qualified candidates with disabilities and a discriminatory impact claim. In other fields, such as diagnostic radiology, the scales may be tipped significantly in favor of the need for accuracy over speed, such that the use of a response test has no practical nexus with the position. In that instance, using such a test as an arbitrary measure to winnow down applicants could lead to disparate impact claims by applicants with disabilities impacting response time.

In addition, employers and vendors must make it easy for applicants with disabilities to request and receive accommodations. Employers should strongly consider notifying applicants, at multiple points throughout the application and interview process and in multiple ways, that accommodations are available to assist employees with disabilities in proceeding through the interview process. In order to provide employees with disabilities notice sufficient to enable them to make the assessment that an accommodation would assist them and to request that accommodation, employers must not "hide the ball" on their interview tactics. For example, if a test is measuring response speed, employees should not be told that it is only a test of their knowledge.

Finally, employers must be aware of state laws that may impact their ability to use AI in hiring. For example, Illinois' Artificial Intelligence Video Interview Act requires employers who use AI to evaluate applicants in Illinois to abide by certain notice, consent, confidentiality, and data destruction requirements. New York City enacted Local Law No. 144, which requires bias audits for any AI screening tools, requires that information about that audit be made publicly available, and that certain notices be provided to candidates. Numerous other jurisdictions have similar bills proposed or pending.

Conclusion

With low unemployment and staffing shortages affecting many companies, including within HR departments, AI can be an important tool for employers that need to hire many employees quickly. Employers seeking to use these tools should not blindly accept that they will provide quality candidates without disparately impacting members of protected classes. Rather, they should understand the algorithm, if not, be involved in its development and bias testing whenever possible. In an effort to avoid ADA claims that would not always be revealed in bias testing, employers should inform applicants of the right of disabled employees to have accommodations in the application and interview process. If employers proceed carefully and ensure that they also do not run afoul of state or local laws, AI can be a valuable HR partner.



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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.

Ms. Fisher White also has extensive employment litigation experience, representing her clients in matters ranging from discrimination defense to the enforcement of non-competes. As part of the Litigation practice group, Ms. Fisher White brings her experience resolving complex employment disputes to a broader range of matters, assisting clients with contract and business tort litigation as well as general litigation

Practice Areas

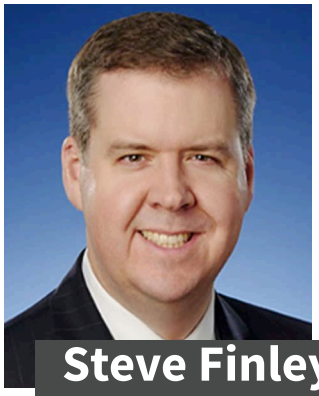
- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Trials / Appeals / Alternative Dispute Resolution

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.
- Assisted clients with creation and implementation of social media and Bring Your Own Device (BYOD) policies.
- Advised employers concerning the investigation of and response to data breaches.

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



Entering the Matrix: Redefining "Products" in a Virtual World

Steve Finley
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Entering the Matrix: Redefining "Products" in a Virtual World
Steve Finley

Products liability claims have long focused on tangible products. As computer software and social media play an ever-expanding role in our lives, novel products liability theories have emerged, targeting social media platforms, software developers and purveyors of digital technologies on the grounds that these tech companies are "product sellers" and their software, social media applications and online platforms are "products." These innovative theories of liability test the limits of products liability law and run afoul of basic products liability principles, as tech companies are not product sellers and the electronic communication platforms they offer are not products within the meaning of products liability law.

Section 230 Immunity

Tech companies enjoy broad protection from liability for online content posted to their social media platforms and electronic communication forums under Section 230 of the 1996 Communications Decency Act. Section 230 immunizes these platforms and forums from liability for the content of their users' posts.

As most claims arising from the alleged misuse of social media or posting of potentially tortious content online concern the content itself, Section 230 has consistently been applied to protect tech companies from liability for claims based on the content of social media and electronic communication forums. Section 230 has been used successfully as a shield against liability since before many of today's largest tech companies were even founded.

Section 230 contains two important provisions that limit liability for user-generated content. The first, Section 230(c)(1), protects online platforms from liability relating to harmful content posted on their sites by third parties. The second, Section 230(c)(2), allows platforms to police their sites and remove harmful content, but protects them from liability if they choose not to do so. Section 230(c)(2) was enacted in response to a 1995 New York state-court decision holding that platforms policing any user generated content on their sites were the publishers of all of the user-generated content and therefore liable for their user-generated content.

In relevant part, Section 230 provides:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
* * *

No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section.

47 U.S.C. § 230(c)(1) and (e)(3).

For more than two decades following its enactment, Section 230 was applied in case after case to dismiss claims against computer-service providers and tech companies, regardless of the cause of action pled. Beginning in approximately 2016, no doubt driven by the dramatic rise in the use of smart devices and social media, the number of lawsuits against social-media firms and tech companies increased. That increase in litigation has given rise to new efforts to limit the scope of Section 230 – both in the legal system and among

elected officials. The Ending Support for Internet Censorship Act has been introduced in the last two sessions of Congress and would substantially rollback the protections afforded to tech companies under Section 230. Meanwhile, two cases involving the liability of tech companies have made their way to The United States Supreme Court. In February, the High Court heard argument in Gonzalez v. Google LLC (Docket 21–1333) and Twitter Inc. v. Taamneh (Docket 21–1496). In Gonzalez, the Court will consider whether Section 230 protection applies to tech companies when an application or software program makes targeted recommendations of content provided by other users or if it only limits the liability of tech companies when they host user content on their sites. In Taamneh, the Court will consider whether internet service providers can be liable for aiding and abetting a designated terrorist organization for recommending the organization's content on its social media platform. Gonzales and Taamneh challenge the broad immunity from liability companies who host and recommend online content have enjoyed for nearly three decades.

Strict Product Liability Claims Against Tech Companies

Resolution of the scope of Section 230 protections will not answer the questions of whether tech companies are product sellers or whether social media and online platforms are products. Should the high court agree that Section 230 operates to broadly immunize tech companies from liability, lower courts will have to grapple with the question of whether, and to what extent, Section 230 bars product liability lawsuits. If Section 230 is narrowed, the threshold question of whether tech companies can be sued under product liability theories will need to be resolved.

Plaintiffs are increasingly bringing product liability claims on the theory that social media platforms and electronic communication forums are products and their designers are product sellers who can be liable under products liability theories for design defect, manufacturing defect, and failure to warn. Plaintiffs contend that these claims are permissible because no category of product is immune from strict liability and the products liability claims are directed to the design of the platform itself rather than user-generated content, making Section 230 inapplicable. These product liability claims, plaintiffs contend, are part of a broader trend of cases recognizing that software and computer programs are products within the meaning of products liability law. See Lowe v. Cerner Corp., No. 20-2270, 2022 WL 17269066 (4th Cir. Nov. 29, 2022).

The volume of product liability cases against tech companies has grown to the point that The Judicial Panel on Multidistrict Litigation consolidated over 80 product liability lawsuits against social media companies including Meta Platforms, Inc.; Instagram LLC; Snap, Inc.; TikTok, Inc.; ByteDance, Inc.; YouTube LLC; Google LLC and Alphabet Inc. See In re: Social Media Adolescent Addiction/ Personal Injury Products Liability Litigation, MDL 3047. Plaintiffs have alleged that the defendants' social media platforms are defective products because they are designed to maximize screen time, which can encourage addictive behavior in adolescents. Plaintiffs contend this conduct can result in emotional and physical harms, including self-injurious behavior and death. The cases coordinated in the In re: Social Media MDL involve threshold questions of law regarding the scope of Section 230 and whether social media applications and online platforms are products subject to claims of design defect and failure to warn.

This novel use of strict product liability raises two threshold questions: Are the purveyors of social media platforms and electronic communication forums product sellers within the meaning of products liability law; and are social media and online communication forums products? Social media platforms and online communication forums are not tangible products that come into direct or proximate physical contact with the user. Moreover, written content has not been classified as a product for purposes of products liability law, as the theories of liability that have traditionally been used to hold responsible the speaker or writer of tortious communication do not include products liability claims. Thus far, litigation over the liability of tech companies for social media content and online postings has been decided under Section 230 without full consideration of whether tech companies are product sellers and their applications and online platforms products.

In Anderson v. TikTok, Inc., __ F.Supp.3d __, 2022 WL 14742788 (E.D. Pa. Oct. 25, 2022), plaintiff alleged that TikTok promoted videos featuring the "blackout challenge," which urged users to record and share videos of themselves being choked into unconsciousness. Plaintiff's ten-year old daughter saw the videos and attempted the challenge by hanging herself from a purse strap; she died several days later. Plaintiff brought claims of negligence, strict products liability, wrongful death and survival action. In an effort to sidestep the limitations imposed under Section 230, plaintiff argued that she sought to hold TikTok liable for its own actions as the designer, manufacturer and seller of a defective product, not for its conduct as a publisher. Plaintiff sought to specifically exclude from her claims any theory that TikTok is liable as a publisher of the content on its site.

Plaintiff is not seeking to hold the TikTok Defendants liable as the speaker or publisher of third-party content and instead intends to hold the TikTok Defendants responsible for their own independent conduct as the designers, programmers, manufacturers, sellers, and/or distributors of their dangerously defective TikTok app and algorithm. Thus, Plaintiffs claims fall outside of any potential protections afforded by Section 230(c) of the Communications Decency Act.

The court, however, found that plaintiff "premise[d] her claims on the defective manner in which Defendants published a third party's dangerous content." Id. at *3. The court held that under Section 230 of the CDA, websites like TikTok cannot be held liable as publishers of third-party content, and because TikTok recommended and promoted, but did not create, the videos in question, plaintiff's suit must be dismissed. Anderson was decided on Section 230 grounds and without consideration of whether TikTok could be sued under a product liability theory.

The Court's decision in Anderson stands in contrast to the Ninth Circuit's holding in Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021). There, plaintiffs alleged that a "speed filter" on Snapchat caused or contributed to a high-speed car accident in which three boys were killed. Unlike Anderson, where the allegedly offending content (the videos promoting the blackout challenge) was created by third parties, the Snapchat speed filter was designed by Snap. Plaintiff's "negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter)." Id. at 1092. The Ninth Circuit drew an important distinction between user-generated content and features of an application created by the tech company. The Ninth Circuit explained that Section 230 "cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties…. Thus internet companies remain on the hook when they create or develop their own internet content." Id. at 1093. The harm caused by Snapchat's speed filter did not turn on the contents of any message posted by a Snapchat user, thus taking the case outside the scope of Section 230.

Social Media and Online Forums as Products?

A products liability claim can only be brought against a product seller, but tech companies that provide social media platforms and online communication forums should not be classified as product sellers. These entities do not engage in the design, manufacture, and sale of tangible products, but rather are in the business of providing technology for the dissemination and exchange of online content. The law of products liability has never been extended to hold liable publishers and facilitators of allegedly tortious words, images, or other content.

The maxim that "to be subject to a products liability claim, one must be a product seller" has been applied to immunize from liability entities that come far closer to engaging in the sale of a product than tech companies. For example, brokers and auctioneers are generally not considered product sellers within the meaning of products liability law, even though these entities may be involved in the distribution of a product to a user. It is true there have been efforts to impose liability on online marketplaces, but at least in those instances the online marketplace is alleged to have facilitated the sale of a physical product, not merely hosted online content. See Oberdorf v. Amazon.com, 930 F.3d 136 (3rd Cir. 2019).

Unlike with traditional products, for which the design features, manufacturing processes, and written

warnings are the work of their sellers, responsibility for creating social media posts and other online content rests with the user, not the platform that hosts the content. Creation of online content, whether words or images, is not the work of the social media platform or online marketplace, but the user who posts the content. No one would suggest that a tech company is the author of content posted to its platform in the same way a manufacturer is the author of warnings that accompany a product it designs and sells. A bedrock principle of products liability law is that a manufacturer can only be liable if a product it designs and sells is the source of the alleged harm. Novel products liability theories against tech companies do not satisfy this requirement, because plaintiffs seek to hold tech companies responsible for content created by a user of the platform, not by the tech company itself.

Products liability law is premised on the notion that a manufacturer has the resources, knowledge, and ability to ensure the safety of the products it sells. As a result, manufacturers are considered to be experts in the products they sell and have a corresponding duty to their users. Tech companies, in contrast, are experts in the development of social media platforms and online communication tools, but are not experts in the myriad content posted to their sites. Tech companies cannot be presumed to possess sufficient knowledge and skill to ensure all content posted to their sites is accurate, appropriate, and unlikely to put users at risk (the policy underlying Section 230 immunity). Requiring tech companies to police the varied and diverse content posted online in the same way manufacturers of traditional products are expected to ensure the safety of users would require tech companies to be experts in every topic on which a user posts to ensure the content does not create an unreasonable risk of harm to the platform's other users. The court in Anderson recognized that "[b]ecause of the staggering amount of information communicated through interactive computer services, providers cannot prescreen each message they republish." Anderson, at *2, citing Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997). Imposing such a duty is simply not workable, nor is it supported by products liability principles.

GIBBONS

Entering the Matrix: Redefining “Products” in a Virtual World

Steve Finley
Gibbons P.C.

Newark ♦ New York ♦ Trenton ♦ Philadelphia ♦ Wilmington ♦ gibbonslaw.com

Welcome to the Metaverse

Welcome to the Metaverse

Section 230

“The 26 words that created the internet”

Section 230 of the Communications Decency Act has been used successfully as a shield against liability since before many of today’s largest tech companies were even founded.

Section 230

Section 230

Section 230 of the Communications Decency Act:

- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
- No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section.

Section 230

Gonzalez v. Google LLC

Supreme Court considers whether Section 230 protection applies to tech companies when an application or software program makes targeted recommendations of content generated by other users or only limits the liability of tech companies when they host user content on their sites.

Section 230

Twitter v. Taamneh

Supreme Court will decide whether internet service providers can be liable for "aiding and abetting" a designated terrorist organization for recommending the organization's content on its social media platform.

Section 230

"Bad facts make bad law"

- Acts of terror and mass murder
- Adolescent suicide
- Self-injurious behavior
- Mental health conditions
- Eating disorders

Section 230

"Isn't the best way to address the types of abuses that we're seeing by the big tech companies… just to allow people to get into court and hold them accountable?"

- Senator Josh Hawley (R-MO) (sponsor of the "Ending Support for Internet Censorship Act")

Section 230

"The algorithms [tech companies] are using aren't accidently getting children addicted. They are purposely getting children addicted to using their products and they are doing it in insidious ways."

– Bucks County (Pennsylvania) Board of Commissioners announcing lawsuit vs. TikTok

Section 230

Redefining "Products" in a Virtual World

Resolution of the scope of Section 230 will not resolve the viability of product liability claims.

- Are tech product sellers?
- Are social media applications and online platforms products?

Redefining "Products" in a Virtual World

- No category of "product" is immune from the scope of strict liability
- Claims are directed to the design of the platform, not user-generated content
- Part of trend recognizing that software and computer programs are products. *See Lowe v. Cerner Corp.*, WL 17269066 (4th Cir. Nov. 29, 2022)
- Prevalence of social media in economy

Redefining "Products" in a Virtual World

- MDL 3047(*In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litig.)*
- Class Action Lawsuits
- Product Liability Lawsuits:
  - Design Defect
  - Failure to Warn

Redefining "Products" in a Virtual World

Anderson v. TikTok, Inc., 2022 WL 14742788 (E.D. Pa. Oct. 25, 2022)

- Plaintiff's ten-year-old daughter died attempting the "blackout challenge"
- Plaintiff brought claims for negligence, strict products liability and wrongful death
- Plaintiff sought to plead around Section 230

Redefining "Products" in a Virtual World

"Plaintiff is not seeking to hold the TikTok Defendants liable as the speaker or publisher of third-party content and instead intends to hold the TikTok Defendants responsible for their own independent conduct as the designers, programmers, manufacturers, sellers, and/or distributors of their dangerously defective TikTok app and algorithm. Thus, Plaintiff's claims fall outside of any potential protections afforded by Section 230(c) of the Communications Decency Act."

Redefining "Products" in a Virtual World

- Plaintiff "premise[d] her claims on the defective manner in which Defendants published a third party's dangerous content."
- Under 230, "websites like TikTok cannot be held liable as publishers of third-party content, and because it recommended and promoted, but didn't create, the videos in question, plaintiff's suit must be dismissed."

Redefining "Products" in a Virtual World

Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021)

- Plaintiff's negligent-design claim treats Snap as the manufacturer of its application Snapchat
- Court distinguished between user-generated content and Snapchat's features
- Section 230 *"cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties….Thus internet companies remain on the hook when they create or develop their own internet content."*

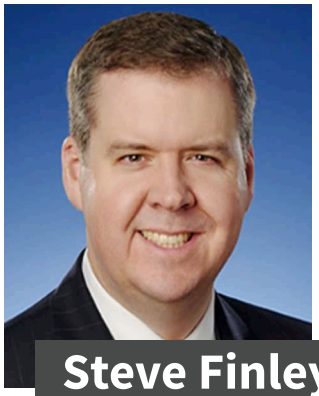
Redefining "Products" in a Virtual World

- Tech companies do not engage in the design and manufacture of tangible products
- Tech companies are in the business of providing technology for the dissemination and exchange of online content
- The law of products liability has never been extended to hold liable publishers and facilitators of tortious words, images, or other content

Hypothetical 1 – The Nightclub

Hypothetical 2 – Table Saw

Hypothetical 3 – Off-Label Use



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Mr. Finley is a litigator who dedicates his practice to the defense of cases involving wrongful death, catastrophic personal injury, and major property loss. He defends companies involved in complex litigation, including multidistrict litigation, mass tort litigation, class action lawsuits, and serial lawsuits. A frequent author on emerging issues in products liability law, he has represented defendants facing novel products liability claims, such as publishers and patent holders.

In addition to his product liability practice, Mr. Finley handles the prosecution and defense of commercial matters, including breach of contract disputes and business tort claims.

While in law school, Mr. Finley was an intern in the Chambers of the Honorable Jacob P. Hart, United States Magistrate Judge for the Eastern District of Pennsylvania. He also served as Co-Editor-in-Chief of the Villanova Journal of Catholic Social Thought and was President of the St. Thomas More Society. As an undergraduate, Mr. Finley served as a staff intern in the White House Office of Faith-Based and Community Initiatives during the Bush Administration.

Areas of Focus
- Products Liability Litigation

Related Practices
- Commercial & Criminal Litigation
- General Products
- Pharmaceutical & Medical Device
- Products Liability

Related Industries
- Biotechnology & Pharmaceutical
- Manufacturing & Consumer Products, Including Electronics

Honors & Awards
- Selected to the Pennsylvania Super Lawyers Rising Stars list, Personal Injury Products: Defense, 2020
- Listed among The Legal Intelligencer's "Lawyers on the Fast Track," 2017

Education
- Villanova University School of Law (J.D.)
- Catholic University of America (B.A.)

Exploring Trends in the Discovery of Personnel Information

Kevin Clark
Lightfoot Franklin & White (Birmingham, AL)

Increased Scrutiny Over the Disclosure of Personnel Files
Kevin Clark

It is commonplace for defendants to seek the disclosure of personnel files during discovery. Personnel files include information such as performance evaluations, workplace investigation notes and incident reports, records regarding promotions or demotions, and discipline and termination records.[1] These documents can damage a plaintiff's case as they often contain evidence that can be useful for impeachment purposes or for demonstrating a pattern of not following safety rules, company policy or other prior conduct that is probative to the subject litigation.[2]

While defendants frequently seek the disclosure of personnel files, "[c]ourts throughout the country have held that individuals have a privacy interest in their employment records because such files contain private and sensitive information."[3] See, e.g., Whittingham v. Amherst Coll., 164 F.R.D. 124, 127 (D. Mass. 1995) ("personnel files contain perhaps the most private information about an employee within the possession of an employer"). Therefore, courts do not automatically grant these discovery requests, and defendants must justify why the disclosure of personnel files are necessary to the defense.

Due to the significant privacy interests that inherently accompany personnel files, courts have always strictly scrutinized discovery requests involving such information. See, e.g., In re Sunrise Sec. Litig., 130 F.R.D. 560, 580 (E.D. Pa. 1989) (holding that discovery of personnel files was only permissible if "(1) the material sought is 'clearly relevant,' and (2) the need for discovery is compelling because the information sought is not otherwise readily obtainable"). However, because we live in a day and age where everyone is hypersensitive to the privacy of personal information, our legal system is protecting personal information more diligently than ever, leading to stricter scrutiny when seeking the disclosure of personnel files.

It is no longer adequate for a defendant to argue that personnel files may contain relevant evidence. Instead, defendants must satisfy a heightened standard of scrutiny to justify their discovery requests. This paper (A) briefly explains why the permissible scope of discovery has been narrowed and (B) discusses how defendants can overcome these discovery barriers.

A. Limited Scope of Discovery.

In 2015, Congress amended Rule 26 of the Federal Rules of Civil Procedure. The amendment provided federal courts with significant discretion—and a valid justification—to deny previously acceptable discovery requests. While the previous draft of Rule 26 broadly allowed discovery of all information "reasonably calculated to lead to the discovery of admissible evidence," the current Rules limit the scope of discovery as follows:

"parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount

1 CHAPTER 17: PERSONNEL FILES, 2003 WL 25322926

2 For example, a corporate defendant may use personnel files to prove the plaintiff demonstrated the same performance deficiencies at other workplaces. This evidence may justify the corporate defendant's decision to fire the plaintiff in an employment discrimination case.

3 § 7:25. Discovery issues—Personnel files, 1 Practical Tools for Handling Insurance Cases § 7:25.

in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Fed. R. Civ. P. 26. (Emphasis added).

Amended Rule 26 has been referred to "as a restoration of the proportionality calculation,"[4] in which courts are granted considerable leeway to deny burdensome discovery requests that are not narrowly tailored to the needs of the case.[5] As the Southern District of New York explained "the amended Rule is intended to 'encourage judges to be more aggressive in identifying and discouraging discovery overuse…' by emphasizing the need to analyze proportionality before ordering production of relevant information." Henry v. Morgan's Hotel Grp., Inc., No. 15-CV-1789 (ER)(JLC), 2016 WL 303114, at *3 (S.D.N.Y. Jan. 25, 2016).

Under this new test, courts often limit discovery to information that is directly relevant to the specific claims and defenses, rather than allowing a general "fishing expedition" into a plaintiff's overall work performance throughout their career.[6]

Not only does the new Rule 26 make it more difficult to convince a court to authorize the discovery of personnel files, but third-party or former employers are less willing to participate in the discovery process due to their own potential liability. "Depending on the circumstances, employers may expose themselves to claims of defamation, invasion of privacy, interference with contractual relations, wrongful referral or negligent or intentional discrimination" for the improper disclosure of personnel files.[7] Further, laws such as the Americans With Disabilities Act, the Family Medical and Leave Act, and the Health Insurance Portability and Accountability Act further motivate third-party employers to act reluctantly towards responding to discovery requests.

B. How to Overcome These Discovery Barriers.

Because of the recent amendment to Rule 26, and third-parties' reluctance to participate in discovery, it is imperative that defendants carefully craft their discovery requests based on the facts of their case. When drafting requests for production that will satisfy the proportionality test of amended Rule 26, defendants must consider how courts have applied amended Rule 26 in the past. "Courts … have started limiting discovery to information relevant to the parties' specific claims and defenses … as opposed to the traditionally broader scope that allowed exploration of the general subject matters of the case."[8]

Taking this general application into consideration, defendants must think carefully about their defenses and how the documents they are seeking will support those defenses. For example, in an employment discrimination case, the possibility that personnel files may contain evidence of poor employee performance likely will not satisfy amended Rule 26. However, the possibility that a personnel file may contain evidence of the exact—or substantially similar—poor employee behavior that the corporate defendant alleges plaintiff engaged in while under its employ likely would satisfy amended Rule 26. Similarly, if a Plaintiff failed to follow workplace safety rules resulting in an accident, targeted discovery seeking prior violations of workplace safety rules would meet the higher burden.

Because personnel files are no longer discoverable simply because they may contain relevant evidence, it is now defendants' responsibility to determine why personnel files are directly relevant to the specific facts of a case. Defendants must clearly articulate this reasoning to the court when drafting their discovery requests. While this may lead to a more limited discovery request, it is necessary to avoid objections to—and denial of—the request. Another option is for defendants to propose that the Court conduct an in camera review of the personnel files. Such a procedure might make the Court comfortable in allowing discovery of the files, with the safeguard

4 [Article title, author, date, available at, last visited.] https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/discovery-in-employment-discrimination-litigation-what-defendants-can-request-and-obtain-from-plaintiffs.

5 It is fairly easy for a plaintiff to establish that requests for personnel files are burdensome. Because this information is only available from plaintiff's employer, the disclosure of personnel files is particularly intrusive and may prejudice plaintiff at their workplace. Therefore, defendants should be prepared to justify their personnel file requests considering the burdens that will naturally accompany the request.

6 [Article title, author, date, available at, last visited.] https://www.flastergreenberg.com/newsroom-articles-Courts_Apply_Revised_Rules_and_Limit_Discovery_in_Employment_Litigation.html.

7 CHAPTER 17: PERSONNEL FILES, 2003 WL 5322926

8 [Article title, author, date, available at, last visited.] https://www.flastergreenberg.com/newsroom-articles-Courts_Apply_Revised_Rules_and_Limit_Discovery_in_Employment_Litigation.html

of the Court reviewing them and only allowing the defendant to obtain certain portions of the files that the Court deemed to be relevant. This fallback approach might be one to take, if the defendant is at risk of having its discovery requests denied outright. If done properly, defendants can still obtain all the pertinent information they need to defend their cases.

Conclusion?

Lightfoot

Increased Scrutiny Over the Discovery of Personnel Files

Kevin E. Clark

April 29, 2023
lightfootlaw.com

TRIAL TOUGH. SOLUTION SAVVY.

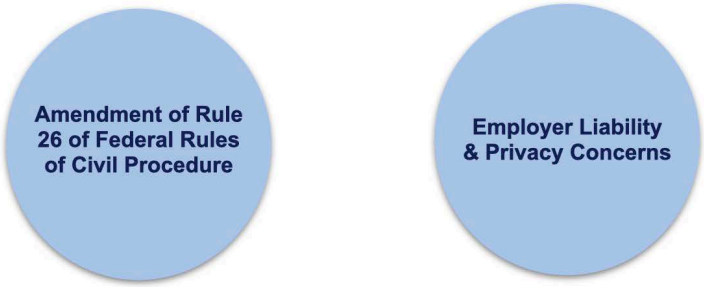
Introduction

- *Whittingham v. Amherst Coll.*
- *Sunrise Sec. Litigation*
- Based on this case law, the discovery of personal files is only permissible if
  - "(1) the material sought is 'clearly relevant,' and (2) the need for discovery is compelling because the information sought is not otherwise readily obtainable"
- "We are seeing increased protection for personal and private information leading to increased scrutiny when seeking the disclosure of personal files"

Discoverable Personnel Files

1. Performance Evaluations
2. Workplace Investigation Notes
3. Incident Reports
4. Promotion & Demotion Records
5. Discipline & Termination Records
6. Training Records

Reasons for Limited Scope of Discovery



Amendment of Rule 26

Rule 26 of Federal Rules of Civil Procedure, amended in 2015

- Encourages more stringent analysis of discovery requests
- Limits discovery to directly relevant information to specific claims rather than a fishing expedition regarding plaintiffs career or performance

Employer Liability

Disclosure of personnel files could expose employers to claims of:

- Defamation
- Invasion of privacy
- Interference with contractual relations

Laws that limit participation for employers:

- Americans with Disabilities Act
- The Family Medical and Leave Act
- HIPAA

Overcoming Discovery Barriers

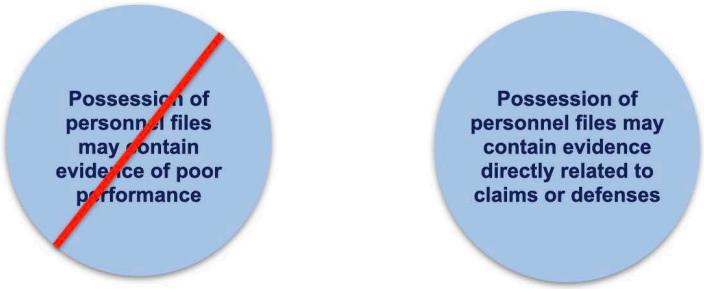
Aside from the considerations of Amended Rule 26, consider past applications in case law

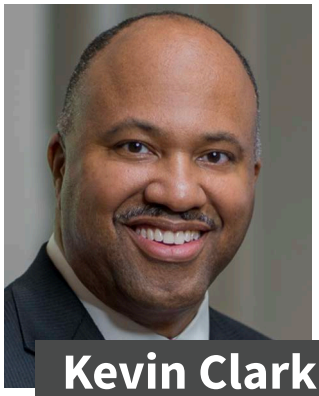
"Courts … have started limiting discovery to information relevant to the parties' specific claims and defenses … as opposed to the traditionally broader scope that allowed exploration of the general subject matters of the case."

https://www.flastergreenberg.com/newsroom-articles-Courts_Apply_Revised_Rules_and_Limit_Discovery_in_Employment_Litigation.html

Overcoming Discovery Barriers

Example of general application of Amended Rule 26





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Kevin Clark loves the art of oral advocacy and it shows.

Kevin has successfully argued hundreds of motions and tried several jury trials in state and federal courts throughout Alabama and across the country. He is a frequent speaker at national legal conferences and seminars hosted by the Defense Research Institute (DRI), The Trial Network and other legal organizations. He also regularly speaks for local schools and civic organizations, and routinely preaches for churches across the country.

Kevin's legal practice spans a wide variety of civil litigation matters, including catastrophic injury, product liability, toxic torts, medical malpractice, employment discrimination and consumer fraud. Kevin also has significant experience defending clients in class action litigation. In addition to litigating cases, he provides training and consulting services for his employment law clients.

Practice Areas

- Catastrophic Injury
- Product Liability
- Automotive
- Employment Law
- Medical Malpractice
- Environmental & Toxic Torts
- Consumer Fraud & Bad Faith
- Commercial Litigation
- Class Actions
- Professional Liability
- Appellate

Awards

- The Best Lawyers in America© by BL Rankings, "Lawyer of the Year" for Birmingham — Tort Litigations/Class Actions (2022)
- The Best Lawyers in America© by BL Rankings — Mass Tort Litigation/Class Actions (2020-22), Product Liability Litigation (2021-22)
- Alabama Super Lawyers by Thomson Reuters — Personal Injury Defense: General, Product Liability Defense (2013-15)
- Alabama Super Lawyers by Thomson Reuters, "Rising Star" — Environmental Litigation (2012)
- Birmingham MS Leadership Class of 2017
- Birmingham Times, "Birmingham Lawyers on the Rise" (2018)
- Mid-South Super Lawyers by Thomson Reuters — Product Liability (2016-17)
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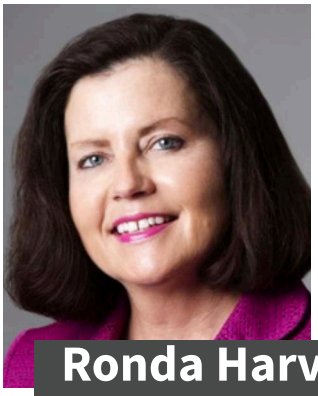


Panel: From the Trenches - Preparing and Presenting Corporate Designees for Depositions

Ronda Harvey
Bowles Rice (Charleston, WV)

From the Trenches – Preparing and Presenting Corporate Designees for 30(b)(6) Depositions
Ronda L. Harvey

I. INTRODUCTION

A Rule 30 (b)(6) corporate representative deposition, while one of the most powerful tools in a lawyer's discovery toolbox, is also one of the most abused. Federal Rule 30(b)(6) has been around for several years, originally enacted in 1970. According to the Advisory Committee Notes to the Rule, the purpose of the Rule was threefold: to (1) reduce the difficulty in determining whether a particular employee or agent is a "managing agent" (one whose statements could be imputed to the organization); (2) curb the practice of bandying "by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it;" and (3) assist organizations which "find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge." Whether the Rule has accomplished any of these purposes is certainly debatable. While the party seeking a Rule 30 (b)(6) deposition may have some of these goals in mind, the Notice for the deposition is often very broad, vague, and burdensome for the recipient.

An article in the National Law Journal, co-authored by one of the deans of the American litigating bar, illustrates the dangers. Observing that the Rule 30(b)(6) deposition rule "revolutionized the discovery of corporate entities," the authors urge every litigant to use this procedure for all depositions of corporations as a way to force corporations to prepare an omnibus witness with knowledge of all facts anyone associated with the corporation may know. Furthermore, the authors recommend the Rule as a means to obtain "binding admissions" for use on summary judgment or at trial. The Rule 30(b)(6) device is vaunted as a major "offensive weapon to bind entities." These claims are demonstrably false and only serve to highlight the mischief that a misguided reading of Rule 30(b)(6) may engender. Depositions of entities under this Rule were never intended to serve these purposes, and attempts to warp the Rule into a device to achieve these ends creates significant unfairness and abuse. Sinclair and Fendrich, supra.

II. The Rule

Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

III. Receipt and Review of the Notice

On occasion, the party requesting a Rule 30(b)(6) deposition may do so informally and discuss the subject matters with the opponent ahead of time. Often, the Notice comes unannounced with several

pages of open-ended subject matters. What happens next? The recipient should review the Notice very carefully and make sure that it adheres to Rule 30 (b)(6), which requires the subject matters for examination to be described "with reasonable particularity." If the Notice is not fully compliant with the Rule, counsel should object. While counsel may certainly file objections, often the objections are first raised in written correspondence in an effort to "meet and confer" with the opponent as required by Rule 26 (c) (1). This written correspondence should include all objections or counsel runs the risk of the opponent claiming waiver of late-raised objections.

In cases where the defendant is a large corporation, the Rule 30 (b)(6) Notice is often viewed with trepidation because the Notice invariably contains very vague and broad subject matters that seem to seek everything including the kitchen sink. At this stage, the recipient may engage in some horse-trading to negotiate appropriate topics during the meet and confer. If the parties are unable to agree, the receiving party should file a Motion for Protective Order. The Motion should seek a temporary stay until the disputed issues are resolved. It is very important to narrow or clarify the subject matters so that the corporate representative can be prepared to address the subject matters.

IV. DESIGNATING THE CORPORATE REPRESENTATIVE

Once the subject matters are properly tailored to meet the "reasonable particularity" requirements, the Rule then requires designation of one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify." Importantly, the corporate representative need not have personal knowledge of the facts to which he testifies because he testifies as to the corporation's position, not his personal opinion. PPM Finance, Inc. v. Norandal USA, Inc., 297 F. Supp. 2d 1072 (N.D. Ill. 2004).

The witness need not be a current employee or officer of the corporation. Indeed, the best person to testify may be a former employee or even an expert. The right witness may differ, depending on the subject matter at issue, and the corporation can designate more than one representative. Counsel should be mindful of the seven-hour deposition time limit and an argument from the opponent that the deposition of each representative under Rule 30 (b)(6) should be considered a separate deposition. Thus, designating two testifying witnesses may yield 14 hours in deposition time.

V. DUTY TO PREPARE THE WITNESS & DESIGNATING DOCUMENTS

Once the issue of who will testify as corporate representative is settled, next comes preparation. A corporation has an affirmative duty to provide a witness who is prepared to discuss the subject matters and provide binding testimony on behalf of the corporation. While the Rule is not designed to force a memory contest, the corporation's duty requires a good faith effort to prepare the witness to testify fully and provide non-evasive answers regarding the subject matters.

How far does the duty extend? In other words, what is required to properly prepare the testifying witness? One court summarized cases from across the federal courts into 39 points, which it characterized as the "litigation commandments and fundamental passages about pre-trial discovery" and states in point 23: "The rule implicitly requires the corporation to review all matters known or reasonable [sic] available to it in preparation for a Rule 30 (b)(6) deposition." QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 690 (S.D. Fla. 2012). The available materials may be fact witness depositions, exhibits to depositions, documents produced in discovery and materials in employee files, which may in turn require interviews of employees, former employees, or others with knowledge.

What happens if the corporation has no documents or employees with knowledge about certain subject matters and cannot acquire that knowledge from any reasonable means? If the corporation cannot provide testimony because it lacks information or knowledge, then "its obligations under the Rule cease." Id. The key in this inquiry is whether the corporation acted reasonably and in good faith. Be warned though: the lack of an answer can be considered a binding answer. If the corporate

witness answers a question during the deposition with "we don't know," this response can prohibit the corporation from later offering evidence at trial on the same point. One goal of the Rule is to prevent sandbagging. Thus, a corporation cannot make a "half-hearted inquiry before the deposition but a thorough and vigorous one before the trial." Id.

The same standard applies to document review. If documents are germane to the subject matters, then the witness must make a good faith effort to review the documents. What about summaries or charts prepared by counsel in an effort to simplify the preparation process? Courts are mindful of the need to ensure that the attorney-client privilege and the work product doctrine are protected. However, courts recognize a more pressing need for these documents in the Rule 30(b)(6) context. "Parties have a "heightened need to discover" documents used to prepare witnesses designated under FRCP 30(b)(6)." Adidas Am., Inc. v. TRB Acquisitions LLC, 324 F.R.D. 389, 397 (D. Or. 2017)(citations omitted). To ensure both issues of privilege and the need for access to these documents are both considered, courts often apply a balancing test. Id. at 399. This balancing of interests was recently applied in the Sixth Circuit in Baxter Int'l, Inc. v. Becton, Dickinson & Co., 2019 WL 6258490, at *11 (N.D. Ill. Nov. 22, 2019), where the Court stated "we must balance, on the one hand, the need to protect the attorney-client privilege and the desire to encourage thorough preparation of corporate deposition witnesses against, on the other hand, the need for the disclosure of documents to allow a witness to be fully examined." In other words, designation of documents for preparation of a Rule 30(b)(6) deponent will most likely require a case-by-case analysis. The concept of preparing an index indicating privilege and work product may be the most helpful way to prepare for a potential challenge. Also, case-specific Case Management Orders may contain specific requirements for disclosure of preparation documents.

VI. SCOPE OF EXAMINATION and BEYOND THE SCOPE OF THE NOTICE

During a Rule 30(b)(6) deposition, an inherent tension exists between the corporate representative's knowledge of the subject matters and the particularity of the subject areas delineated in the notice. As one commentator noted, "[t]his tension underscores the importance of drafting the Rule 30(b)(6) notice with care to seek a balance between a notice that is both general enough to cover the topics the requesting attorney wants to learn about (without getting so broad as to be unduly burdensome), yet specific enough to give the corporation enough direction to be able to prepare a witness to provide the information that the requesting attorney really wants." Hon. Sidney I. Schenkier, "Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6)," 29 No. 2 Litigation 20 (Winter ed., 2003). Thus, the two oft-occurring objections from counsel present at a Rule 30(b)(6) deposition are: (1) "your witness is totally unprepared to answer questions concerning the subject matters listed in the notice;" and, (2) "that question is beyond the scope of the subject matters provided in the notice." This is often a balancing test that may be presented to the Court in motions for sanctions after the deposition.

Can a witness refuse to answer a question that is arguable beyond the scope of the deposition? A few decades ago, authorities were arguably split on this issue. See Paparelli v. Prudential Ins. Co., 108 F.R.D. 727, 730 (D. Mass. 1985) (the Court concluded that the examining party "must confine the examination to the matters in the notice," after reasoning that a "limitation on the scope of the deposition to the matters specified in the notice is implied in the rule"); but see King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (the Court concluded that although the examining party is not limited to asking questions only within the scope of the 30(b)(6) notice, the notice still serves as a limitation on "a corporation's obligations regarding whom they are obligated to produce for such a deposition and what that witness is obligated to answer"). Some courts today allow questions outside the scope of the Notice to be asked during the deposition, but those questions "will not bind the organization, and the organization cannot be penalized if the deponent does not know the answer." E.E.O.C. v. Freeman, 288 F.R.D. 92, 98–99 (D. Md. 2012).

From a practical perspective, the transcript can become messy if the witness is allowed to toggle back and forth between the witness' role as a corporate representative offering binding corporate

testimony and the witness' individual, personal knowledge that does not bind the corporation. For a clean and clear record, the witness should keep the answers within the arena of corporate knowledge, even though they may be called again as an individual fact witness. If opposing counsel suggests combining the two into one deposition, counsel for the corporate representative must weigh the convenience of one deposition against the confusing nature of essentially two types of testimony presented in that single deposition and, importantly, must be sure the witness clearly indicates when the witness is offering personal testimony or corporate representative testimony.

VII. DANGER! THE BINDING EFFECT OF RULE 30(b)(6) DEPOSITIONS

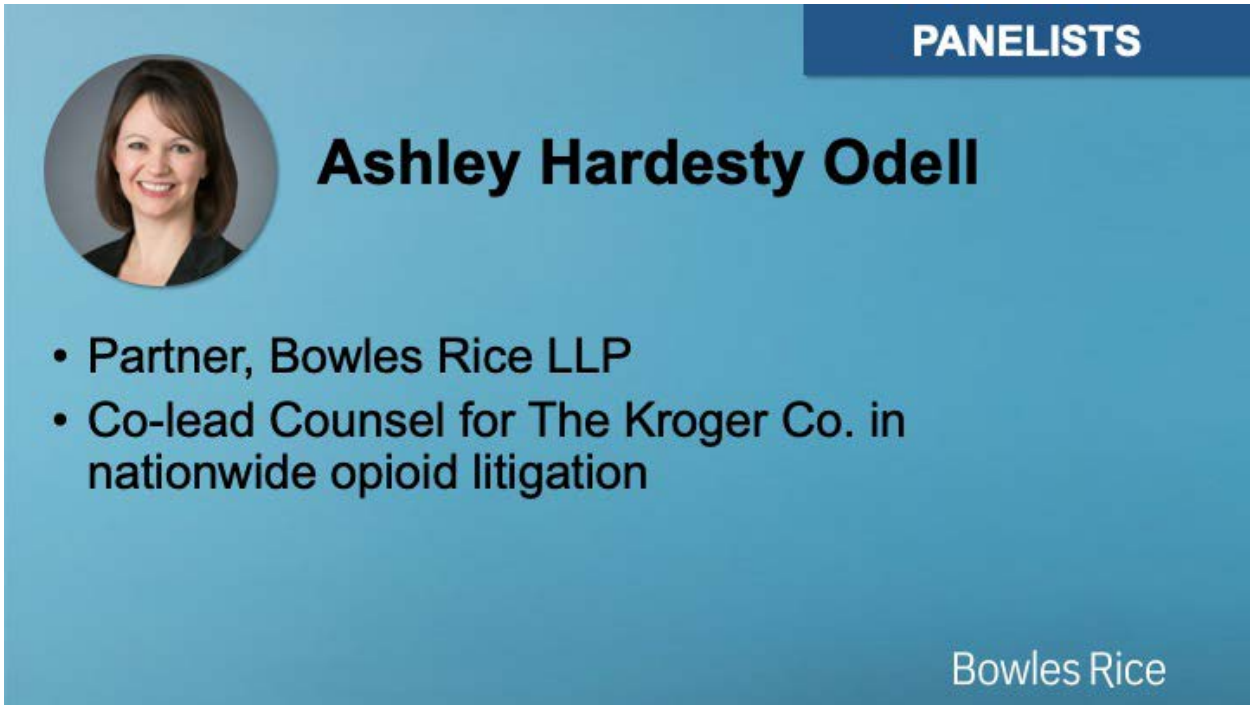
The most dangerous aspect of Rule 30(b)(6) depositions is potentially the "binding" effect of such testimony. Since the witness is "testifying" for the organization, the testimony elicited is "binding" on the organization. The witness must give "complete, knowledgeable and binding answers on behalf of the corporation." Bigsby v. Barclays Capital Real Estate, Inc., 329 F.R.D. 78, 80 (S.D.N.Y. 2019) (explaining that a corporate deponent "has an affirmative duty to make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf").

What does "binding" mean? Can the testimony be used against the organization for "any purpose" like other party depositions? Is it a judicial admission? Luckily, most courts hold that it is not a judicial admission and that evidence at trial may explain or contradict the testimony or statement. See Continental Cas. Co. v. First Fin. Employee Leasing, Inc., 716 F. Supp. 2d 1176, 1190 (M.D. Fla. 2010) (explaining that Rule 30(b)(6) testimony "does not constitute a judicial admission and the corporation 'is no more bound than any witness is by his or her prior deposition testimony'").

Other courts treat the testimony as equal to "judicial admissions." See Rainey v. Am. Forest & Paper Assoc., 26 F. Supp 2d 82, 94 (D.D.C. 1998) (binding for summary judgment purposes unless the party can prove that the information was not known or was inaccessible at the time of deposition). In Rainey, the statement could not be contradicted by affidavit in opposition to the summary judgment motion. But see A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630 (7th Cir. 2001) (disagreeing with Rainey); see also United States ex rel. Landis v. Tailwind Sports Corp., 292 F. Supp. 3d 211, 217 (D.D.C. 2017) (recognizing that "the broad principle that testimony of a Rule 30(b)(6) representative binds the designating entity has been expressly repudiated by every court of appeals to consider the issue").

The best rule seems to be that the testimony is like any other testimony and can be contradicted or used for impeachment purposes. But beware, this is unsettled law, and the testimony of the corporate representative may be very hard to deal with at trial or at summary judgment stages. A corporation defendant could, and most likely will, be precluded from introducing last-minute affidavits at the summary judgment stage on crucial factual issues that contradict prior Rule 30(b)(6) testimony unless the corporation defendant can prove that the information presented in the affidavit was not known or was inaccessible at the time of the Ryle 30(b)(6) deposition. See United States ex rel. Landis v. Tailwind Sports Corp., 292 F. Supp. 3d 211, 217 (D.D.C. 2017) (explaining that contradictory affidavits may be excluded for the narrow purpose of avoiding "ambush-by-declaration"—late-stage attempts to introduce affidavits that directly contradict prior 30(b)(6) testimony). Counsel should thoroughly consider case law for each specific jurisdiction when planning and preparing for the corporate representative deposition.


Rule 30 (b)(6) Corporate Designee Deposition
Ronda Harvey, Esq.
Bowles Rice


PANELISTS
Ashley Hardesty Odell
• Partner, Bowles Rice LLP
• Co-lead Counsel for The Kroger Co. in nationwide opioid litigation
Bowles Rice

PANELISTS

Jaime McDermott, R.Ph.

- The Kroger Co.
- Manager of Pharmacy Controlled Substance Compliance
- Former Manager Patient Safety and DEA Compliance
- Corporate Representative for Dispensing

Bowles Rice

PANELISTS

Levi Brehm

- The Kroger Co.
- Senior Compliance Analyst
- Former Asset Protection Supervisor
- Corporate Representative for Distribution

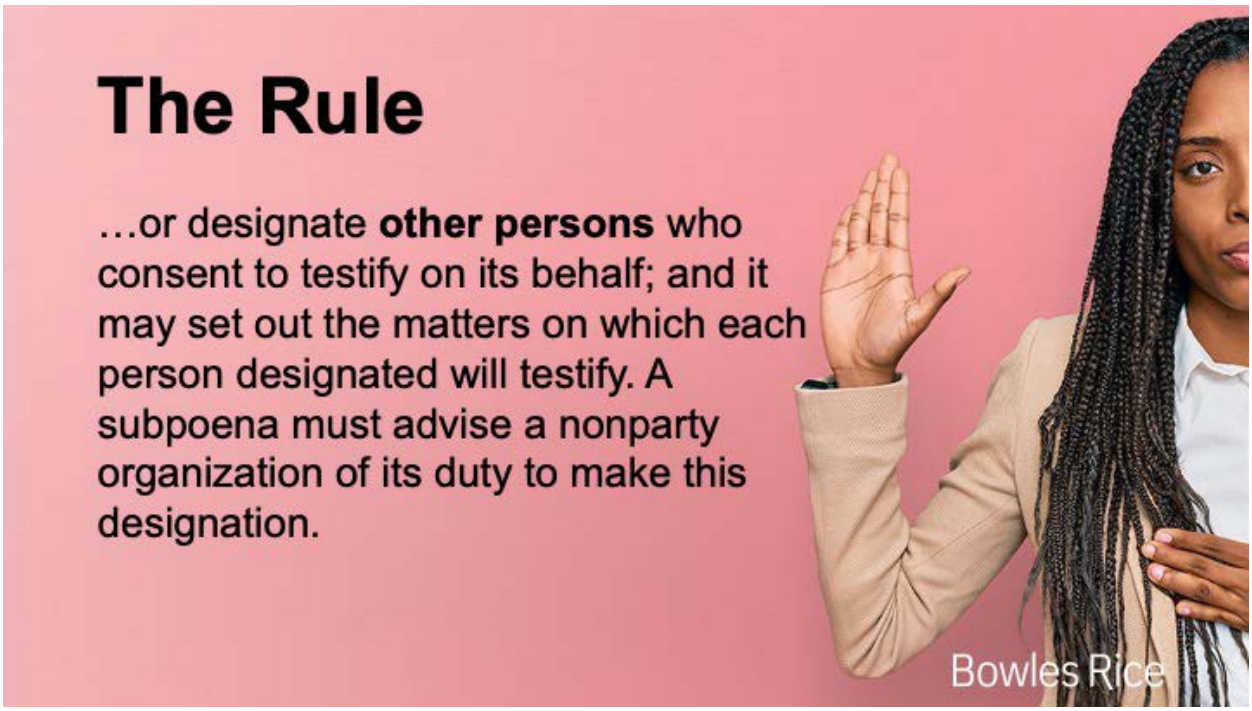
Bowles Rice

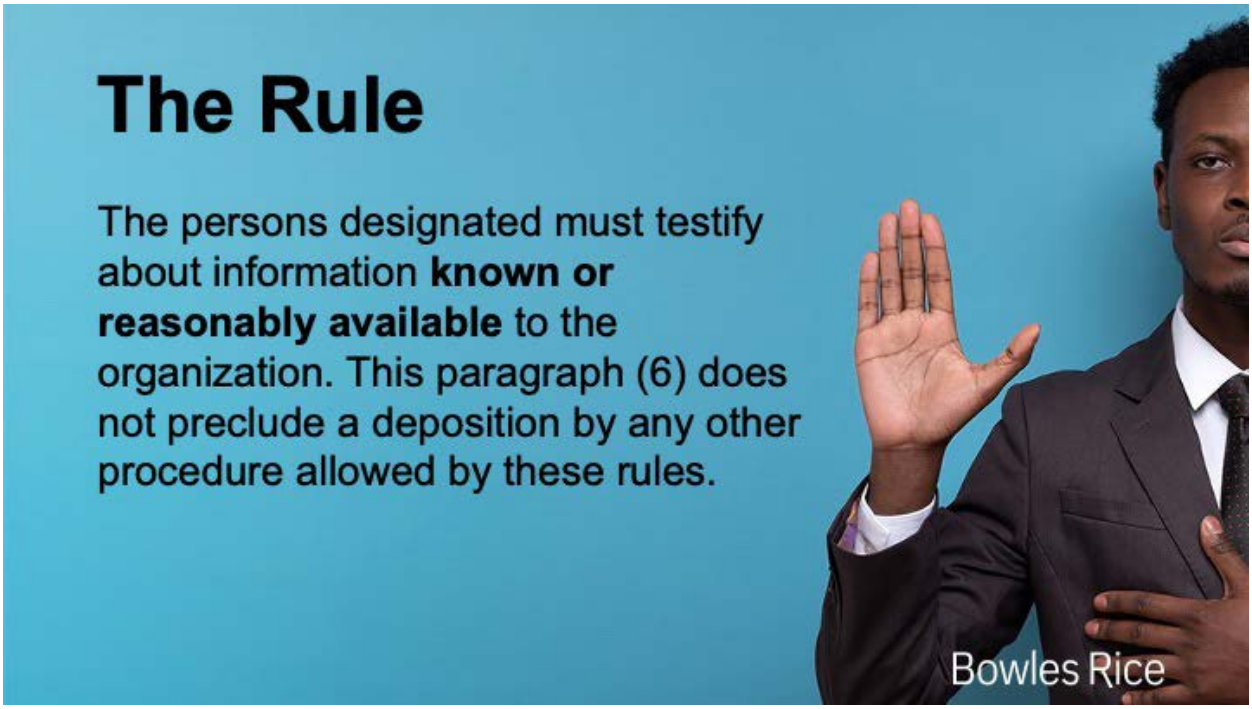
The Rule

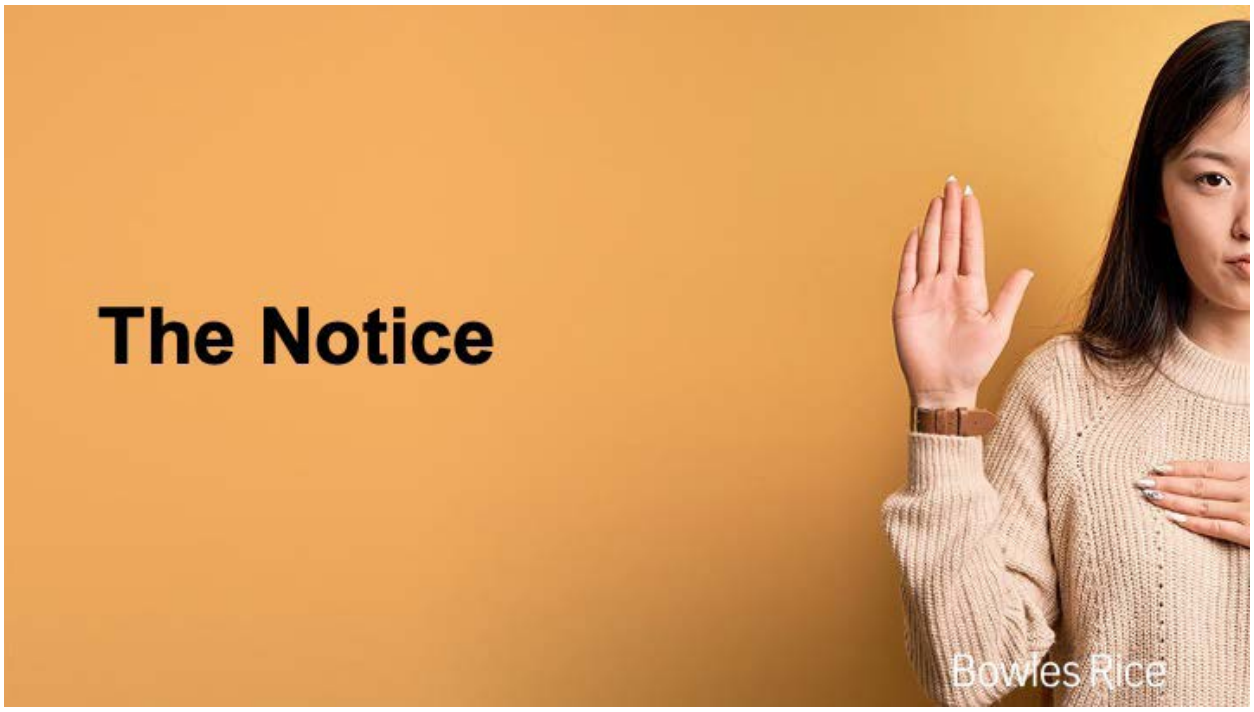
Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity…

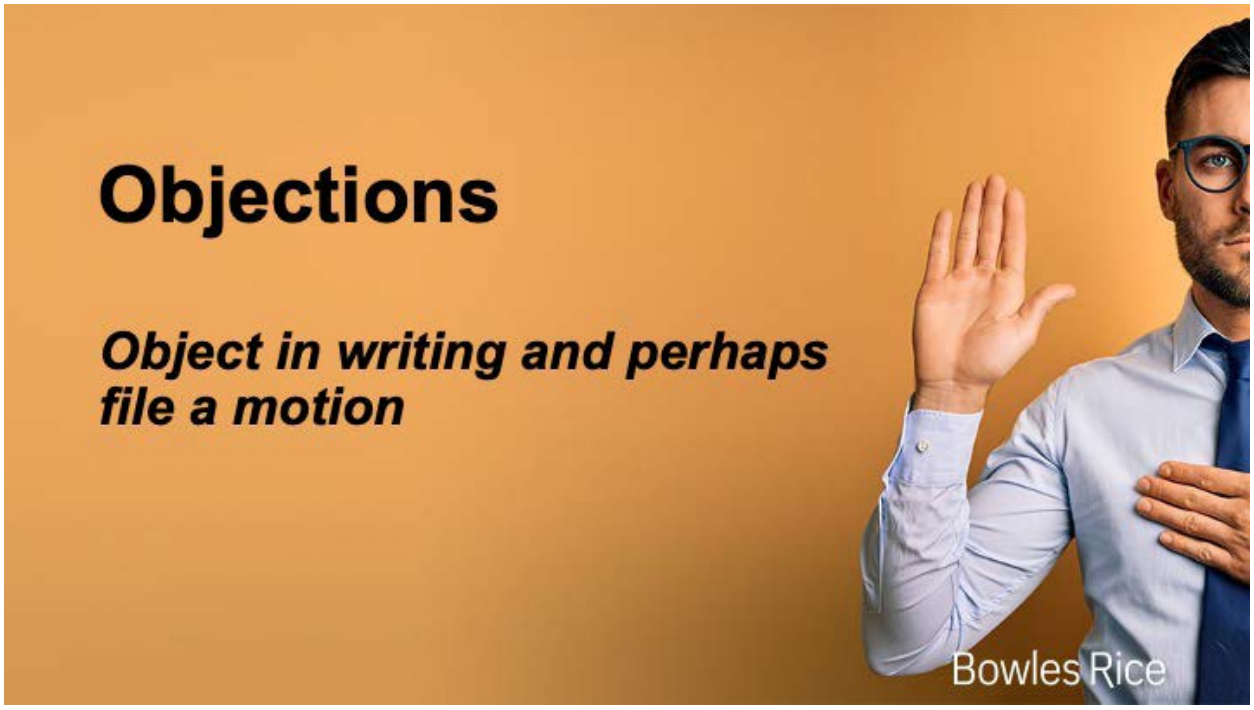
The Rule

…and must describe with **reasonable particularity** the matters for examination. The named organization must then designate one or more officers, directors, or managing agents,…


The Rule
…or designate **other persons** who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation.
Bowles Rice


The Rule
The persons designated must testify about information **known or reasonably available** to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.
Bowles Rice

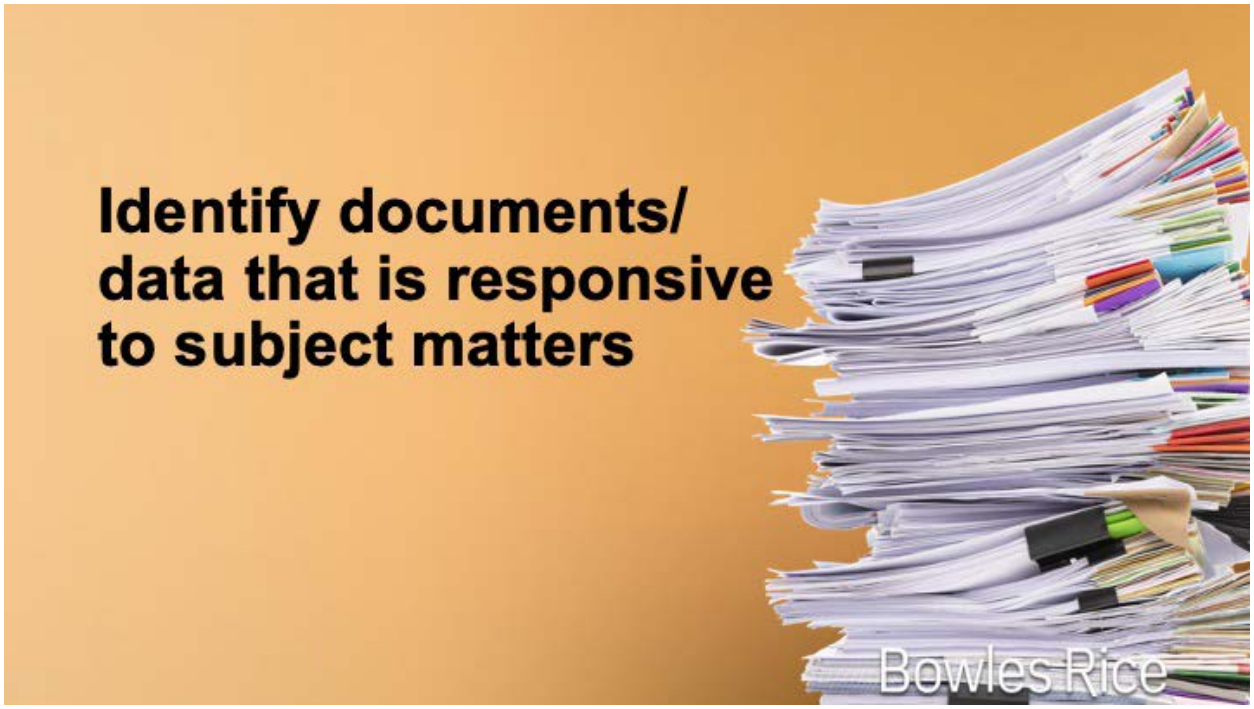

The Notice
Bowles Rice


Objections
Object in writing and perhaps file a motion
Bowles Rice

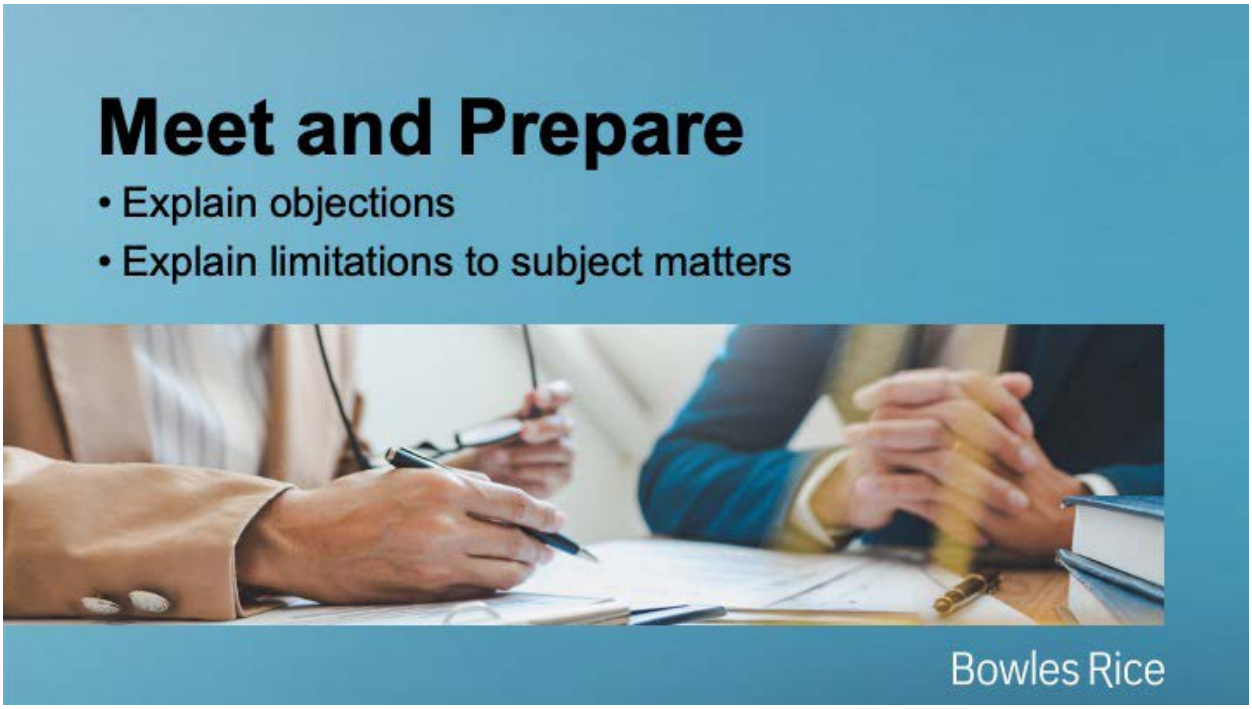

Meet-and-confer to reach agreement on Subject Matters for Examination
Bowles Rice


Identify Corporate Representative
• Most knowledgeable on subject matters
• Doesn't have to be current employee
• Could hire someone
Bowles Rice

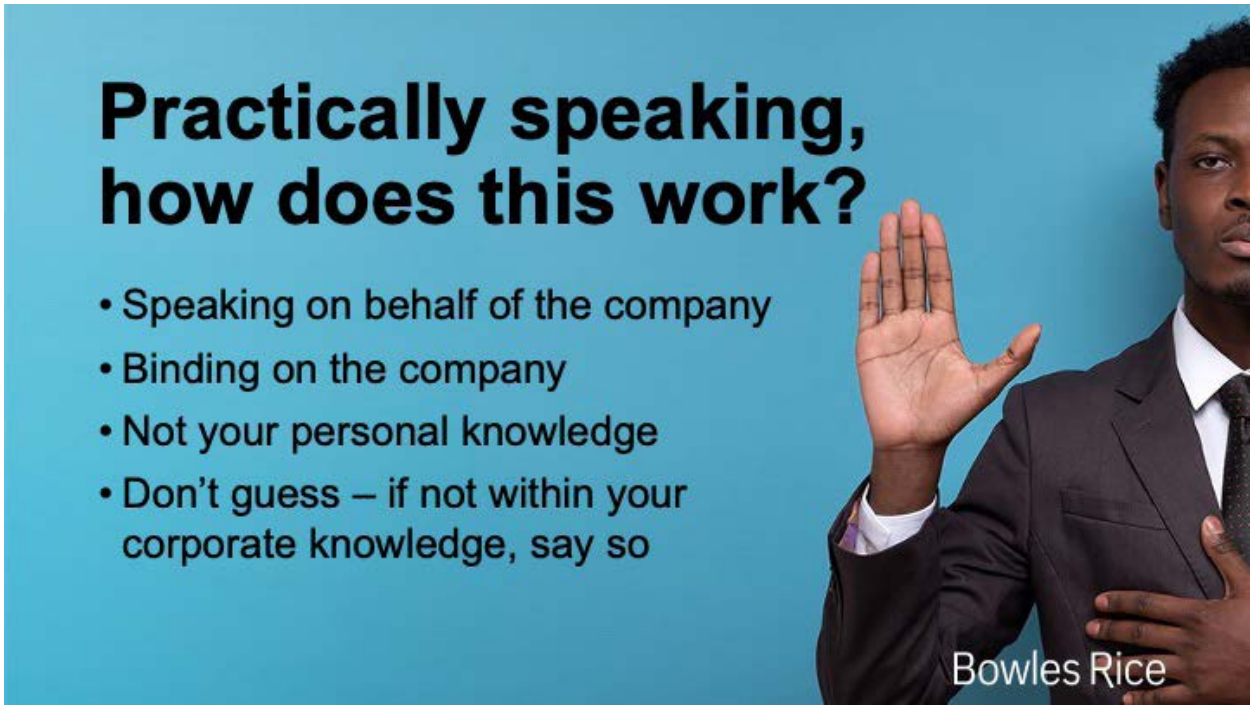

Duty to Prepare
Bowles Rice

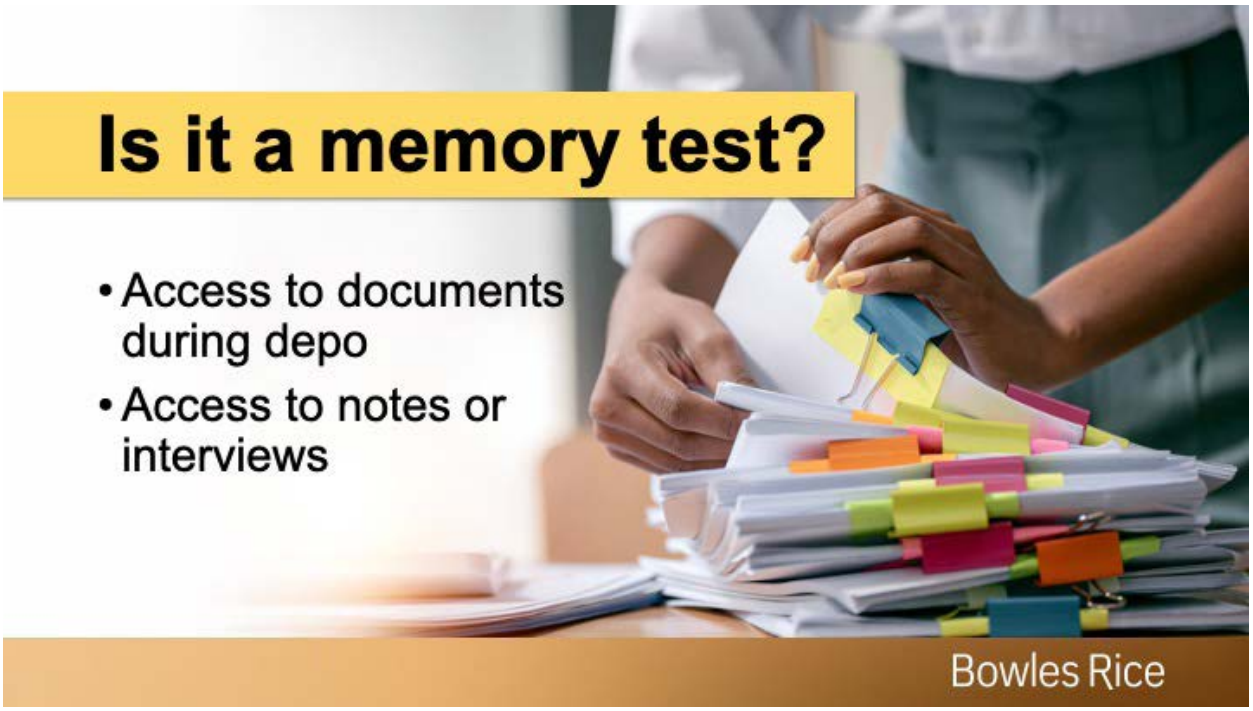

Identify documents/
data that is responsive
to subject matters
Bowles Rice

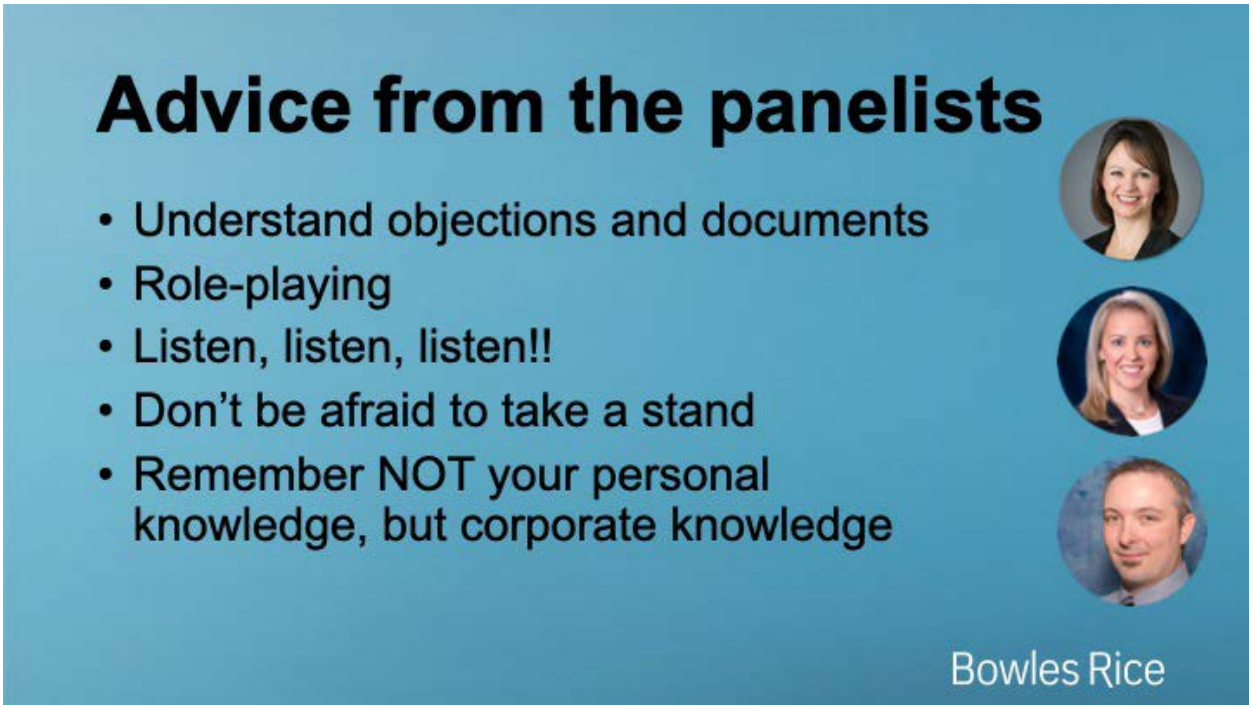

Share documents/ data with corporate representative
Bowles Rice


Meet and Prepare
• Explain objections
• Explain limitations to subject matters
Bowles Rice


More preparation
•Role-playing
•Ask tricky questions
•Include defense lawyer to object
Bowles Rice


Practically speaking, how does this work?
• Speaking on behalf of the company
• Binding on the company
• Not your personal knowledge
• Don't guess – if not within your corporate knowledge, say so
Bowles Rice

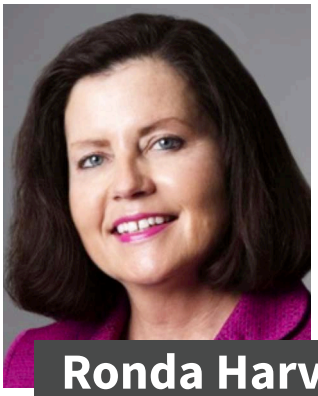

Is it a memory test?
• Access to documents during depo
• Access to notes or interviews
Bowles Rice


Advice from the panelists
• Understand objections and documents
• Role-playing
• Listen, listen, listen!!
• Don't be afraid to take a stand
• Remember NOT your personal knowledge, but corporate knowledge
Bowles Rice

More from the panelists…

- Biggest Challenge?
- Heated objections?
- Qualities for strong witness?

Bowles Rice



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Ronda Harvey

Partner | Bowles Rice (Charleston, WV)

Ronda Harvey focuses her practice on employment litigation. She also advises clients on a wide variety of human resources issues.

A significant part of Ronda's practice for the past 25 years has been defending employers in lawsuits brought by employees in both state and federal courts. She has successfully tried cases to verdict for employers, and represents them in administrative proceedings. She has successfully argued appeals to the West Virginia Human Rights Commission on behalf of employers. She currently provides representation to a state agency in claims involving retirement benefits.

Ronda works with employers in a variety of industries, including manufacturing, health care and energy. She understands that each client is unique, and works in partnership with her clients to fully understand their business and help them manage the regulatory minefield of employment issues. She frequently provides training to managers and supervisors on both human resource and safety issues.

Her experience and successful representation of employers, including Fortune 500 companies, has earned her a preeminent AV rating from Martindale Hubbell, long considered the gold standard in the legal profession. Based on feedback from her peers and clients, she also is recognized by the leading peer review organizations in the legal industry, including Chambers USA's Leading Lawyers for Business; Best Lawyers in America; and Super Lawyers for her litigation practice.

Practice Areas

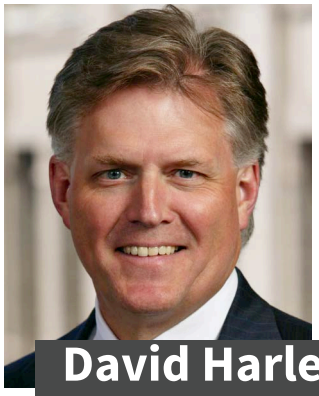
- Labor and Employment
- Deliberate Intent and Workplace Safety
- Product Liability Defense
- Litigation
- Mass Tort and Toxic Tort Defense
- CARES Act / COVID-19 Response Team
- Higher Education

Honors

- Named a 2020 "State Litigation Star" in Labor/Employment by Benchmark Litigation
- Recognized by Chambers USA: America's Leading Lawyers for Business among "Leaders in their Field" for Litigation: General Commercial (since 2015)
- Named to The Best Lawyers in America ® (Product Liability Litigation - Defendants), 2013-present
- Peer-Review Rated AV by Martindale-Hubbell
- Named as Super Lawyer in General Litigation
- National Academy of Jurisprudence Premier 100 Trial Attorneys of West Virginia

Education

- J.D., West Virginia University College of Law (1993)
- B.S., West Virginia University (1984)



Mitigating "Forever" Liability When Faced with "Forever" Chemicals Claims

David Harless
Christian & Barton (Richmond, VA)

Mitigating "Forever" Liability When Faced with "Forever" Chemicals Claims
W. David Harless

I. THE BEGINNING[1]

Wilbur Earl Tennant lived and raised cattle on a fourth-generation family farm near Parkersburg, West Virginia. In July 1996, Tennant filmed the water in Dry Run, a creek that ran through his property. The water, once clear, now looked like dirty dishwater. Bubbles formed. Foam thick enough to poke it with a stick and leave a hole gathered in the eddies. The water smelled rotten. "That's the water right there, underneath that foam," Tennant said.… "How would you like your livestock to have to drink something like that?" The source of Dry Creek was a pipe flowing out of a collection pond located at the low end of a landfill opposite his property line.[2]

Two weeks later, Tennant filmed one of his cows, a polled Hereford, in an open field. The cow's calf lay dead nearby. In another field an adult cow lay dead, crusted with diarrhea, hip bones protruding from a diminished carcass, and sunken eyes. Its death occurred 20-30 minutes earlier following the stillborn death of its calf. Tennant had lost approximately 100 calves and more than 50 cows during the past two years.[3]

In October 1998, Tennant and his wife met with a young lawyer in Cincinnati, Ohio, Robert Bilott, the grandson of a Parkersburg friend. Tennant requested Bilott's assistance, and Bilott ultimately agreed to take his case. Bilott investigated Tennant's claims and eventually filed suit on behalf of Tennant and his family against DuPont.[4] In discovery, Bilott learned that DuPont had for years manufactured Teflon at its Parkersburg Plant, also known as Washington Works. In doing so, DuPont used the chemical compound perfluorooctanoic acid ("PFOA"), which was manufactured by 3M. PFOA is one of thousands of chemical compounds falling within the category of per-and polyfluoroalkyl substances ("PFAS"). Bilott alleged that for at least 25 years, DuPont, and/or its supplier of PFOA, 3M, had conducted laboratory animal studies on PFOA, including studies in 1978 and again in 1999 on monkeys, that had resulted in death for high-dosage monkeys and toxicity in the lowest dose monkeys.[5] Further, Bilott contended that in 1994 DuPont began dumping liquid sludge containing high levels of PFOA into the Dry Run landfill, the source of water for Dry Run creek.[6] In July 2001, Bilott settled the Tennant family claims against DuPont confidentially. There remained, however, the unresolved matter of DuPont's alleged contamination of the Ohio River and the drinking water of the residents in and around and downstream from Parkersburg.

In August 2001, Bilott and local West Virginia counsel filed a class action against DuPont in West Virginia state court seeking relief in the form of DuPont's underwriting of the expense for medical monitoring of members of the class and remediation of the contaminated public and private water sources.[7] In 2002, the trial court certified a class of 80,000 individuals whose drinking water had been contaminated by PFOA allegedly attributable to

1 The summary of events described in this section were sourced from and are addressed in much greater detail in Robert Bilott's book, Exposure: Poisoned Water, Corporate Greed, and One Lawyer's Twenty-Year Battle against DuPont (Atria Books 2019).

2 Id. at 4, 6.

3 Id. at 5, 7.

4 Tennant v. E.I. du Pont de Nemours & Co., No. 6 :99-cv-0488 (S.D. W. Va. 1999) (Tennant lawsuit).

5 Id. at 73-74.

6 Id. at 83.

7 Leach v. E.I. du Pont de Nemours & Co., No. 01-C-698 (W. Va. Cir Ct.) (Leach class action).

DuPont's discharges from its Washington Works plant. In 2005, the parties entered into a class-wide settlement that among its provisions required DuPont to: (1) fund the design, installation, operation, and maintenance of a water treatment project devoted to reducing the level of PFOA in the drinking water supply to the lowest practicable levels; (2) fund a broad epidemiological study into the effects of PFOA on the community performed by three independent epidemiologists ("Science Panel"); (3) underwrite the expense of medical monitoring of class members for the diseases determined by the Science Panel to be linked to PFOA exposure; (4) make payments to each class member, receipt of which was contingent upon each class member's submission to a full medical examination funded by DuPont; and (5) pay the attorneys' fees and expenses for class counsel.[8] A final provision of the Leach class settlement was that the Leach plaintiffs reserved their rights to all personal injury claims, if any, against DuPont, and could assert those claims later if they suffered a disease or condition later identified by the Science Panel as having a likely link between exposure to PFOA and the plaintiff's disease or health condition.

The Science Panel's study continued for seven years. Over 69,000 class members provided blood samples and medical records, constituting one of the largest domestic epidemiological studies ever. In 2012, the Science Panel reported its conclusion—exposure to PFOA was probably linked to six diseases/conditions: kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol, and pregnancy-induced hypertension and preeclampsia.

Thereafter, members of the Leach class having one or more of the six diseases/conditions identified by the Science Panel filed approximately 3,500 cases against DuPont in accordance with the Leach class settlement agreement. Those cases were then consolidated in an MDL proceeding before the United States District Court for the Southern District of Ohio.[9] The parties selected, and the MDL court approved, six cases for which the Court would conduct bellwether trials.

The first case was tried in October 2015. The jury awarded $1.6 million in compensatory damages to a 59-year-old grandmother who was diagnosed with kidney cancer after drinking PFOA-contaminated water for 17 years.[10] In July 2016, Bilott and his colleagues presented another claim on behalf of a college professor who suffered testicular cancer and survived surgery that entailed the removal of one of his testicles and several lymph nodes in his abdomen. The jury awarded him $5.1 million in compensatory damages and $500,000 in punitive damages.[11] A third bellwether trial resulted in a verdict of $2 million in compensatory damages, and $10.5 million in punitive damages in favor of a testicular-cancer victim.[12] During the fourth bellwether trial in February 2017, DuPont agreed to pay $670.7 million to settle all of the cases in the MDL, including the cases that had already gone to trial.[13]

In February 2020, in a trial proceeding outside settlement of the MDL, a jury rendered a $40 million award against DuPont in favor of a man from Ohio who had been exposed to PFOA contaminated water since age six and had suffered testicular cancer since age 16. The Sixth Circuit Court of Appeals affirmed the judgment in December 2022.[14]

II. THE FAMILY OF PFAS

PFAS are a family of thousands of compounds used in myriad commercial applications due to their unique properties, such as resistance to high and low temperatures, resistance to degradation, and nonstick characteristics. PFOA and perfluorooctane sulfonate ("PFOS") are generically referred to as "C8" because they share an 8-carbon chain (C8) structure. They are considered currently the most toxic PFAS to humans, wildlife, and the environment. Particular concern over potential adverse effects on human health grew in the early 2000s with the discovery of PFOA and PFOS in human blood. Since

8 Class Action Settlement Agreement, Leach v. E.I. du Pont de Nemours & Co., No. 01-C-698 (W. Va. Cir Ct.) (http://www.c-8medicalmonitoringprogram.com/docs/Settlement_Agreement.pdf). DuPont agreed to pay over $400 million as a result of this settlement, of which $235 million was dedicated to a Medical Monitoring Fund payable if the Science Panel reached a "Probable Link Finding" with respect to any disease.

9 In Re: E. I. Du Pont de Nemours and Company C-8 Personal Injury Litigation, 2:13-md-02433 (S.D. Ohio) (DuPont MDL).

10 Bilott, supra, at 335, 351-53.

11 Id. at 359, 363.

12 Id. at 363.

13 Id. at 364; DuPont Reaches Global Settlement of Multi-District PFOA Litigation, DuPont Press Release, https://www.dupont.com/news/dupont-reaches-global-settlement-of-multi-district-pfoa-litigation.html (last visited March 12, 2023).

14 In Re: E. I. Du Pont De Nemours and Company C-8 Personal Injury Litigation: Abbott v. E. I. Du Pont De Nemours and Company, 54 F.4th 912 (6th Cir. 2022).

that time, hundreds of PFAS have been identified in water, soil, and air. Many PFAS are environmentally persistent, bio-accumulative, and have long half-lives in humans, particularly the C8 compounds.

PFAS have been manufactured and used broadly in commerce since the 1940s. Since the mid-2000s, major U.S. manufacturers no longer manufacture PFOA and PFOS. There remain, however, a limited number of ongoing uses, e.g., aqueous film-forming foam ("AFFF") used to suppress high-temperature fuel and chemical based fires. In lieu of PFOA and PFOS, the industry developed replacements that were believed to be as effective in their industrial and manufacturing uses, but less toxic and persistent. These PFAS alternatives have fewer carbon atoms ("C6") and are identified as hexafluoropropylene oxide dimer acid and its ammonium salt (referred to as "GenX chemicals"), and perfluorobutane sulfonic acid and its potassium salt (referred to as "PFBS"). In chemical and product manufacturing, GenX chemicals are considered a replacement for PFOA, and PFBS is considered a replacement for PFOS. GenX and PFBS have been and continue to be integrated into various consumer products and industrial applications.

At the time of their introduction, GENX and PFBS purportedly had the desired properties and characteristics associated with PFOA and PFOS but were believed to be less toxic and more quickly eliminated from the human body and the environment than PFOA and PFOS. However, claims filed in recent litigation and determinations made in recent regulatory actions suggest plaintiffs and regulators will claim that these PFAS compounds may be equally toxic to their predecessors, PFOA and PFOS.

III. PFAS TOXICITY AND HUMAN HEALTH EFFECTS

Since the Science Panel's epidemiological findings in the Leach class action in 2012 of a probable link between exposure to PFOA and six diseases or health conditions, the Environmental Protection Agency (EPA) has pursued an aggressive review of the adverse human health effects from exposure to the PFAS-compounds PFOA, PFOS, GenX, and PFBS. In June 2022, the EPA radically revised its health advisory on the maximum levels of lifetime exposure to each of these contaminants from and in public drinking water systems. For example, the EPA reduced the health advisory for the maximum safe level of PFOA in drinking water to .004 parts per trillion (ppt), 17,500 times lower than the previous standard of 70 ppt.[15] The lifetime exposure advisory for PFOS was reduced from 70 ppt to .02 ppt, 3,500 times lower than the 2016 standard. As the bases for its decisions, the EPA explained:

> The interim updated health advisories for PFOA and PFOS are based on human epidemiology studies in populations exposed to these chemicals. Based on the new data and EPA's draft analyses, the levels at which negative health effects could occur are much lower than previously understood when EPA issued the 2016 health advisories for PFOA and PFOS (70 parts per trillion or ppt) – including near zero for certain health effects.
>
> Human studies have found associations between PFOA and/or PFOS exposure and effects on the immune system, the cardiovascular system, human development (e.g., decreased birth weight), and cancer. The most sensitive non-cancer effect and the basis for the interim updated health advisories for PFOA and PFOS is suppression of vaccine response (decreased serum antibody concentrations) in children . . . . EPA has not derived a cancer risk concentration in water for PFOA or PFOS at this time because the cancer analyses are ongoing.[16]

These advisories, which were not mandatory or enforceable, were issued by the EPA to provide interim guidance to water-system operators and federal, state, and local officials regarding the EPA's interim assessment of the health effects of these PFAS compounds. At the time it issued these advisories, the EPA expressed its intention to propose and finalize before the end of 2023 a National Primary Drinking Water Regulation (NPDWR) establishing a binding, enforceable standard for both the maximum contaminant level for certain PFAS, but also the testing regimen

15 Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances, 87 Fed. Reg. 36848 (Environmental Protection Agency June 21, 2022).

16 Questions and Answers: Drinking Water Health Advisories for PFOA, PFOS, GenX Chemicals and PFBS, https://www.epa.gov/sdwa/questions-and-answers-drinking-water-health-advisories-pfoa-pfos-genx-chemicals-and-pfbs (last updated 2/7/2023; last viewed 3/14/2023).

that would be required of public drinking water authorities.[17]

On March 14, 2023, the EPA issued the proposed NPDWR for six PFAS: PFOA, PFOS, GenX Chemicals, and PFBS, and two additional PFAS compounds that were not the subject of the EPA's earlier advisories—perfluorononanoic acid (PFNA) and perfluorohexane sulfonic acid (PFHxS). The proposed rule would require that public water authorities (1) routinely monitor and test for the presence of these PFAS, (2) notify the public of the levels of these PFAS, and (3) reduce the levels of these PFAS in drinking water if they exceed the proposed standards.[18]

Specific to PFOA and PFOS, the EPA proposed a maximum contaminant level (MCL) of 4 ppt for each compound, substantially greater than the earlier advisories of .004 ppt and .02 ppt, respectively. The EPA substantially increased the mandatory MCL to 4 ppt, having determined that it is the lowest concentration at which PFOA and PFOS can be reliably quantified within specific limits of precision and accuracy during routine laboratory operating conditions. EPA has historically called this level the "practical quantitation level" (PQL). Presumably, as technology and laboratory conditions improve, the PQL for PFOA, PFOS, and other PFAS compounds will fall, and the mandatory MCL likewise will be reduced.

IV. HUMAN AND ENVIRONMENTAL PATHWAYS FOR EXPOSURE TO PFAS

PFAS can be introduced to the human body by ingestion, inhalation, or absorption.[19] The sources and circumstances of exposure are myriad. Aside from workplace exposures associated with the manufacture of PFAS compounds or the production or manufacture of chemicals and products that contain PFAS, another source of exposure to PFAS is through the storage, handling, and use of chemical products that contain PFAS, such as fluorinated aqueous film forming foam (AFFF). AFFF is used for fire training and for extinguishing fuel-based and chemical-based fires at military sites, commercial airports, and other high-hazard flammable liquid sites such as railroad crash sites, oil and gas extraction sites, petroleum refineries, bulk storage facilities, and chemical manufacturing plants.[20]

The likeliest source of human exposure to PFAS is from drinking water. In a recent study, it was estimated that 18–80 million people in the U.S. receive tap water with 10 ppt or greater concentrations of PFOA and PFOS combined.[21] The study estimates also that over 200 million people in the U.S. likely receive water with a PFOA and PFOS concentration at or above 1 ppt.[22]

Another study has proposed that in the absence of comprehensive PFAS testing data for drinking water sources, locations of presumptive PFAS contamination should be identified on the basis of the proximity to certain industries or other activities involving PFAS compounds. The study posits that proximity to contamination is associated with higher PFAS levels in drinking water, which in turn is associated with higher PFAS blood levels. The analysis then proceeds to identify over 57,000 sites of presumptive PFAS contamination, falling within the following categories of facilities: (i) AFFF discharge sites, including military sites, commercial airports, other firefighting training sites, and high-hazard flammable liquid fire sites; (ii) industrial facilities that produce and/or use PFAS; and (iii) sites related to PFAS-containing waste, such as wastewater treatment plants, landfills, and waste incinerators.[23]

Research also has confirmed the presence of PFAS compounds in food and consumer products. For example, food products grown in or livestock fed from soil contaminated by water or sludge having elevated levels of PFAS compounds may generate

17 Id.

18 Per- and Polyfluoroalkyl Substances (PFAS): Proposed PFAS National Primary Drinking Water Regulation, Environmental Protection Agency, https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas (last reviewed on March 14, 2023).

19 In his book, Bilott describes receiving notes produced in discovery by DuPont in the Leach class action. They were taken during an internal DuPont meeting in 1980 to discuss occupational risks and personal protective equipment for PFOA-exposed employees. The notes described the variability of the chemical's toxicity based on its pathway – orally was described as "slightly toxic"; skin exposure was "slightly to moderately toxic"; and inhaled was "highly toxic." Bilott at 174.

20 Derrick Salvatore, et al., Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources, Environ. Sci. Technol. Lett. 2022, 9, 983-990 (October 12, 2022).

21 This is 2.5 times greater than the maximum contaminant level of 4 ppt for PFOA and PFOS set forth in the NPDWR proposed by the EPA on March 14, 2023. See note 18.

22 David Q. Andrews and Olga V.Naidenko, Population-Wide Exposure to Per- and Polyfluoroalkyl Substances from Drinking Water in the United States, Environ. Sci. Technol. Lett. 2020, 7, 931–936 (October 4, 2020).

23 See Salvatore, et al., n. 20.

elevated PFAS levels in produce, beef, and dairy products.[24] Other studies have demonstrated the presence of PFAS compounds in consumer products such as cosmetics, sunscreen, shaving cream, stain-resistant face masks, toilet paper, burger wrappers, microwave popcorn bags, pizza boxes, dental floss, waterproof rain gear, fluorinated plastic containers (e.g., olive oil, catsup, and mayonnaise bottles), and stain-resistant furniture and carpet.[25] Notwithstanding the confirmed presence of PFAS in these food and consumer products, there are no mandatory standards establishing either toxicity or safety levels for the PFAS compounds in these items.

Studies by the EPA have confirmed that freshwater fish throughout the U.S. are contaminated with PFAS. In a 2013-14 data set, EPA collected test data from fish fillets collected from sites across all 48 continental U.S. states. Fish with detectable levels of PFAS were found in all 48 states. Of the 349 samples analyzed, only one contained no detectable PFAS. Similarly, 152 fish samples were collected in 2013-14 from 30 sampling sites in and around the Great Lakes. All of these fish samples had detectable PFAS at overall higher levels than the earlier nationwide study. In both studies, PFOS (C8) was the predominant perfluorinated contaminant.[26]

V. PFAS LITIGATION TRENDS

The Tennant lawsuit, the Leach class action, and the resulting DuPont MDL in Ohio were the precursors to a cascade of lawsuits and enforcement actions that have been filed in state and federal courts during the past 20 years. Plaintiffs have included claimants asserting personal injury, property damage, medical monitoring, and consumer protection claims under theories of products liability, strict liability, negligence, nuisance, trespass, and state and federal environmental and consumer fraud laws.[27]

DuPont has continued to be at the forefront of defendants sued in PFAS litigation. According to a recent Bloomberg Law report, DuPont has been named as a defendant in more than 6,100 cases filed between 2005 and March 2022. More than 6,400 PFAS-related lawsuits were filed in federal courts between July 2005 and March 2022, and Dupont was the top corporate defendant in PFAS litigation by case count during that time period.[28]

Although DuPont was the first defendant in large-scale PFAS litigation, 3M has become another primary target defendant in lawsuits.[29] Historically, 3M developed PFOA and sold it to DuPont for its Teflon production activities. 3M has been sued by its customers, by the users of products that sourced 3M's PFAS, and by states and citizens for damage to water systems and the environment contaminated by 3M's PFAS waste discharges.

A. AFFF Multi-District Litigation

Part 139 of Title 14 of the Code of Federal Regulations requires that the Federal Aviation Administration (FAA) issue airport operating certificates to commercial service airports. Since the 1970s, the FAA has required airports with Part 139 certifications to provide aircraft rescue and firefighting (ARFF) personnel, equipment, and services using aqueous film forming foam (AFFF) that meets military specification MIL-PRF-24385 (MilSpec). The MilSpec requires that AFFF include PFAS compounds. Further, before 2019, the FAA mandated that airport operators routinely test and calibrate their AFFF equipment, and train on live fires, all entailing the release of AFFF on airport

24 Analytical Results of Testing Food for PFAS from Environmental Contamination, U.S. Food and Drug Admin., https://www.fda.gov/food/process-contaminants-food/analytical-results-testing-food-pfas-environmental-contamination (last visited March 13, 2023).

25 See, e.g., Heather D. Whitehead, et al., Fluorinated Compounds in North American Cosmetics, Environ. Sci. Technol. Letter. 2021, 8, 538-544; Consumer Reports, Dangerous PFAS Chemicals Are in Your Food Packaging, https://www.consumerreports.org/health/food-contaminants/dangerous-pfas-chemicals-are-in-your-food-packaging-a3786252074/ (March 24, 2022); Derek J. Muensterman, et al., Per- and Polyfluoroalkyl Substances (PFAS) in Facemasks: Potential Source of Human Exposure to PFAS with Implications for Disposal to Landfills, Environ. Sci. Technol. Lett. 2022, 9, 4, 320–326; Jake T. Thompson, et al., Per- and Polyfluoroalkyl Substances in Toilet Paper and the Impact on Wastewater Systems, Environ. Sci. Technol. Lett. 2023, https://pubs.acs.org/doi/10.1021/acs.estlett.3c00094; Heather D. Whitehead, et al., Directly Fluorinated Containers as a Source of Perfluoroalkyl Carboxylic Acids, Environ. Sci. Technol. Lett. 2023, https://pubs.acs.org/doi/abs/10.1021/acs.estlett.3c00083.

26 Nadia Barbo, et al., Locally caught freshwater fish across the United States are likely a significant source of exposure to PFOS and other perfluorinated compounds, Environ Res. 2023 Mar 1;220:115165, https://www.sciencedirect.com/science/article/pii/S0013935122024926?via%3Dihub.

27 Cataloguing all these actions is beyond the scope of this discussion. A thorough overview of the history of these cases and their claims can be found at Craig T. Liljestrand, PFAS Exposure: A Comprehensive Look at Emerging Facts and Studies, Risk and Liability Assessment, Litigation History, Evolving Regulations and Future Predictions, Defense Counsel Journal, Vol. 89, No. 2 (International Association of Defense Counsel 2022), and Ben Fruchey and Nick Tatro, PFAS Litigation: An Overview of Cases, Claims, Defenses, Verdicts and Settlements, Michigan Defense Quarterly, Vol. 36, No.2, 6-10 (2019).

28 Companies Face Billions in Damages as PFAS Lawsuits Flood Courts, https://news.bloomberglaw.com/pfas-project/companies-face-billions-in-damages-as-pfas-lawsuits-flood-courts (Bloomberg Law May 23, 2022) (last visited March 15, 2023).

29 Why 3M Can't Escape PFAS Liability by Ending Production: Charts, https://news.bloomberglaw.com/environment-and-energy/why-3m-cant-escape-pfas-liability-by-ending-production-charts (Bloomberg Law December 23, 2022) (last visited on March 15, 2023).

property or elsewhere.

AFFF is not used at commercial service airports alone. Since the development of the MilSpec in 1969 by the U.S Navy to combat devastating shipboard fires, AFFF has been widely used on military bases, at general aviation airports, in fire fighter training programs, and at chemical and industrial production locations.

In December 2018, the Judicial Panel on Multidistrict Litigation created an MDL in the District of South Carolina, Charleston Division, to centralize cases "alleg[ing] that AFFF products used at airports, military bases, or certain industrial locations caused the release of PFOA or PFOS into local groundwater and contaminated drinking water supplies."[30] (AFFF MDL). The AFFF MDL also includes claims by firefighters and others alleging direct exposure to AFFF.

Another issue that was deemed central to the AFFF MDL cases was the assertion of a government contractor defense by the defendant AFFF manufacturers.[31] In 2021, the AFFF manufacturer defendants moved for summary judgment under the government contractor defense articulated in Boyle v. United Technologies Corp., 487 U.S. 500 (1988) and its progeny. On September 16, 2022, the MDL district court denied the motions for summary judgment, finding that there were material issues of fact regarding, among other issues, whether the manufacturers had informed the U.S. government of the dangers associated with PFAS in AFFF.[32]

As of March 16, 2023, 4058 cases were pending in the AFFF MDL. The first bellwether trial is scheduled for June 5, 2023, and involves a public water provider, the City of Stuart, Florida.[33] The City is seeking to recover compensatory and punitive damages arising from PFOA and PFOS contamination of its groundwater and drinking water supply wells, including costs of investigation of contamination, testing and monitoring, providing water from an alternate source, and installing and maintaining a wellhead treatment and adequate filtration system.

B. Environmental Cases and Regulation

Apart from the AFFF MDL, DuPont, 3M, and other manufacturing defendants have been sued for violations of state and federal environmental laws and regulations largely associated with PFAS contamination of local drinking water supplies.

In 2018, 3M agreed to pay $850 million in settlement with the State of Minnesota for industrial discharges that contaminated the surface and ground water used as a source of drinking water for Minneapolis and St. Paul.[34]

Wolverine World Wide, the footwear company, entered settlement with the State of Michigan for the payment of $69.5 million for remediation of contaminated residential drinking wells and the environment. The contamination resulted from 3M Scotchgard contaminated waste discharged from Wolverine's leather tannery.[35]

In 2021, DuPont and other DuPont spinoff companies agreed to pay $50 million to the State of Delaware for testing and remediation costs associated with contaminated water sources.[36]

Until recently, the federal government's response to PFAS has been largely passive and involved the issuance of aspirational, but unenforceable, advisories for the maximum levels of certain PFAS in drinking water. Since 2022, however, the EPA has issued notices of proposed rulemaking designating PFAS compounds as hazardous substances and establishing mandatory drinking water standards that likely foreshadow aggressive enforcement activity by the EPA and state regulatory bodies charged with enforcing federal environmental regulations.

On September 6, 2022, the EPA issued a proposed rule that designates PFOA and PFOS as

30 In re AFFF Prods. Liab. Litig., 357 F. Supp. 3d 1391, 1394 (J.P.M.L. (2018).

31 Id.

32 In re AFFF Prods. Liab. Litig., MDL No. 2:18-mn-2873, 2022 WL 4291357 (September 16, 2022).

33 City of Stuart v. 3M Company, et al., No. 2:18-cv-3487 (D.S.C.).

34 Agreement and Order, State of Minnesota v. 3M Company, Court File No. 27-CV-10-28862 (Minn. Dist. Ct., 4th Dist., February 20, 2018).

35 See Craig T. Liljestrand, note 27.

36 Settlement Agreement, Limited Release, Waiver and Covenant Not to Sue, https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2021/07/2021-07-13-EXECUTED-PFAS-Settlement-Agreement-DuPont-Corteva-Chemours.pdf.

"hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, known as CERCLA.[37] The EPA has indicated that it intends to identify additional PFAS as hazardous substances. Once the proposed rule is final, which is expected to be in mid-2023, the EPA and authorized state agencies may enforce liability for response costs, natural resource damages, cleanup, and the costs of public health studies for releases of PFOA and PFOS into the environment. Further, private citizen suits are available under CERCLA to compel enforcement of the standards or to correct a violation.[38]

Categories of parties who may be held liable for these costs generally include current and former site owners and operators, persons who arranged for the treatment or disposal of a hazardous substance, persons who arranged for the transport of a hazardous substance for treatment or disposal, and persons who transported a hazardous substance for treatment or disposal and selected the receiving site.[39] Categories of trades or industries that may become responsible parties include the federal government at U.S. military installations and other federal facilities, civilian airport owners and operators, local fire departments that released PFAS from the use of AFFF, owners and operators of landfills at which PFAS wastes were disposed, generators of PFAS-laden wastes sent to landfills for disposal, and chemical manufacturers and processors that release PFAS at sites that they own or operate.[40]

As discussed earlier, on March 14, 2023, under the authority granted by the Safe Drinking Water Act (SDWA), 42 U.S.C §300g-1, the EPA issued the proposed NPDWR for the PFAS compounds PFOA, PFOS, PFNA, HFPO-DA (commonly known as GenX chemicals), PFHxS, and PFBS.[41] The proposed rule establishes maximum contaminant levels (MCLs) for these PFAS compounds in drinking water. The rule will require that public water authorities (1) routinely test for the presence of these PFAS, (2) notify the public of the levels of these PFAS, and (3) reduce the levels of these PFAS in drinking water if they exceed the proposed standards. The proposed regulations will likely become final before the end of 2023 and will become enforceable three years thereafter.

The foreseeable consequence of this rule and its MCLs is testing and remediation costs to local water authorities and their municipalities, which in turn requires cost-shifting. Rather than impose these costs on their customers/constituents, localities will likely seek enforcement actions against persons and entities suspected of having introduced PFAS-laden wastewater, storm water, and industrial and chemical runoff to drinking water sources.

Public and private remedies may be available also under the Clean Water Act (CWA)[42] to the extent that enforcement agencies impose the new PFAS MCL standards upon public water treatment works, industrial facilities, and stormwater discharges to public waters, lakes, rivers, and streams. According to recent guidance issued by the EPA, state-authorized permitting authorities are encouraged to "leverage" their permitting program to restrict the discharge of PFAS at their sources, to require quarterly testing for PFAS compounds by permittees, and to require the elimination or reduction of PFAS pollution/prevention within 12 months following issuance of a permit.[43] These efforts are intended to achieve a criteria for water quality that will likely be established with reference to the proposed MCLs.

C. Medical Monitoring Claims

Medical monitoring claims are a new theory of recovery within the arsenal of personal injury and toxic tort claims. In essence, these claims permit the recovery of the costs for future testing and medical monitoring of plaintiffs who can demonstrate that as a result of the negligence of the defendant they have been exposed to hazardous substances with known or strongly correlated health consequences, that there is an enhanced risk that the plaintiff may contract a known disease or illness from such

37 Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415 (Sept. 6, 2022).

38 42 U.S.C. § 9659.

39 Federal Role in Responding to Potential Risks of Per- and Polyfluoroalkyl Substances (PFAS), Congressional Research Service (August 10, 2022).

40 Id. at 35.

41 See note 18.

42 33 U.S.C. §1251, et seq.

43 U.S. Environmental Protection Agency, Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs, https://www.epa.gov/system/files/documents/2022-2/NPDES_PFAS_State%20Memo_December_2022.pdf (December 5, 2022).

hazardous substances, and that there are available monitoring procedures that provide early detection of such diseases or illnesses.[44] The American Law Institute is considering currently the adoption of a new Restatement (Torts) Third that embraces medical monitoring as a recognized tort claim absent evidence of an injury.[45]

Robert Bilott and his colleagues made great use of West Virginia's earlier recognition of medical monitoring in the Leach class action. Ultimately, DuPont agreed to pay up to $235 million dedicated to medical monitoring for plaintiffs for any disease that the Science Panel had determined had a probable link to PFAS exposure.[46]

In 2018, as a related case to the DuPont MDL that was pending before the Southern District of Ohio,[47] Bilott and other attorneys filed suit on behalf of Kevin D. Hardwick in federal court in the Southern District of Ohio.[48] Hardwick is a former firefighter who during his 40-year career used AFFF containing PFAS and used equipment or gear treated or coated with materials containing or contaminated with PFAS. Hardwick is bringing the action on behalf of a nationwide class of all persons whose blood and/or bodies are contaminated with PFAS. Each of the 10 named defendants are alleged to have manufactured, distributed, and sold PFAS that in turn is alleged to have resulted in the "contamination of Plaintiff's and the other class members' blood and/or bodies with PFAS, and the bio-persistence and bio-accumulation of such PFAS in such blood and/or bodies."[49]

The Complaint seeks certification of a nationwide class that includes "all individuals within the United States who, at the time the class is certified … have a detectable level of PFAS materials in their blood serum."[50] Further, neither Mr. Hardwick nor the proposed class members are seeking any compensatory damages for their personal injuries. Instead, they are seeking the establishment of an independent panel of scientists charged with the responsibility of researching and studying, and then making binding determinations of what is referred to as, Sufficient Results, which is defined to be "a causal connection between any single or combination of PFAS in human blood and any injury, human disease, adverse human health impact, and/or a risk sufficient to warrant any personal injury compensation or future diagnostic medical testing, including medical monitoring."[51]

The district court rejected the proposal for certification of a nationwide class. However, the court certified instead a class defined as the following: "Individuals subject to the laws of Ohio, who have 0.05 parts per trillion (ppt) of PFOA (C-8) and at least 0.05 ppt of any other PFAS in their blood serum."[52] Remarkably, current technology is incapable of detecting 0.05 ppt of PFOA or any other PFAS in blood serum. Thus, the district court certified a class comprised of all residents of Ohio, 11.8 million people, including all persons otherwise subject to its laws.[53] The Sixth Circuit Court of Appeals granted interlocutory review of the district court's class certification ruling.[54]

D. Consumer Fraud/Mislabeling Claims

Numerous class actions have been filed since 2021 seeking certification of a class of consumers who claim to have either used a product, consumed a food item, or consumed a food product having packaging, containing PFAS. The product use/consumption claims include REI waterproof raingear;[55] Thinx and Knix women's underwear;[56] cosmetics, including Cover Girl and Revlon products;[57] Oral-B dental floss;[58] Capri Sun,[59] Simply Orange orange juice;

44 See generally Mark A. Behrens and Christopher E. Appel, American Law Institute Proposes Controversial Medical Monitoring Rule in Final Part of Torts Restatement, Defense Counsel Journal, Vol. 87, No. 4 (International Association of Defense Counsel January 19, 2021).

45 Id. A survey of those states that have expressly recognized medical monitoring claims and associated remedies is beyond the scope of this article.

46 See note 8.

47 In Re: E. I. Du Pont de Nemours and Company C-8 Personal Injury Litigation, 2:13-md-02433 (S.D. Ohio).

48 Kevin D. Hardwick v. 3M Company, et al., No. 2:18-cv-1185 (S.D. Ohio).

49 Am. Compl. (ECF No.96), ¶¶ 5-27, Kevin D. Hardwick v. 3M Company, et al., No. 2:18-cv-1185 (S.D. Ohio).

50 Id. at ¶ 83.

51 Id. at ¶¶ 67, 132-33.

52 Opinion and Order (ECF No. 233) at pp. 1, 48, Kevin D. Hardwick v. 3M Company, et al., No. 2:18-cv-1185 (S.D. Ohio) (March 7, 2022).

53 USCA Order and Judgment (ECF No. 244) at 2, Kevin D. Hardwick v. 3M Company, et al., No. 2:18-cv-1185 (S.D. Ohio) (September 9, 2022).

54 Id.

55 Krakauer v. Recreational Equip., Inc., No. 3:22-cv-05830 (W.D. Wash.).

56 Dickens v. Thinx, Inc., No. 1:22-cv-4286-JMF (S.D. N.Y.); Blenis v. Thinx, Inc., No. 21-cv-11019 (D. Mass.); Rivera v. Knix Wear, Inc., No. 5:22-cv-2137 (N.D. Cal.).

57 Brown v. Cover Girl, No. 1:22-cv-02696 (S.D.N.Y.); Anderson v. Almay and Revlon, Inc., No. 1:22-cv-02722 (S.D.N.Y.); Spindel v. Burt's Bees, Inc., No. 3:22-cv-01928 (N.D. Cal.).

58 Dalewitz v. The Proctor & Gamble Co., No. 7:22-cv-07323 (S.D.N.Y.).

59 Toribio v. The Kraft Heinz Company, No. 1:22-cv-06639 (N.D. Ill.).

60infant car seats;[61] and Tampax Pure Cotton tampons.[62] The packaging claims include, by way of example, burger and sandwich wrappers[63] and microwave popcorn bags.[64]

Unlike their personal-injury counterparts, these cases make no claims of injuries to health, person, or property. Instead, they focus on false, misleading, or deceptive advertising or statements on product packaging. Proof of false statements regarding a product's qualities, safety, or sustainability, and the reliance thereon, rather than personal injury is the key. For instance, in Dickens v. Thinx, Inc., No. 1:22-cv-4286-JMF (S.D. N.Y.), class plaintiffs claimed that various styles of Thinx menstrual underwear contained PFAS, notwithstanding claims by the manufacturer on product packaging, its website, and other sites that their products were safe, sustainable, and rigorously tested for harmful chemicals.[65] In the Oral-B dental floss matter, the plaintiffs contended that Proctor & Gamble misrepresented the safety and quality of its PFAS-laden floss through statements that the company adhered to a "rigorous safety process to analyze every ingredient—before we ever consider putting it in one of our products." The Complaint alleges further that the manufacturer represented that it was "helping ensure a healthy planet for present and future generations," and that the dental floss was part of the company's "Pro-Health" line, which was "aimed at consumers willing to pay more for products that touted health benefits, as opposed to flavor or cosmetic appeal."[66]

On the food front, Simply Orange orange juice and Coca-Cola Company are the targets of a recently filed class action in federal court in New York. The Complaint alleges that Coca-Cola represented that the product is an "All Natural" juice drink that is "made simply" with "all-natural ingredients," but that in fact the orange juice contains PFAS compounds.[67] Similarly, Kraft Heinz Company is defending a recently filed class action involving its Capri Sun line of fruit juices for kids that are prominently labeled on the front and back of the packaging as having "all natural ingredients."[68]

While these cases are in their infancy, some Defendants have had success opposing these claims in pretrial motions. In Seidl v. Artsana USA, Inc., No. 5:22-cv-2586, 2022 WL 17337910 (E.D. Pa., Nov. 30, 2022), the plaintiff asserted consumer protection, fraud, negligent misrepresentation, breach of express warranty, and unjust enrichment claims against the manufacturer of a child's car seat that she purchased believing it was free of PFAS and other chemicals. She alleged as the source of her belief a press release by the manufacturer that was issued when the specific line of car seats came out and the manufacturer's Chemical Policy, each of which allegedly misrepresented that the product was free of PFAS and other chemicals. The Court dismissed all of the plaintiff's claims. As for the plaintiff's allegations that the defendant failed to disclose that its car seat contained PFAS, the court held that "the law does not place any obligation on [defendant] to proactively disclose to consumers what, if any, chemicals it uses to treat its car seats." Id. at 9. Further, the Court held that the plaintiff had failed make out her claim that the defendant had actively misrepresented to her that the car seat did not contain PFAS, relying upon the press release and Chemical Policy, because there were no facts alleged in the Complaint from which the Court could infer that the plaintiff read or relied upon the statements in those documents. Id. at 10-12.

In the case of Richburg v. Conagra Brands, Inc., No. 22-cv-2421 (N.D. Ill.), the district court dismissed the plaintiff's claims that the defendant had falsely and misleadingly marketed and labeled its Orville Redenbacher microwave popcorn products as containing "only real ingredients," and "100% ingredients from natural sources," when instead the bag in which the popcorn is popped contained allegedly harmful levels of PFAS that migrated into the popcorn during the heating process. The

60 Lurenz v. The Coca-Cola Company, 7:22-cv-10941 (S.D.N.Y.).

61 Seidl v. Artsana USA, Inc., No. 5:22-cv-2586 (E.D. Pa.).

62 Bounthon v. The Proctor & Gamble Co., No. 3:23-cv-00765 (N.D. Cal.).

63 Clark v. McDonald's Corp., No. 3:22-cv-628 (S.D. Ill.); Hussain v. Burger King, No. 4:22-cv-02258 (N.D. Cal.).

64 Richburg v. Conagra Brands, Inc., No. 22-cv-2421 (N.D. Ill.).

65 Compl. (ECF No.1), ¶¶ 27-29, Dickens v. Thinx, Inc., No. 1:22-cv-4286-JMF (S.D. N.Y.). This case recently settled for payment of up to $5.0 million, which includes the payment of attorneys' fees up to $1.5 million. Dickens v. Thinx, Inc. Settlement, Frequently Asked Questions, https://www.thinxunderwearsettlement.com/Home/FaqNo.faq11.

66 Compl. (ECF No.1), ¶¶ 2-3, 6, Dalewitz v. The Proctor & Gamble Co., No. 7:22-cv-07323 (S.D.N.Y.).

67 Compl. (ECF No.1), ¶¶ 4-5, Lurenz v. The Coca-Cola Company, 7:22-cv-10941 (S.D.N.Y.).

68 Am. Compl. (ECF No.30), ¶¶ 4-5, Toribio v. The Kraft Heinz Company, No. 1:22-cv-06639 (N.D. Ill.).

court dismissed all claims, finding that statements on the product packaging regarding the quality of the ingredients in the product would not mislead a consumer as to the qualities or chemical composition of the packaging.[69]

VI. MITIGATION OF PFAS RISKS

Consider these questions:

Does my company manufacture PFAS compounds? Does my company use PFAS compounds in the manufacture or development of its products or services?

Do any of the raw materials, chemicals, ingredients, component parts, or packaging for my company's products contain PFAS?

Is my client purchasing from its suppliers for resale any goods or products that contain PFAS compounds?

Does my company make representations on its packaging or labeling regarding the purity, natural qualities, or health benefits of products that contain PFAS compounds?

Do you discharge or dispose of PFAS-laden chemicals, foam, products, wastewater or refuse? Does your stormwater runoff contain PFAS compounds?

Additionally, these questions should be asked in the past tense, e.g., Have any of the raw materials, ingredients, component parts, or packaging for my products contained PFAS? If the answer to any of the above questions is "Yes," or "I don't know," you should consider undertaking the following mitigation measures.

A. Investigation and Audit – Protected or Unprotected?

The questions posed above provide a partial roadmap for the focus of an investigation and audit. If your client is a PFAS manufacturer described in the first question, then it is likely already a named defendant in numerous lawsuits and well beyond finding useful the following suggestions. If, however, your client falls within the categories described by the remaining questions, the following may be of assistance.

Before initiating an investigation and audit of PFAS history and associated risk assessment, the client and its counsel must undertake a detailed consideration of the purpose for the investigation. Is the client seeking legal advice regarding its legal exposure and potential PFAS liabilities? If so, the client may wish to have legal counsel oversee the investigation and direct internal and outside resources. Alternatively, does the client intend to use some or all of the findings from the investigation in defense of regulatory proceedings or litigation? If so, caution at the outset should be exercised in making the entire investigation protected. If selected factual findings or communications with counsel and the client are later publicly disclosed, this may risk a subject matter waiver of the entire investigation and audit.

If the client wishes to conduct an unprotected investigation, there may still be communications with counsel that will be privileged, particularly those communications soliciting or offering legal advice related to the unprotected facts and information. Additionally, if there is pending litigation or reasonably anticipated litigation, the attorney work product protections may protect the identity of witnesses and documents that counsel thought important enough to interview or review, as well as counsel's mental impressions from such activities.

Once the client has determined, with counsel's guidance, whether to undertake a protected or unprotected investigation and audit, the role of counsel in the investigation and audit should be memorialized in writing. Further, to the extent engaged to undertake and supervise the investigation, counsel should inform (and memorialize informing) all of the client's employees and external consultants who will be involved in the undertaking of the investigation's purpose—e.g., to obtain legal advice from counsel, to evaluate the legal efficacy of recent compliance demands by regulators or pre-litigation demands by private

69 Richburg v. Conagra Brands, Inc., No. 22-cv-2421, 2023 WL 1818561 at 6 (N.D. Ill., Feb. 8, 2023).

litigants, etc.[70]

B. Eliminating Use of PFAS Compounds

If the business or client does not manufacture PFAS compounds, then it must have sourced the PFAS compounds or PFAS-laden products or materials from a third party. The client or business must endeavor to identify every product manufactured, produced, sold, distributed, or handled by the business that contains or contained PFAS compounds. Suggested approaches include:

Review Material Safety Data Sheets for all materials and supplies provided to the business by third parties. If there are none, or they are incomplete, request the information from outside suppliers.

Demand an itemized listing of all chemicals used in suppliers' products.

Seek approved substitutes and alternatives for PFAS compounds and products that are currently in use at your business.

Require that suppliers of products for resale, and suppliers of raw materials, chemicals, ingredients, component parts, or packaging for the company's products, execute a Supplier Code of Conduct and Chemical Supplier Agreement attesting that PFAS are not in their products.

Implement internal screening procedures to ensure that PFAS is not used or introduced to the company's products.

C. Supplier Indemnification and Certifications

The client should inventory its supplier contracts to confirm the presence of and evaluate supplier indemnification obligations. Future contracts should include indemnification provisions for all claims and liabilities arising from or related to PFAS in a suppliers' products, including the company's environmental and remediation liabilities. Additionally, the client should consider requiring certifications from third-party laboratories or testing services that the supplier's products are free of PFAS, or otherwise require that the supplier underwrite the company's expense to have the products sampled and tested by a trusted laboratory.

Insurance

PFAS has been in the stream of commerce since the 1970s. The client should inventory all insurance policies since that time, particularly legacy and recent comprehensive general liability policies. If the client does not have copies of policies going back to the 1970s, it should consider employing the services of an insurance policy archaeologist specializing in the recovery of copies of legacy insurance policies. Ultimately, the company must evaluate the policies for the insurers' coverage/indemnification for and duty to defend against products liability and environmental claims.

Particular attention should be given in advance to certain wormholes that are likely to surface. For example, the insured should evaluate what constitutes an "occurrence" for PFAS contamination under the policy that may require notice to the insurer. Typically, notice to the insurer is triggered by an occurrence (defined by the policy), claim, or lawsuit. At what point does the release of a PFAS contaminant constitute an "occurrence?" Is it when it is generated? Perhaps when it migrates off the property into nearby water? Or is it when PFAS actually contaminates or damages other property or drinking water systems? The applicable state's law and the terms of the policy will likely control these determinations.

Second, in advance of an occurrence, claim, or lawsuit, the insured should evaluate the scope of its duty to cooperate with the insurer. The answer will vary among states. For example, must the insured cooperate with the insurer in its investigation of whether an exclusion to coverage applies, e.g., the pollution exclusion? If cooperation is required, does it encompass disclosure of investigatory materials that are protected by the attorney-client privilege or work product protections? If so, will the forum state enforce a common interest agreement between the insured and the insurer to prevent waiver of these protections? Again, the outcomes will be determined by the applicable state's law.

70 For a comprehensive discussion of these issues, see Thomas E. Spahn, The Attorney-Client Privilege and The Work Product Doctrine: A Practitioner's Guide, Chap. 22 (Virginia CLE Publications, 3d ed.).

Environmental Contamination Claims

The most likely origins of environmental claims are (i) runoff from the owner's contaminated soil that is contaminating or poses the risk of contaminating neighboring private or public property, lakes, rivers, or streams, or public or private drinking water sources, (ii) effluent or waste that is being discharged to lakes, rivers, or streams, or (iii) waste or refuse that is being relocated to landfills or other off-site disposal locations. Often, there are many sources of the alleged contamination. The client should consider the following actions:

Survey other potential sources of releases/ contamination, e.g., landfills, wastewater treatment facilities, industrial sites, etc.

The client, with counsel's advice, should consider wet and dry sampling near wastewater release outfalls that empty into the contaminated lakes, rivers, or streams.

The company should identify all prior owners of the client's property and its prior uses.

For drinking water contamination claims involving private wells, the company should inventory the location of surrounding private septic systems. If litigation ensues, the contents of the septic system should be analyzed for PFAS-laden contents, e.g., toilet paper.

CHRISTIAN & BARTON, LLP
ATTORNEYS AT LAW

Mitigating "Forever" Liability When Faced with "Forever" Chemicals Claims

W. David Harless

Survey: Your Company PFAS Profile

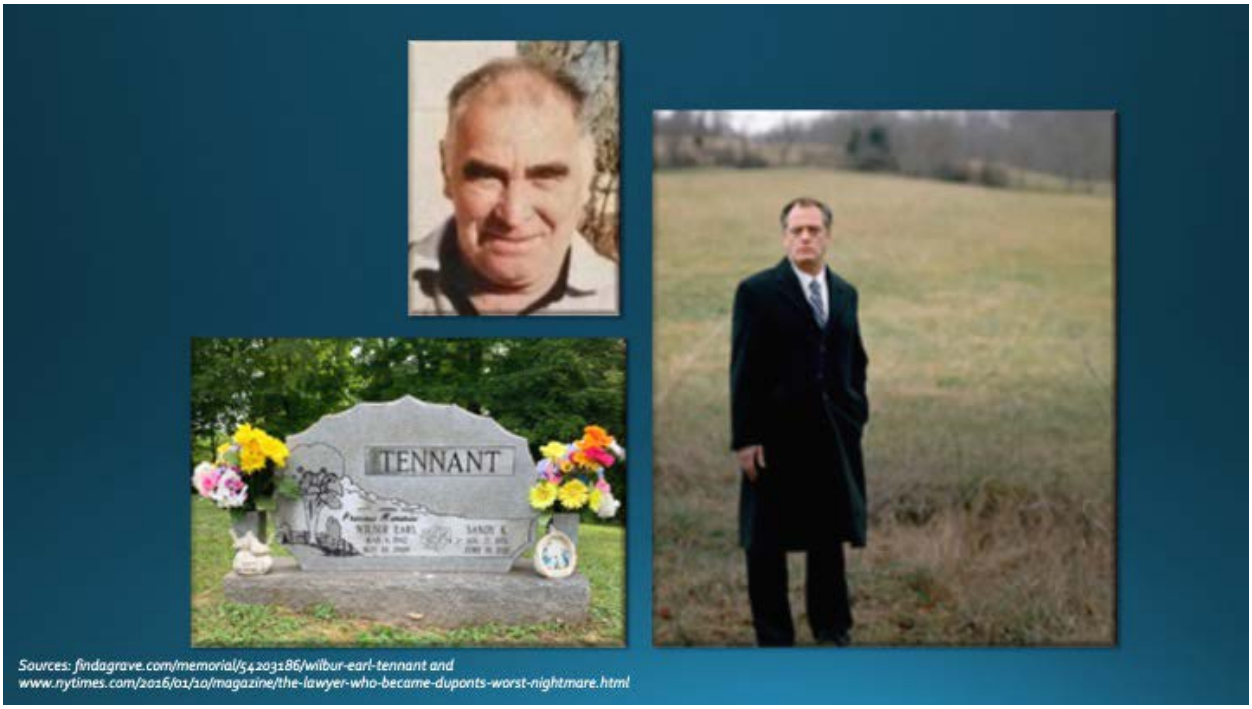
My company produces PFAS or products that contain PFAS.

My company formerly produced PFAS or products containing PFAS, but no longer.


None of my company’s products have ever contained PFAS-laden ingredients, raw materials or parts.
CERTIFIED
All of my suppliers’ ingredients, raw materials, component parts and products are PFAS-free.


My company has never discharged or disposed of PFAS-contaminated wastewater or refuse.
My company’s stormwater runoff contains no PFAS compounds.


We do not need to investigate PFAS!
Indeed, I enjoyed some PFAS on my oatmeal this morning.


TENNANT
Sources: findagrave.com/memorial/54203186/wilbur-earl-tennant and www.nytimes.com/2016/01/10/magazine/the-lawyer-who-became-duponts-worst-nightmare.html

Science Panel Findings of Probable Link

- 69,000 class members provided blood samples
- Science Panel conducted study over seven years
- 2012 Findings – PFOA exposure probably linked to:
  - Kidney cancer
  - Testicular cancer
  - Thyroid disease
  - Ulcerative colitis
  - Diagnosed high cholesterol
  - Pregnancy-induced hypertension and preeclampsia

DuPont Washington Works PFOA Settlements

Tennant Case	*Leach* Class Action	*DuPont* MDL	TOTAL
Estimated $100 million	$400+ million	$670.7 million	$1.17 billion

Per- and Polyfluoroalkyl Substances (PFAS)

Perfluorooctanoic Acid	Perfluorooctane Sulfonate
(PFOA)	(PFOS)
8-Carbon Chain (C-8)	8-Carbon Chain (C-8)

Unique Properties

- Resistance to high and low temperatures, e.g., firefighting foam.
- Resistance to degradation.
- Nonstick characteristics, e.g., Teflon.
- Resistance to water, e.g., GoreTex.

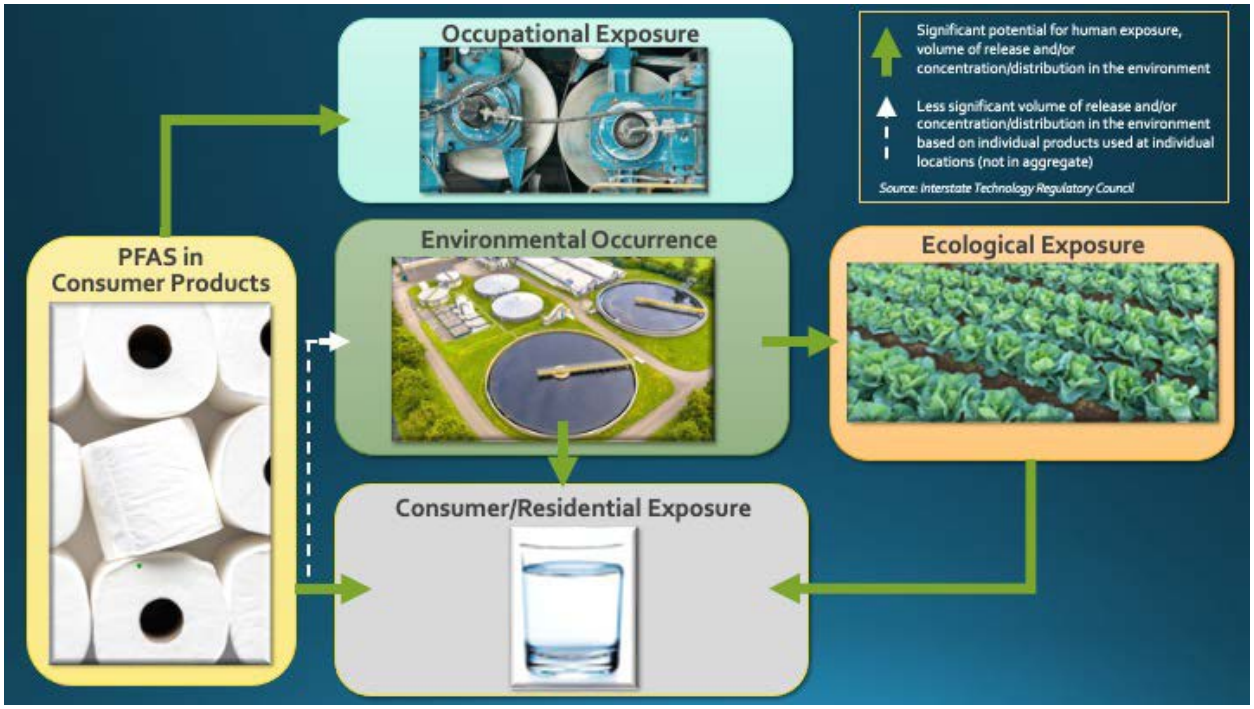
New PFAS – C6

	PFAS Compounds	
C8 (8 carbon atoms)	PFOA	PFOS
C6 (6 carbon atoms)	GenX Hexafluoropropylene oxide dimer acid	PFBS Perfluorobutane sulfonic acid


Pathway: Inhalation


Pathway: Ingestion

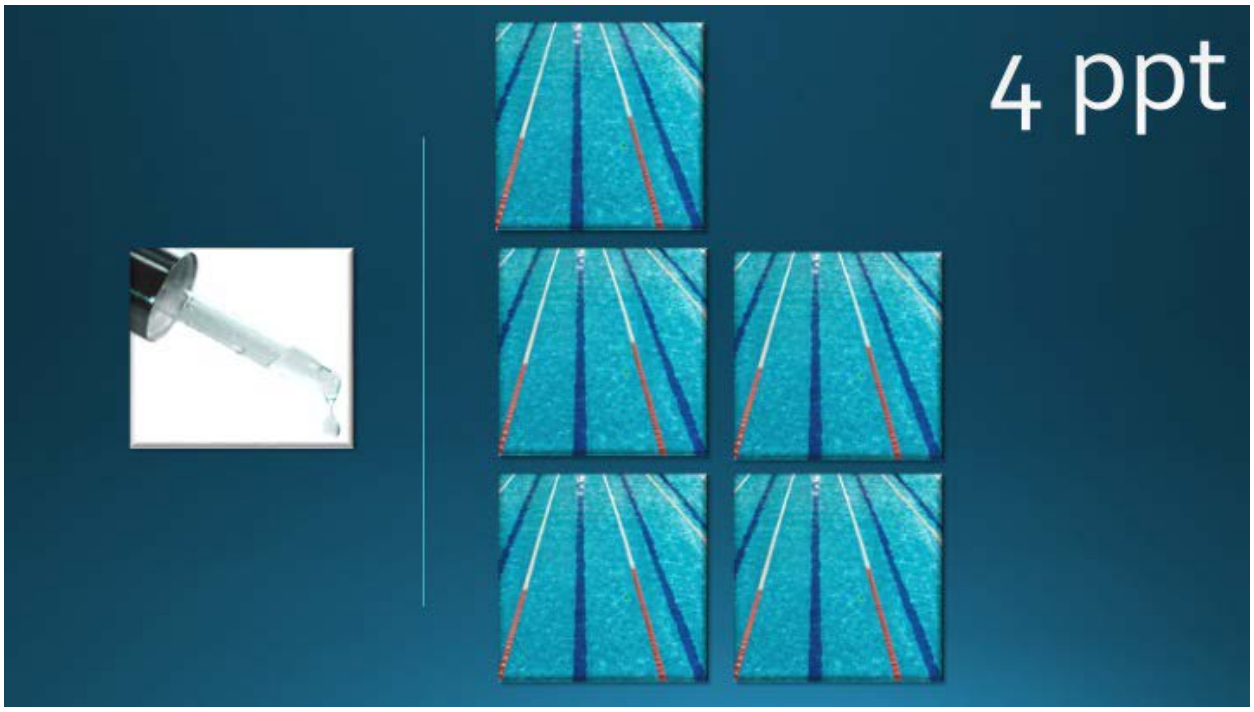

Pathway: Absorption
credit: knix.com

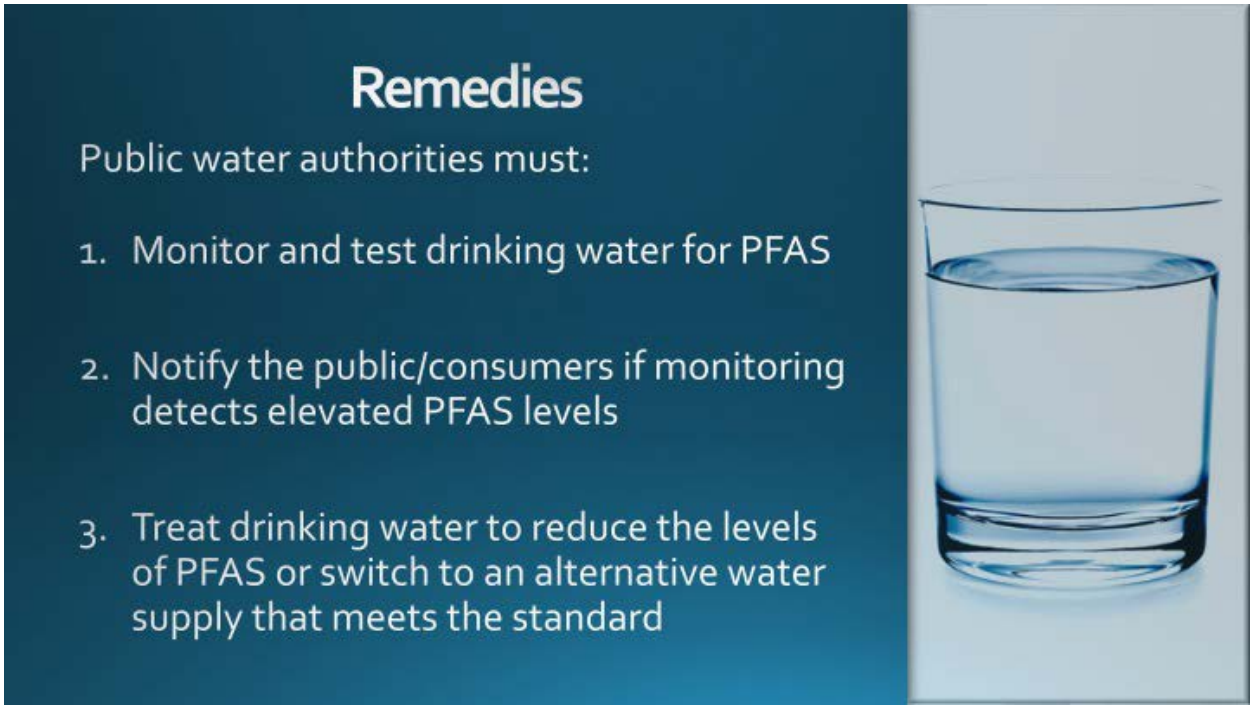

Occupational Exposure
Significant potential for human exposure, volume of release and/or concentration/distribution in the environment
Less significant volume of release and/or concentration/distribution in the environment based on individual products used at individual locations (not in aggregate)
Source: Interstate Technology Regulatory Council
PFAS in Consumer Products
Environmental Occurrence
Ecological Exposure
Consumer/Residential Exposure

EPA - National Primary Drinking Water Regulation (NPDWR)

	PFOA	PFOS
2016 PFAS Drinking Water Advisory	70 ppt combined	
2023 PFAS Proposed NPDWR Mandatory Standard	4 ppt	4 ppt

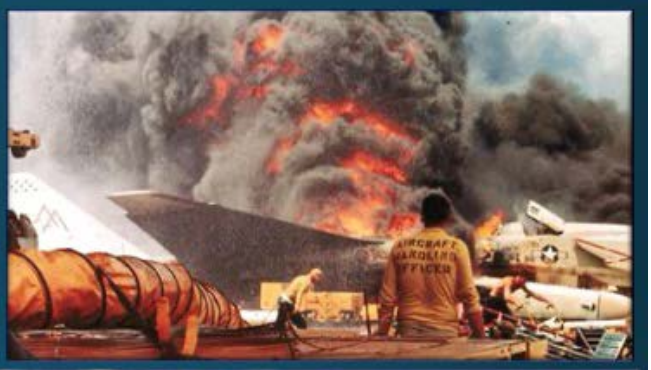
70 ppt


4 ppt


Remedies
Public water authorities must:
1. Monitor and test drinking water for PFAS
2. Notify the public/consumers if monitoring detects elevated PFAS levels
3. Treat drinking water to reduce the levels of PFAS or switch to an alternative water supply that meets the standard

Aqueous Film-Forming Foam (AFFF)

In re AFFF Products Liability Litigation (D. S. C., Charleston Div.)



- 4000+ cases
- June 2023 bellwether trial
- Government Contractor defense rejected

Environmental Litigation Settlements

Year	Amount	Claims
2018	$850 million	3M to State of Minnesota for PFAS contamination of Minneapolis/St. Paul drinking water sources.
2019	$69.5 million	Wolverine World Wide to State of Michigan for PFAS contamination of private wells and environment from release of waste containing 3M's Scotchgard product.
2021	$50 million	DuPont and spinoffs paid the State of Delaware for testing and remediation of PFAS contaminated water sources.

Medical Monitoring Claims
Hardwick v. 3M Company, et al. (S.D. Ohio)

ARKEMA AGC ARCHROMA
DUPONT Chemours DAIKIN
SOLVAY 3M

Food and Personal Care

COVER GIRL

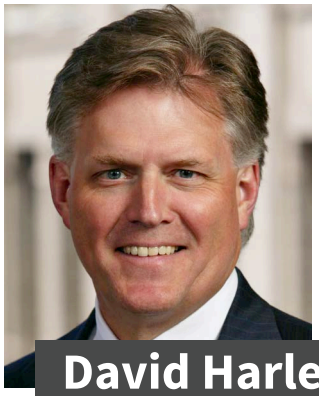
REVLON

Food Packaging

Mitigation of Risks

1. Investigation and Audit – Protected or Unprotected?
2. Eliminate/reduce PFAS Compounds
3. Supplier Indemnification and Certifications
4. Insurance
5. Environmental Contamination Claims


Bad News
ubiquitous adjective
:existing or being everywhere at the same time
Good News



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David Harless is a partner in the firm's Litigation department and serves as head of the firm's Employment practice group. He represents a wide variety of corporations, closely-held companies, and individuals in complex business and commercial disputes, such as contract, business tort, restrictive covenant, trade secret, and employment litigation, and products liability, premises liability, and tort defense litigation. He spends significant time advising clients regarding employment matters, and defending against discrimination, wrongful discharge, and hiring claims. He also serves as general legal counsel to the Capital Region Airport Commission, which owns and operates the Richmond International Airport.

Mr. Harless is a member of the firm's Executive Committee, a Fellow of the American College of Trial Lawyers, and a former president of the Virginia State Bar and the Bar Association of the City of Richmond. He has been a faculty member of the Virginia State Bar's mandatory professionalism course, the panel that trains such faculty, as well as the National Trial Advocacy College of the University of Virginia. In addition, Mr. Harless has lectured on numerous business and employment litigation and trial practice topics.

Practice Areas

- Trials / Appeals / Alternative Dispute Resolution
- Complex Business and Commercial Disputes
- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Products Liability and Torts
- Municipal Governance and Public Sector

Recognition

- The Best Lawyers in America© - Bet-the-Company Litigation, Commercial Litigation, Employment Law-Management, Litigation-Labor & Employment, Personal Injury Litigation-Defendants, 1995-2023
- Chambers USA - Litigation: General Commercial, 2004-2022
- Virginia Super Lawyers - Business Litigation, 2006-2022
- Legal Elite (Virginia Business) - Civil Litigation, 2010, 2019-2020, 2022; Labor/Employment, 2000-2009, 2011-2019, 2021
- William J. Brennan Jr. Award, National Trial Advocacy College at the University of Virginia School of Law, 2020
- Walker Award of Merit, Virginia Bar Association, 2017

Education

- University of Virginia School of Law, J.D., 1981
- University of Kentucky, B.B.A., 1978

Well, That's Settled! … (Or is it?)

Moheeb Murray
Bush Seyferth (Troy, MI)

Well, that's settled . . . (Or is it?): Key Issues Every Litigator Should Remember About Settlement Agreements
Moheeb Murray

Finally settling a hard-fought case can be one of the great pressure release valves that a trial lawyer can experience, ranking only behind a favorable verdict or winning on a dispositive motion. But if not undertaken with sufficient planning and attention to details, a settlement agreement can quickly become an excruciating pressure point if things go awry. No one wants to have to make the "Houston-we-have-a-problem" call to their client because the other side claims you agreed to a settlement when you did not (or vice versa) or after the parties went through a full-day mediation capped with a term sheet, only to fight about whether it captured all the material settlement terms. This article discusses key points every trial lawyer should keep in mind when approaching settlement, including how a settlement agreement becomes binding, the issues that often cause parties to stumble when finalizing an agreement (and how to avoid them), and the mechanisms to invalidate a settlement, if necessary. When does an enforceable settlement agreement arise?

Oral settlement agreements outside of mediation

In general, an agreement to settle a claim or lawsuit is considered to be like any other contract. Therefore, absent any jurisdiction-specific rules or statutes, an oral agreement by the parties or their counsel that addresses material terms can be binding if it complies with the statute frauds. The statute of frauds typically requires the following to be in writing: (a) an agreement that cannot be performed within one year (e.g., a settlement payout schedule exceeding a year); (b) a promise to answer for another's debt; (c) a promise in consideration of marriage; (d) a promise by a personal representative to answer for damages out of her own estate; (e) an agreement to pay a commission for the sale of real estate; (f) a contract involving the sale of goods over $500; and certain other types of agreements. See, e.g., MCL 566.132; UCC §2-201. Of course, the scope of the statute of frauds can vary by state, so be sure to check your jurisdiction.

Even if an oral settlement agreement satisfies an applicable statute of frauds, enforceability of that agreement can vary by jurisdiction. Federal common law does not necessarily require that a settlement be reduced to writing. See, e.g., Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981) ("Federal law does not require, however, that the settlement be reduced to writing. Absent a factual basis rendering it invalid, an oral agreement to settle a Title VII claim is enforceable against a plaintiff who knowingly and voluntarily agreed to the terms of the settlement or authorized his attorney to settle the dispute.") But irrespective of the statute of frauds, several states (e.g., CA, MI, etc.) expressly prohibit oral agreements settling lawsuits, unless: (1) the agreement is put on the record in court, (2) the judge has an opportunity to question the parties about whether they understand the agreement's terms, and (3) the parties expressly acknowledge the terms of the agreement to which they will be bound. See, e.g., Cal. Code Civ. Proc. §664.6; MCR 2.507(G) ("Agreements to be in Writing. An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.")

Therefore, if, for example, attorneys agree to a settlement number and certain terms over the phone on September 1 but the agreement later falters on September 5, jurisdiction-specific rules and statutes determine if the parties must settle for the number and terms accepted during the September 1 call.

Settlement agreements established by letters, emails, or even text messages

Can a party be bound to a settlement just by sending a letter, email, or text? The answer is yes, if the necessary conditions exist. The two sides to a dispute often have settlement negotiations that morph into written exchanges culminating in a settlement when an offer is made and accepted. Under the Uniform Electronic Transactions Act, electronic communications satisfy any statute requiring a contract to be in writing, if the required elements of contract formation exist. What it means to "sign" can surprise clients, or sometimes some lawyers; even if there is no "ink" signature on a single settlement agreement document, an enforceable written agreement can be established if the parties' counsel (or the parties themselves) have simply "subscribed" to the written communications establishing the offer and acceptance of the material terms of settlement. This is true even if the parties' communications might state that they plan to enter into a formal settlement agreement later. See., e.g., Scheinmann v. Dykstra, No. 16-cv-5446, 2017 WL 1422972, at *6 (S.D.N.Y. Apr. 21, 2017); Kloian v. Domino's Pizza L.L.C., 273 Mich. App. 449 (2006). Generally, a sender of a communication "subscribes" by typing or signing his or her name at the end of the communication. Kloian, 273 Mich. App. at 459 (holding one communication was subscribed because the attorney "typed, or appended, his name at the end of the e-mail message" but another was not because the email only had the "attorney's name at the top in the email heading.") But specifically typing one's name at the bottom is not required in some jurisdictions. Some courts have held a sender can subscribe to or authenticate intent in an email by including a pre-affixed email signature block or by virtue of the sender's name appearing in an email "from" box. See, e.g., Khoury v. Tomlinson, 518 S.W.3d 568, 576 (2017) ("The 'from' field in the email authenticated the writing in the email to be Tomlinson's. [The] UETA expressly allows for automated transactions to satisfy the requirements of contract formation."); but see Cunningham v. Zurich Am. Ins. Co., 352 S.W.3d 519, 529-30 (2011) (holding automatic signature block insufficient to show intent to be bound). These cases, of course, do not preclude a party from contesting whether the written communication is authentic or legitimately sent by the person who purportedly subscribed to it. But those would likely be very rare circumstances to challenge a settlement agreement.

As communication becomes increasingly informal, an emerging issue is whether text messages or direct messages (DM or instant message) can form a settlement agreement. So far, in some jurisdictions, the answer seems to be yes, if the prerequisites noted above are met. For instance, in St. John's Holdings, LLC v. Two Electronics, LLC, 2016 WL 1460477 (Mass. Land Ct. 2016), the court held that text messages incorporating various other correspondence were enough to create an enforceable agreement when the texts indicated an agreement and the parties' agents concluded the texts with their names as the senders. Id. *6-10. The court noted that the parties did not include their names at the end of later text messages about the agreement, but nonetheless held that the texts to which the parties specifically subscribed showed their intent to be bound. Id. As noted above, however, some courts take a broader view than others about what indicates a party's "subscription" to an electronic communication, so the mere fact that names do not appear at the end of text messages might not defeat an argument that the texts created a binding contract.

Mediated settlement agreements

Mediated settlements often result after a long day of the mediator's shuttle diplomacy between the parties conveying oral offers and counteroffers, and, eventually, an oral agreement. In practice, most sophisticated parties will then memorialize that settlement through a term sheet before leaving the mediator's office or very shortly thereafter, with contemplation of executing a more formal settlement agreement later. But there are times when the settlement process falls apart between the end of mediation and execution of a final, formal settlement agreement. This breakdown can leave

the parties arguing about whether an oral agreement at the mediation or the term sheet (if one exists) is an enforceable settlement agreement.

Consider first whether the Uniform Mediation Act ("UMA") applies; many states have adopted[1] or are in the process of adopting it. The UMA prohibits disclosing to a court confidential communication during or in furtherance of a mediation, making such communications inadmissible as evidence in any legal proceeding. UMA §4. It does, however, allow the parties to agree in advance that certain mediation-related communications can be admissible if a disagreement arises later. Id. §6. Effectively then, under the UMA, unless both parties have agreed otherwise in writing, a party seeking to enforce a settlement agreement must rely only on the written agreement.

But states that have not adopted the UMA, and federal courts presiding over federal-question cases, may have different standards in their court rules or rules of evidence for enforcing oral settlement agreements at mediation or allowing evidence of mediation communications. For instance, Michigan Court Rule 2.412 specifically addresses the issue. First, it defines "mediation communications" to include statements, whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation. Second, it states that "[m]ediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants" subject to exceptions stated in a subrule, one of which is if the parties agree in writing to allow the disclosure. MCR 2.412. In those jurisdictions that have not adopted the UMA or do not have other similar rules, the admissibility of mediation communications may be even less clear.

Considering it is probable that the parties' oral or written communications during or leading up to mediation will not be usable as evidence, a term sheet could play a bigger role than merely being a placeholder until the parties enter a formal settlement agreement. In fact, it could end up being the settlement agreement, because the parties will not be able to submit evidence beyond what the signed term sheet says. Therefore, it is critical to have a term sheet in hand, signed by the attorneys and clients, containing all the material terms you need to settle the case. If you want finality from the mediation, your term sheet should expressly state that the parties contemplate entering a subsequent formal settlement agreement that is not a precondition of settlement. But if you believe there are material terms still to be considered, you should expressly indicate in the term sheet that settlement is not final until there is a fully executed, formal settlement agreement yet to be completed.

Common obstacles that arise after "agreeing" to settle

The terms of settlement agreements are as varied as the cases from which they arise. Lawyers and parties can also have varying degrees of experience and sophistication in settling cases. And even among those with relatively equal sophistication and experience, there can be a strategic game of "gotcha" over certain terms by one side to try to gain additional leverage for concessions. Consequently, the parties could have conflicting views on what constitutes a material settlement term. And that could leave one party with an agreement different than the one it thought it had, or both sides without an agreement at all. It is therefore important to expressly raise and memorialize in writing all of the material terms in a term sheet (keeping in mind, too, the points above).

Failure to negotiate confidentiality, nondisparagement, or similar material terms

Some attorneys consider confidentiality, nondisparagement, or other similar terms to be "standard" agreement terms. Accordingly, they may not expressly negotiate for these terms and not include them in a settlement term sheet, merely expecting them to be included in the "formal" settlement agreement. But this could be problematic for a few reasons. For example, if a plaintiff agreed to a settlement number, but confidentiality and nondisparagement were never raised beforehand in

1 New Jersey, Iowa, Illinois, Nebraska, Hawaii, Idaho, Vermont, Utah, South Dakota, Ohio, Washington, Georgia, and the District of Columbia.

a written offer or a term sheet, one might argue the settlement agreement did not include consideration for those terms. The other party then might then take the position that if the defendant wants confidentiality, it must pay more than the already-agreed-upon payment.

Plaintiffs' lawyers are increasingly raising this issue based on the 2003 "Dennis Rodman case," which is a Tax Court case captioned Amos v. Commissioner, T.C. Memo. 2003-329. The case arose after Dennis Rodman allegedly kicked Amos, a sideline photographer, in the groin during a 1997 NBA game. Amos sought medical care, but doctors found no serious injury. Nonetheless, within a week, he pursued a claim against Rodman. Rodman quickly paid Amos $200,000 to settle, but a substantial motivation for the agreement was maintaining confidentiality of the settlement agreement, which the agreement addressed in detail including stating confidentiality was part of the consideration for settling. Amos did not report any portion of the $200,000 as income. He was later audited, and after an appeal to the tax court, ordered to pay tax on $80,000 of the settlement. The tribunal ruled that under I.R.C. §104, only damages for physical injury are non-taxable, so it had to examine the "dominant reason" for the agreement to determine what portion was taxable. It concluded that, since the agreement did not apportion how much of the settlement was for physical injuries, it had to make its own determination of what the apportionment should be. It concluded, based on the record, 60% of the settlement was for physical injury and 40% was for confidentiality.

Because of their fear of tax consequences to their clients, plaintiffs' attorneys, even in cases outside of the personal injury context, are taking contrasting positions: (1) categorically not agreeing to confidentiality or nondisparagement provisions; (2) demanding that the agreement expressly state that none of the settlement proceeds are for confidentiality; (3) demanding that the agreement set a nominal amount as consideration for those terms; or (4) seeking to enter into an entirely separate agreement for confidentiality. If a litigant does not address these issues in settlement negotiations, it runs the risk of confidentiality being excluded from the agreement or, perhaps, a court finding there was no agreement at all.

Release terms

Sometimes parties exchange correspondence or execute a term sheet memorializing their settlement without specifically addressing release terms. Again, a party might assume a release is a standard term that the parties will address later in a "formal" settlement agreement. But in cases with, for example, multiple parties asserting claims, counterclaims and crossclaims, or if there are non-party indemnitors of a defendant, the release terms are critically important. If these terms are not expressly negotiated before the parties indicate their assent to settlement, they could end up fighting about it later. And at least some courts take the view that a release is not necessarily a material settlement term. See e.g., In re Deepwater Horizon, 786 F.3d 344, 357 (5th Cir. 2015) ("Release provisions are generally—though not always—material terms of settlement agreements. However, even where the existence of a release is material, the precise terms and specific language of the release are not necessarily material. Consequently, 'even where the scope of the release is disputed, ... courts routinely enforce settlement agreements even where the precise wording of a release has not been finalized.' This remains true even when one of the parties ultimately fails to sign the finalized release.") (internal citations omitted).

Indemnity terms and liability for breaches of warranties in the agreement

Though indemnity clauses appear in many settlement agreements and might be thought of as "boilerplate," they are often quite the opposite. It is usually important to have precise language about the scope and limits of an indemnity obligation. Waiting to negotiate the specifics until after one or both parties believe there is a settlement agreement, either through written correspondence or a mediation term sheet, can be a significant stumbling block to finally concluding a case.

Medicare set asides and other liens

For personal injury cases involving plaintiffs who are Medicare beneficiaries or will become eligible within 30 months of settlement, failing to address Medicare's interests in the settlement negotiations can substantially delay, or even scuttle, a resolution. Under the Medicare Secondary Payer Act, Medicare is entitled to reimbursement for injury-related medical expenses it paid for the plaintiff or will pay in the future. This may require making a portion of the settlement proceeds payable to Medicare, and might even necessitate creating a "set-aside" for future payments. Obtaining the necessary information from conditional payment information letters or a final demand letter from Medicare can take months, and there are stiff penalties for the parties' failure to comply with the Medicare Secondary Payer Act. So, a failure to address this issue before coming to an agreement on a settlement payment can leave the parties scrambling or might cause them to abandon settlement altogether.

Similarly, parties should be careful to negotiate expressly about the resolution of any other liens, such as attorney liens from plaintiff's prior counsel, tax liens on any property at issue in the settlement, insurance provider liens, and any mechanics liens or construction liens. Again, having negotiated a "settlement" amount without accounting for these issues could leave a party with an unexpected liability, causing them to try to renegotiate an agreement or claim that the parties never reached a binding agreement in the first place.

Undoing the terms of a final settlement

Bases for voiding a settlement agreement

The general bases for voiding all or part of a settlement agreement are like those for any other contract. Broadly, those bases are fraud (or fraud in the inducement), mutual mistake of fact, illegality, duress, and undue influence. See, e.g., Deuley v. DynCorp Int'l, Inc., 8 A.3d 1156, 1163 (release will be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries).

Fraud in the inducement

Fraud in the inducement is an affirmative defense to enforcement of a settlement agreement that can entitle the party asserting it to rescission. See Jordan v. Knafel, 378 Ill. App. 3d 219, 229 (2007). To establish the defense, a party must show: (1) a representation of a material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed by him on reasonable grounds to be true, but reasonably believed to be true by the other party; and (4) relied upon by the other party to his detriment. Id.

In the Jordan case, NBA star Michael Jordan brought a declaratory judgment action against Karla Knafel seeking to, among other things, invalidate an alleged oral agreement to pay Knafel $5 million per year to not file a paternity suit against him. Jordan denied he had made the agreement at all, but even if there had been an agreement, it was induced by Knafel's fraudulent representation that Jordan was her child's father. Indeed, it was eventually established through DNA testing that he was not the father. The court agreed. It held that the paternity issue was material to Jordan's decision to enter into the agreement, such that it was at least a significant factor in his decision to act. See id.at 229-30. It also held that Knafel knew or should have known that her representation to Jordan with certainty that he was the child's father was false because she also had unprotected sex with another man during the relevant timeframe. Id. And "when a party claims to know a material fact with certainty, yet knows that she does not have that certainty, the assertion constitutes a fraudulent misrepresentation." Id. at 231 (citation omitted). Her "fail[ure] to disclose material information in the process of contract formation" rendered the agreement voidable. Id. at 232. Finally, the court noted that, because Knafel did not provide contrary evidence, Jordan's reliance would be presumed because "representations [were] made in regard to a material matter and action [by Jordan] has been taken." Id.at 232-33 (citations omitted).

The Jordan case did not include a written agreement and, therefore, did not address the effects of a merger/integration clause or a "no-reliance" provision on Jordan's fraud theory about

Knafel's pre-settlement representations. Had there been a written agreement with such clauses, it would be necessary to understand whether and to what extent Jordan could have affected the fraud argument. As an initial matter for discussion, the distinction between integration/merger clauses and no-reliance clauses is often overlooked. Judge Posner, in the Seventh Circuit, has provided one of the better explanations of the distinction:

By virtue of the parol evidence rule, an integration clause prevents a party to a contract from basing a claim of breach of contract on agreements or understandings, whether oral or written, that the parties had reached during the negotiations that eventuated in the signing of a contract but that they had not written into the contract itself. But fraud is a tort, and the parol evidence rule is not a doctrine of tort law and so an integration clause does not bar a claim of fraud based on statements not contained in the contract. Doctrine aside, all an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced, or its price jacked up, by fraud.

Vigortone AG Prod., Inc. v. PM AG Prod., Inc., 316 F.3d 641, 644 (7th Cir. 2002). After noting "the majority rule is that an integration clause does not bar a fraud claim," he observed that "[o]ne consequence of the rule is that parties to contracts who do want to head off the possibility of a fraud suit will sometimes insert a 'no-reliance' clause into their contract, stating that neither party has relied on any representations made by the other." Id. And "[s]ince reliance is an element of fraud, the clause, if upheld—and why should it not be upheld, at least when the contract is between sophisticated commercial enterprises—precludes a fraud suit." Id. at 645. In sum, the general rule is that an integration/merger clause does not bar seeking to rescind a settlement based on fraud, but that a no-reliance provision will bar fraud-based rescission.

Some courts, however, take a different view, holding that even a "no-reliance" clause may not preclude a fraud claim. For example, one panel of the Florida Court of Appeals held that the only way to preclude rescission based on fraud is to explicitly say so:

[Defendant] cites numerous authorities from other jurisdictions in an attempt to persuade us there is a distinction between a "merger and integration" clause and a "no-reliance" clause, and we should follow the precedents of other jurisdictions that a "no-reliance" clause precludes rescission based on fraud in the inducement. However, we conclude our supreme court has spoken clearly that no contract provision can preclude rescission on the basis of fraud in the inducement unless the contract provision explicitly states that fraud is not a ground for rescission.

Lower Fees, Inc. v. Bankrate, Inc., 74 So. 3d 517, 520 (Fla. Dist. Ct. App. 2011). But even Florida courts disagree on this point. See Billington v. Ginn-La Pine Island, Ltd., 192 So.3d 77, 84 (Fla. Dist. Ct. App. 2016) ("[W]e hold that the 'non-reliance' clauses in this case negate a claim for fraud in the inducement because Appellant cannot recant his contractual promises that he did not rely upon extrinsic representations.")

The distinction between a merger/integration clause and a no-reliance clause is important, because if a party wants to avoid the effect of a merger clause to bring in evidence of the parties' obligations based on agreements or terms not included in the settlement, it must have the ability to viably assert fraud. "[W]hen a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause." LIAC, Inc. v. Founders Ins. Co., 222 F. App'x 488, 493 (6th Cir. 2007) (quoting, UAW-GM Human Resource center v. KSL Recreation Corp., 228 Mich. App. 486, 503 (1998)). If the agreement does not include a no-reliance clause, a party might be able to overcome the merger/integration provision. But if the agreement has no-reliance language, a party's attempts to overcome the merger/integration clause will not be successful, at least in most jurisdictions.

Mutual mistake of fact

The Jordan case discussed above also addresses when a mutual mistake of fact renders a settlement agreement voidable. If a mistake by both parties "as to a basic assumption on which the contract was

made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake." See, e.g., Jordan v. Knafel, 378 Ill. App. 3d 219, 234, 880 N.E.2d 1061, 1073 (2007) (quoting, Restatement (Second) of Contracts § 152, at 385 (1981)). As an alternative to Jordan's fraud-in-the-inducement argument, the court also determined the contract would be voidable because, at a minimum, Jordan and Knafel were mutually mistaken about the fact of the child's true paternity. Id. It found the issue of paternity went to a basic assumption on which the contract was made because it was consideration for Jordan to settle and that Jordan did not bear the risk of mistake regarding the child's paternity because he "had no duty to attempt independent verification of the information especially where . . . ascertainment of the true fact was more readily available to Knafel than it was to Jordan." Id. at 234-35.

Impossibility of performance, duress, illegality, and undue influence

There are other, though less frequently litigated, legal principles that a party might rely on to escape a settlement agreement, including impossibility, duress, illegality, and undue influence. For instance, after reaching a settlement agreement, a party might assert a right to rescind the agreement because certain unanticipated or changed circumstances make it impossible for that party to perform. But impossibility arises only when a party is unable to perform because of unanticipated and unforeseeable circumstances beyond that party's control. See Freedman v. Hason, 155 A.D.3d 831, 833 (2017) (rejecting claim of impossibility to performing settlement agreement where bank seized escrow funds to be used for settlement when the bank's seizure of those particular funds was foreseeable.)

A party might also try to argue that it entered into the settlement agreement only because it had no other choice. But the standard for proving duress is extremely high. Duress cannot vitiate a contract absent extreme conditions such as threats of physical or economic harm, criminal prosecution, or unjustified civil proceedings. The party asserting duress must also establish the other party acted with intent to cause it to act to its own detriment by taking a certain action or refraining from action. Mere fear is insufficient. The acts or threats must have been to a degree that the party claiming duress was deprived of its freewill by agreeing to settle. And, in some jurisdictions, a party claiming duress must prove that the other party was doing an act it "had no legal right to do" and "some illegal exaction or some fraud or deception." See, e.g., Lockwood Int'l, Inc. v. Wells Fargo Bank, N.A., 459 F. Supp. 3d 827 (S.D. Tex. 2020).

To set aside a settlement agreement based on undue influence, a party asserting it must show by clear and convincing evidence it "was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was . . . the effect of such undue influence." Pawnee Cty. Bank v. Droge, 226 Neb. 314, 321 (1987).

If a party can demonstrate that performance of a settlement agreement or parts of it will constitute an illegal act, it could have the agreement voided in whole or in part. "A contract to do a thing which cannot be performed without violation of the law" violates public policy and is void. In re Kasschau, 11 S.W.3d 305, 312 (Tex. App. 1999) (voiding a settlement agreement where a provision "illegally required the parties to destroy evidence in a potential criminal proceeding brought at the instance of non-parties to the settlement agreement.") "As a general rule, where part of the consideration for an agreement is illegal, the entire agreement is void if the contract is entire and indivisible." Id. "The doctrine of severability is an exception that applies in circumstances in which the original consideration for the contract is legal, but incidental promises within the contract are found to be illegal." Id. "In such a case, the court may sever the invalid provision and uphold the valid portion, provided the invalid provision does not constitute the main or essential purpose of the agreement." Id.

Practical tips for an effective settlement agreement

Whether parties have an enforceable settlement agreement can, at times, be uncertain. Often it is not as simple as pointing to an agreement with

signatures on the "dotted lines." Depending on the circumstances, an agreement could also arise, sometimes unexpectedly, from a conversation, email, text message, term sheet. To alleviate some of the uncertainty, counsel should keep in mind the following tips:

Written negotiation communications (including emails and text messages) that are not intended to create an agreement should state that they are subject to further discussion, subject to a formal agreement, or similar terms.

Have a draft term sheet or a template with you at the mediation to improve the process.[2]

Have a preplanned list of all desired material terms before the mediation, and add or subtract from it as the mediation progresses.

The term sheet should state that it contains all of the material terms.

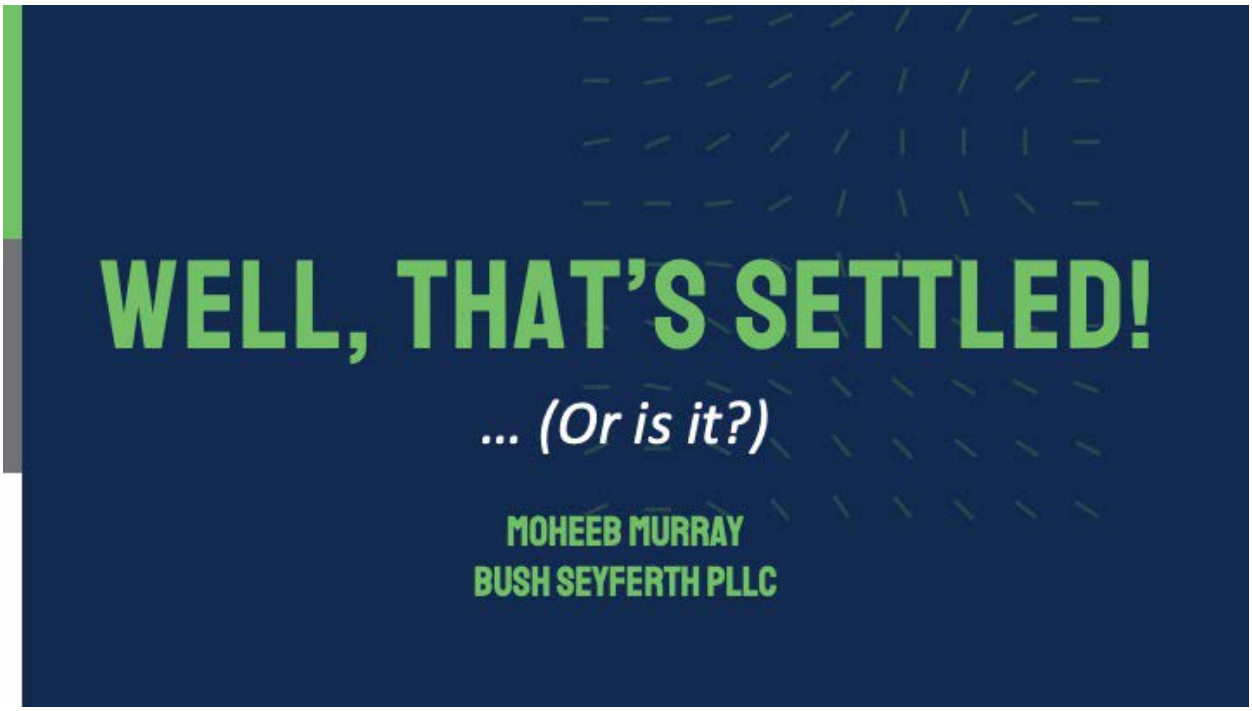
The term sheet should state that a formal written settlement agreement is not a precondition to settlement, unless you want the term sheet to be binding and enforceable.

Do not rely on any oral statements. Include a comprehensive integration clause and no-reliance language preferably including a specific waiver of any claims that the agreement was induced by fraud.

For settlements mediated by a magistrate judge, place the settlement on the record with the the magistrate's court reporter.

Consider making the mediator the arbitrator of disputes over settlement agreement and make that decision unappealable. In the alternative, include a provision stating that the same court will retain jurisdiction to enforce the agreement, and include that language in an order.

2 See Laura Watson and Tony Rospert, "Prepare to Settle: Develop a Pre-Mediation Framework for Complex Business Disputes," CMBA Bar Journal, November 2014 ("Once each party and its counsel have fully developed the possible settlement scenarios and terms, counsel should memorialize them in writing. The proposed term sheet should outline paths to settlement that warrant further discussion with the other side.")


WELL, THAT'S SETTLED!
… (Or is it?)
MOHEEB MURRAY
BUSH SEYFERTH PLLC


GENERAL TYPES OF AGREEMENTS & THEIR ENFORCEABILITY
Oral Agreements
Exchange of Letters, Emails, or Texts
Mediated Agreements
Signed "Formal" Settlement Agreements

GENERAL TYPES OF AGREEMENTS & THEIR ENFORCEABILITY

Oral Agreements

- Remember statute of frauds
- Some states bar oral settlement agreements regardless of SOF
  - See, e.g., Cal. Code Civ. P. §664.6 or MCR 2.507(G)
    - Must be in a signed writing *or* on the record

GENERAL TYPES OF AGREEMENTS & THEIR ENFORCEABILITY

Agreement by Exchange of letters, email, or even texts

- Multiple exchanges can form an agreement
- Intent to be bound = Intent to *send* the communication, not specifically to "sign."
  - Some states have stricter "subscription" rule.
- Sometimes enforceable agreement even if writings reference "formal" settlement agreement later.

GENERAL TYPES OF AGREEMENTS & THEIR ENFORCEABILITY

Mediated Agreements

- Uniform Mediation Act (12 states, plus DC so far)
  - Establishes privilege over mediation communications, unless written agreement by all to waive the privilege.
  - Effectively makes the written settlement agreement the only admissible evidence.

GENERAL TYPES OF AGREEMENTS & THEIR ENFORCEABILITY

Other grounds for inadmissibility of oral statements during mediation

- State statutes or court rules (E.g., MCR 2.412)
- Rule of Evidence 408

GENERAL TYPES OF AGREEMENTS & THEIR ENFORCEABILITY

- All material terms included?
- Formal agreement an express precondition of settlement?
- Signed by representatives with proper authority?

SETTLEMENT AGREEMENTS THAT REQUIRE JUDICIAL APPROVAL

- Minor or incompetent plaintiffs
- Wrongful death cases
- Class action settlements
- Cases involving a receiver
- Bankruptcy adversary proceedings affecting the estate

COMMON ISSUES THAT CAN BLOW UP A SETTLEMENT

- Including material terms into final agreement that we not expressly negotiated
  - Confidentiality
    - *Amos v. Commissioner (Rodman case)*

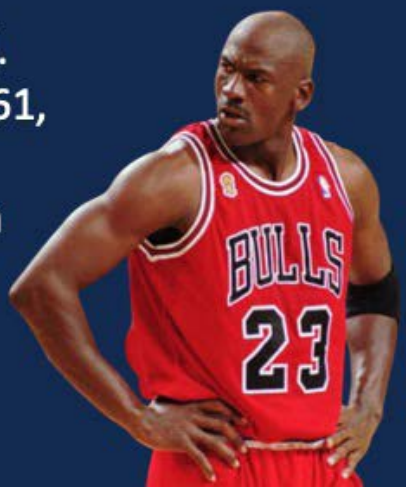
COMMON ISSUES THAT CAN BLOW UP A SETTLEMENT

- Nondisparagement
- Description Of Released Parties & Claims
- Warranties & Representations
- Indemnity/Hold Harmless
- Medicare Set Aside
- Liens
- Structured Settlement

"UNDOING" A SETTLEMENT AGREEMENT

Fraud in the inducement

- Example: *Jordan v. Knafel*, 378 Ill. App. 3d 219, 232, 880 N.E.2d 1061, 1071–72 (2007)
- Written agreements: Integration clause v. no-reliance clause



"UNDOING" A SETTLEMENT AGREEMENT

Mutual Mistake of Fact

- Basic assumption on which contract was made.
- Material effect on the agreed exchange of performances.
- Voidable unless adversely affected party bears the risk of mistake.
- Unilateral mistake is not sufficient.

"UNDOING" A SETTLEMENT AGREEMENT

Mutual Mistake of Fact

- Michael Jordan case, part II
  - Even if *Knafel's* representation was not fraudulent, she and Jordan both operated under a mistake of fact.
  - Jordan did not bear burden of the mistake

"UNDOING" A SETTLEMENT AGREEMENT?

ILLEGALITY

UNDUE INFLUENCE

DURESS

2+2=5

IMPOSSIBILITY

PRACTICAL TIPS

01 Make sure all written negotiation communications (including emails and texts) expressly say they are "subject to contract" or similar language.

PRACTICAL TIPS

01 Make sure all written negotiation communications (including emails and texts) expressly say they are "subject to contract" or similar language, if you don't want them to be binding.

PRACTICAL TIPS

02 Make sure any oral agreement is memorialized and confirmed right away in a detailed writing.

PRACTICAL TIPS

03 The writing, even a "term sheet," should include all terms you consider material.

- Have a preplanned list of material terms *before* mediation

PRACTICAL TIPS

04 Have a draft term sheet or full settlement agreement with you at the mediation.

PRACTICAL TIPS

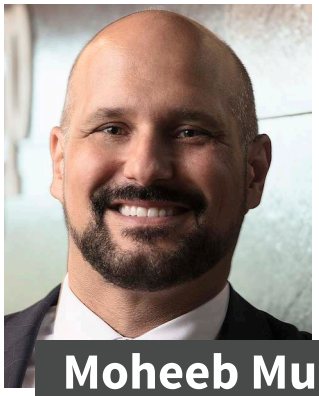
05 Term sheet should expressly address whether a subsequent "formal" agreement is a precondition to settlement.

PRACTICAL TIPS

06 Include a robust integration clause *and* a robust no-reliance clause.

PRACTICAL TIPS

07 Consider making the mediator the arbitrator of any disputes over the settlement agreement and make that decision unappealable.



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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
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- Insurance Litigation
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Honors and Awards

- Best Lawyers® Lawyer of the Year, Insurance Law (Troy, MI: 2023)
- 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

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- Civil Litigation Mediation Training
- Harvard Professional Development Programs, Harvard Division of Continuing Education, Participant, Strategic Leadership, September 28-29, 2016

Navigating Turbulent Waters: A Conversation with Global Public Affairs Executive Danny Martí

Greg Marshall
Snell & Wilmer (Phoenix, AZ)

Navigating Turbulent Waters: A Conversation with Global Public Affairs Executive Danny Martí[1]

Greg Marshall and Danny Martí – Head of Public Affairs and Global Policy, Tencent

As litigators, we don't often have the opportunity of seeing the world through the lens of company leadership. But the truth is that risk management and litigation often flows from leadership decisions, which reflect a complex balancing of priorities, company culture, and considerations of what's happening in the world socially, economically and politically.

For this article, we step back from the day-to-day work of litigators, and hear from someone who works with lawyers around the world and oversees the public affairs function for one of the largest and most valuable companies in the world.

Danny Martí serves as the Head of Public Affairs and Global Policy at Tencent, recognized as one of the World's Most Innovative Companies (BCG, 2022). Danny is a member of Tencent America's Management Committee and serves on the boards of other international companies, including as Chairman at Ironhide Game Studio (Uruguay), a Director at Tequila Works (Spain), and as a Board Observer at Funcom (Norway).

Before joining Tencent, Danny held several high-profile roles in the public and private sectors. Immediately prior to Tencent, Danny served as the Head of Global Government Affairs at London-based RELX Group, the world's largest publisher and a global provider of information and analytic solutions (including LexisNexis), as well as the Vice Chairman of the U.S. Chamber of Commerce Global Innovation Policy Center (GIPC).

In 2014, President Obama nominated Danny to serve as the U.S. Intellectual Property Enforcement Coordinator, aka the "White House IP Czar," where he was unanimously (92-0) confirmed by the United States Senate and sworn into office by then-Vice President Biden. Prior to his time at the White House, Danny was the Managing Partner of the Washington, D.C. office of a leading 'AMLAW 100' law firm, with a practice focused on intellectual property litigation and transactional matters.

With this background, Danny is in the unique position of understanding what's happening around the world socially, economically, and politically, and distilling and packaging that information for business leadership. The Trial Network is fortunate to have Danny's attendance. What follows is a primer of the issues we aim to cover, in the question / answer format of our presentation.

Q: What is it that you and your team do for Tencent, and is your position a fixture in most large companies today?

A: At its most basic, the team manages the company's relationships with various stakeholders, including government officials, policymakers, regulators, NGOs, industry associations, customers/partners, and so on. To be effective, it is important that the team closely monitors legislative and regulatory developments, identifying potential risks and opportunities, and develop strategies to support the company's business interests.

A public affairs team will focus on many items that

1 The opinions expressed within the article and presentation are solely the author's/presenter's and do not reflect any opinions, positions or beliefs of the author/presenter's employer or any other group.

are important to the business, including everything from traditional government relations to regulatory affairs, stakeholder engagements to policy management, and communications and media relations to corporate social responsibility (CSR).

In light of the breadth of these issues, most medium to large-sized companies, especially those with material international operations or innovative market roles, have created and supported dedicated in-house public affairs teams like the one that I manage for Tencent.

While these functions have long existed within companies, often managed by legal departments, many companies recognized that they needed to be involved early in the regulatory and legislative process because it can and does materially affect a company's ability to succeed in the marketplace, which is what led to the creation of teams outside of the legal department like mine.

According to one McKinsey study, the business value at stake from government and regulatory intervention alone is quite large: about 30 percent of earnings for companies in most industries, and even higher in highly regulated sectors such as banking, where the figure may reach as high as 50 percent.[2] For these and other reasons, we now see public affairs teams like mine as a fixture across many international companies today.

Q: How have you observed the role of in-house counsel evolve since you jumped from the private sector into the public sector and then back into the private sector in various roles?

A: The general counsel and in-house legal teams have traditionally been on the forefront of the complex legal issues that management teams commonly wrestle with. But as the world continues to get more complex, and the expectations on businesses continue to deepen and evolve, general counsel is now getting pulled in more and more to answer the "big questions," questions beyond strictly "legal" questions, that CEOs face.

For example, we see employees, investors and others now asking management to take positions and exercise leadership on such issues as climate change, racial injustice and other social and political issues of importance in the communities in which we work and live. This is part of the modern evolution of business as well as the developing scope of inhouse legal and public affairs departments.[3] Despite the best of planning, companies will continue to face their own crisis moments or will otherwise need to quickly respond to regulatory developments, domestic and community-based opportunities, and international uncertainties.

Q: What do you see as some of the biggest policy trends, and how can we expect them to impact risk management and litigation in the years to come?

Where does one start? There are, of course, many policy issues that have or will impact risk management and litigation and the broader practice of law. These policy developments are all around us.

As one example, with the growing focus on climate change, we see the cumulative number of climate change-related cases having more than doubled since 2015. This is a combination of policy and political discourse in action. Just over 800 cases were filed between 1986 and 2014, while over 1,000 cases have been brought in the last six years, with the vast majority in the United States.[4]

Turning to employment law, debates around economic inequality and perceived exploitative practices that suppress wages has contributed to the Federal Trade Commission's recently proposed new rule that would ban employers from imposing noncompete agreements on their employees.[5]

2 https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/organizing-the-government-affairs-function-for-impact#/

3 For example, on August 19, 2019, 181 CEOs of America's largest corporations overturned a 22-year-old policy statement that defined a corporation's principal purpose as maximizing shareholder return.

In its place, the CEOs of Business Roundtable adopted a new Statement on the Purpose of a Corporation declaring that companies should serve not only their shareholders, but also deliver value to their customers, invest in employees, deal fairly with suppliers and support the communities in which they operate. See, e.g., Business Roundtable, "One Year Later: Purpose of A Corporation," accessed at https://purpose.businessroundtable.org/.

Another example can be found with the voluntary commitments and multi-stakeholder partnerships made in support of the implementation of the United Nation's Sustainable Development Goals (SDGs). See UN SDG Goals, accessed at https://sdgs.un.org/goals.

4 See Global Trends in Climate Change Litigation: 2021 Snapshot, accessed at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

5 See FTC Non-Compete Clause Rulemaking (Jan. 5, 2023), accessed at https://www.ftc.

Similarly, the powerful "MeToo" social movement against sexual harassment and abuse set off a wave of litigation and changes to corporate and legal practices. In 2022, a law went into effect that transformed how businesses resolve allegations of workplace sexual harassment and assault, and how such issues are addressed in employment contracts.

Policy developments and trends profoundly shape the corporate risk and litigation environment.

Q: What do you see as some of the biggest technology policy issues today and how they are likely to affect risk management and litigation?

This is an area of law that barely existed twenty-five years ago and now seems to dominate both policy debates and the litigation environment.

Artificial Intelligence (AI) will add many new and exciting benefits to our personal and professional lives. Take for instance the ChatGPT, the AI-driven intelligent chatbot launched in November 2022 that has shown an impressive ability for its detailed responses across so many different domains of knowledge.

Although I am excited about the future of an AI-assisted world, the rapid development of AI has at the same time raised many legal and ethical questions. For example, who is responsible if an AI system causes harm? How do we ensure that AI is used in a fair and non-discriminatory way?

As AI becomes more prevalent, litigation related to these issues is certain to increase. Some markets are seeking to regulate this space early, while others are taking more of a "hands off" or "wait and see" approach. This area will keep regulators and lawyers, including litigators, busy for decades to come.

AI is likely to be mired in a decade of litigation over just its inputs alone. AI rests on being trained against large quantities of data and text (often billions of inputs). AI developments will test existing intellectual property laws and the litigation over the next few years will create many of the "rules of the road" going forward. For example, AI systems may be accused of infringing on various forms of IP, such as copyrights, when an AI system is trained against copyright protected content without permission. AI systems can also generate new material and innovations that will give rise to disputes and challenges over who really owns the IP created by a non-human AI system.

Similarly, with the increasing amount of personal data being generated and collected by companies, data privacy will remain a leading technology policy issue around the world. The growth of data collection and use cases has led to the introduction of new regulations such as the General Data Protection Regulation (GDPR) in the European Union and the California Consumer Privacy Act (CCPA) in the United States. I see this as the beginning and not the end of the regulatory process. Litigation related to data privacy is likely to increase year over year as consumers become more aware of their rights and companies struggle to comply with a complex and evolving global regulatory framework.

Lastly, I expect a continued if not growing focus on platform regulation. The power and influence of large technology platforms has raised concerns about issues such as data privacy, fair competition, and the impact of misinformation. Governments are debating how best to regulate these platforms to ensure that they serve the public interest. With a few exceptions, this is a largely unsettled and evolving area that will keep lawyers quite busy.

Q: What sorts of risks do you see connected with non-fungible tokens (NFTs)? This technology seems to have occupied much of the news over the past year.

There is a real future to being able to own something in a digital world, especially where you can enjoy and use the digital asset across platforms or in different ways.

Take for example a blockchain-backed digital "skin" or outfit that you buy in one video game and can use in other games, or as part of your own avatar. I think this is where we are eventually heading when we talk about unique and tradeable digital identifiers

gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

in the metaverse.

I do, however, have personal concerns over how NFTs may have become an empty trend where people invested in digital artwork, like a digital image of a cartoon monkey, that has little use or aesthetic value but is hyped simply because it is an NFT. This crass commercialism is something we can do without. As Bill Gates remarked on this NFT phenomenon, it is "based on greater fool theory,"[6] that is, the idea that overvalued assets will go up in price only when there are enough foolish investors willing to pay more for them.

Whatever we think of them, we are already seeing a growing body of legal issues and disputes, from copyright infringement where the seller of the NFT does not own the underlying image, trademark claims, including a recent jury trial in February where an artist's NFT version of Hermes' famous Birkin bag violated the French fashion house's trademark rights,[7] contract disputes involving self-executing contracts at the time of purchase, fraud, money laundering and regulatory compliance (securities laws), taxation and so on.

Q: Tencent is a leading tech and entertainment company, especially in video games, which many experts predict will take the lead in launching the metaverse. What can litigators expect to come from the metaverse and what should we be focused on today?

Insiders see the metaverse as the next evolution of the internet, offering a more immersive and interactive experience for users.

There have been many "phases" of the internet, from the early days of simple connectivity (think email, basic web browsing) to a more networked economy (early e-commerce) with enhanced digital interactions (social media, cloud, video streaming, etc.). As dynamic and incredible as these developments have been, when was the last time you were in "awe" when you got behind your computer and digitally "plugged in"?

This next generation of our digitally connected lives with bring some of that "awe" back – it will be less passive (consume content) and more about experiencing new things in a blended world.

At Tencent, we speak less about the metaverse, as this term remains a bit undefined, and we speak more about hyper digital reality. Simply put, this concept integrates the digital world with reality to create a blended experience. Yes, it can be part virtual reality (VR), but also augmented reality (AR) or mixed reality (MR). Extended reality, or "XR," is the generally accepted catch-all phrase.

This hyper digital reality or XR will offer people real-time immersive experiences and will allow them to connect more deeply with the virtual world and to switch seamlessly between the virtual and the real world. It has the power to spark people's imagination and push the boundaries of possibility. I see a whole new creative landscape emerging.

In some respects, the metaverse is already here. We see parts of the longer-term potential in games like Roblox that enjoy over 200 million monthly active users and is essentially a 3D world where people can meet, play games and socialize. My kids are on it with their friends all the time. Or take Fortnite, with hundreds of millions of players who join to play games, but also to digitally attend concerts from artists like Ariana Grande and Travis Scott (in avatar form).

This is not all behind a computer screen or a gaming console. We are beginning to see these glimpses of extended reality in the real world as well. One of the first of its kind was the so-called "Charging Golden Bull" at Pavilion Kuala Lumpur on a giant LED screen, breaking through glass as a symbolic gesture of chasing away Covid-19 and delivering the message of good health and prosperity during the Chinese New Year.[8] Another fun example of XR was brought to us by Spanish luxury fashion house Balenciaga and online video game Fortnite, where a real-world immersive 3D billboard experience could be felt on the streets of London, New York, Tokyo

6 See Ryan Brown, "Bill Gates says crypto and NFTs are '100% based on greater fool theory'" (CNBC, June 15, 2022), accessed at https://www.cnbc.com/2022/06/15/bill-gates-says-crypto-and-nfts-are-based-on-greater-fool-theory.html.

7 See Blake Brittain, "Hermes wins U.S. trademark trial over 'MetaBirkin' NFTs" (Reuters, February 8, 2023), accessed at https://www.reuters.com/legal/hermes-wins-us--trademark-trial-over-metabirkin-nfts-defendants--lawyer-2023-02-08/ .

8 See YouTube, Pavilion Kuala Lumpur 3d Golden Bull, accessed at https://youtu.be/m92R7_-MG8M.

and Seoul.[9]

As this technology develops and we test existing boundaries and create new immersive experiences, managing risk and litigation will be forefront concerns:

Intellectual property: the metaverse will be home to many digital assets, such as virtual clothing, architecture, and avatars. There will be questions about how intellectual property laws apply to these assets and whether (and how) they can be bought, sold, or transferred.

Governance and regulation: As the metaverse grows, there will be questions about who is responsible for the platform's governance and regulation. This will include issues such as content moderation, privacy policies, and dispute resolution.

Data protection: The metaverse will collect vast amounts of user data, and there will be questions about how this data is collected, stored, and used. There will be a need for data protection regulations that ensure user privacy and limit the risk of data breaches.

Cybersecurity: The metaverse will be a prime target for cyber-attacks, and there will be questions about who is responsible for the interconnected platform's cybersecurity. We can expect regulations to ensure that the various elements of the metaverse have appropriate security measures in place, and litigation when cyber-attacks cause consumer injury.

Jurisdiction and cross-border issues: The metaverse is a global platform, and there will be questions about which laws and regulations apply to users from different countries. When litigation arises, personal jurisdiction questions may take on a dominate role.

Property and contract law: The metaverse will allow users to buy and sell virtual assets, and there will be questions about how property and contract law applies to these transactions. This will include issues such as fraud and enforceability, and fodder for risk and litigation.

The development of the metaverse will require cooperation between policymakers, legal experts, and technology companies to ensure that the platform is safe, secure, and governed by fair and effective rules. The above examples are just a few of the many ways in which I see the metaverse having an impact on risk and litigation in the years to come. This means a busy time for in-house lawyers and skilled litigators for the foreseeable future.

9 See YouTube, Fortnite x Balenciaga 3D Billboard, accessed at https://youtu.be/UTOt-0ly-8gw.


NAVIGATING TURBULENT WATERS:
A Conversation with Global Public Affairs Executive
Danny Marti


U.S. Intellectual Property Enforcement Coordinator
(IPEC) aka "IP Czar"
Nominated By President Obama in 2014,
Served in the White House 2015-2017
EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES

GROWING ROLE OF PUBLIC AFFAIRS

- Government Relations
- Regulatory Affairs
- Stakeholder Engagements
- Policy Management
- Communications and Media Relations
- Corporate Social Responsibility (CSR)

POLICY ISSUES IMPACTING C-SUITES

REUTERS

5 minute read · March 21, 2023 3:27 AM GMT+8 · Last Updated 2 days ago

General counsels on the front line: balancing ESG and economic priorities

FORTUNE

America's CEOs Seek a New Purpose for the Corporation

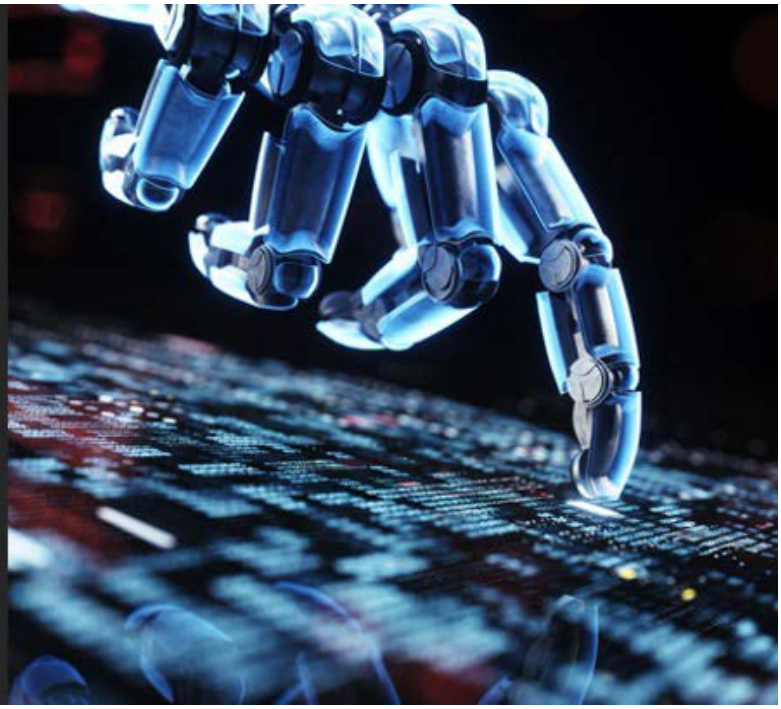
The New York Times

Leave Russia? A Year Later Many Companies Can't, or Won't.

4

POLICY TRENDS IMPACTING LITIGATION

TECH POLICY ISSUES

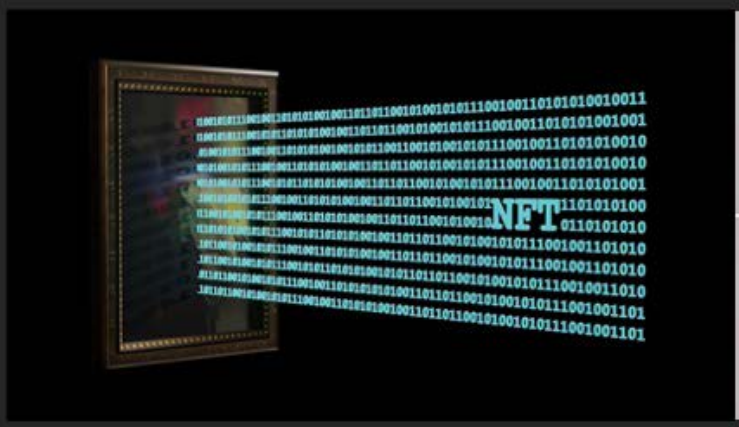


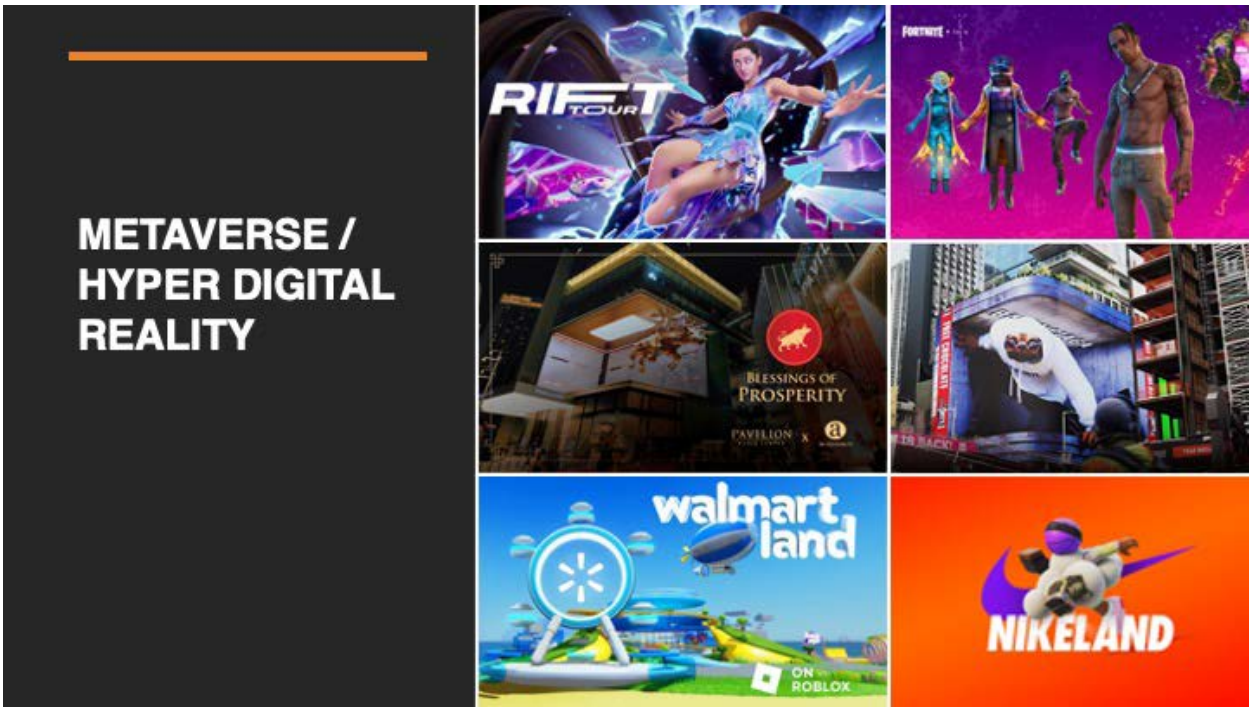
ARTIFICIAL INTELLIGENCE

DATA PRIVACY

PLATFORM REGULATION

NON-FUNGIBLE TOKENS (NFTs)




METAVERSE /
HYPER DIGITAL
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BLESSINGS OF PROSPERITY
walmart land
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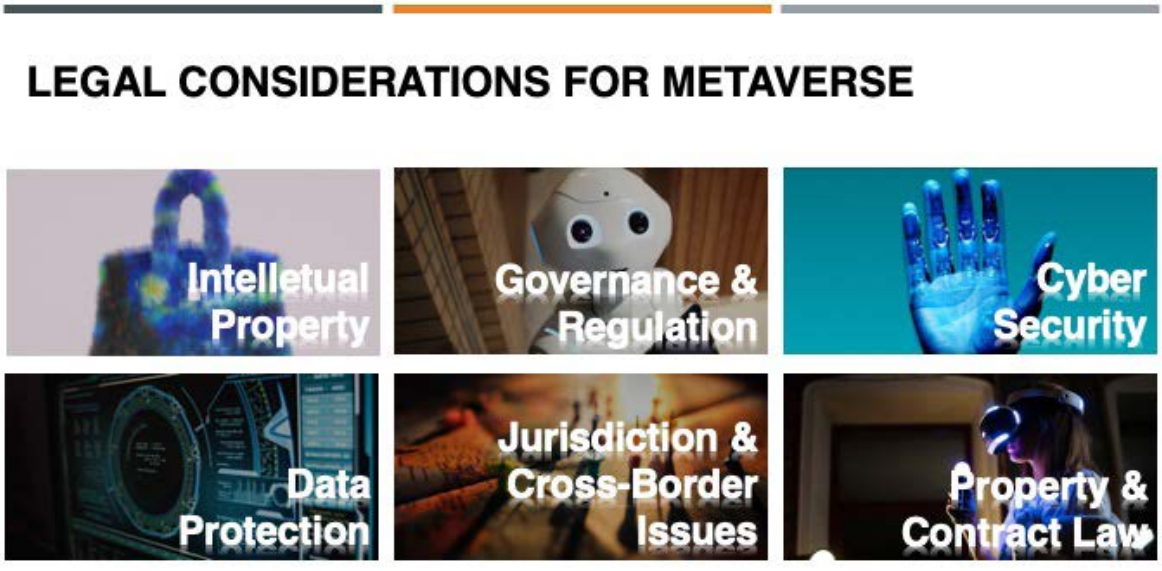
LEGAL CONSIDERATIONS FOR METAVERSE
Intelletual Property
Governance & Regulation
Cyber Security
Data Protection
Jurisdiction & Cross-Border Issues
Property & Contract Law

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Greg Marshall

Partner | Snell & Wilmer (Phoenix, AZ)

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.

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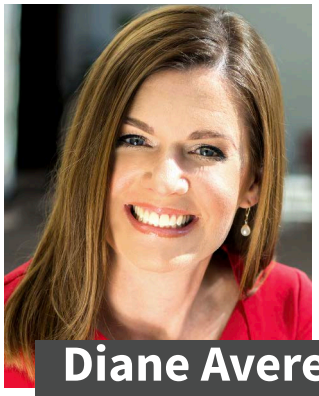
Professional Recognition and Awards

- The Best Lawyers in America® (2023)
- 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)



Break-Out A: Who's Zooming Who?

Diane Averell

Porzio Bromberg & Newman (Morristown, NJ)

Five Ways to Maximize Your Virtual Mediation Experience and Achieve Success
Diane Fleming Averell

Virtual mediations are widely embraced as a cost-effective and efficient way to resolve cases. However, there are material differences between the traditional in-person mediation and the remote version. To succeed in the virtual setting, in-house lawyers and their outside advisors must reevaluate their traditional mediation playbooks and develop a new game plan that adjusts to and optimizes the pros and cons of the onscreen proceeding. The following tips and considerations aim to assist you in maximizing your next virtual mediation experience and achieving success.

1. Select the "Right" Mediator For This Case and This Medium. Choosing the right mediator has always been a critical first step. Important factors to the selection process include the mediator's professional background on the bench and in private practice; substantive experience in a particular field of law; any perceived leanings toward plaintiffs versus defendants; personality and temperament; mediation style and approach; and reputation for successfully resolving cases. These factors remain relevant to selecting the right neutral for virtual mediation, but now there is an added wrinkle to the evaluation: has this mediator developed a command of the technology and demonstrated the ability to resolve cases in the remote mediation setting?

The most well-respected retired jurists with a knack for settling tough cases can be rendered completely ineffective in the virtual setting due to (a) an inability to build rapport with the parties onscreen; and (b) an obvious lack of competency with crucial features of the platforms, namely assigning and distributing the parties to breakout rooms and then navigating between them with ease. Any perceived discomfort with communicating through this medium or noticeable bumbling with the technological aspects can quickly frustrate the process, shake the parties' confidence in the mediator, and render her/him a less credible authority.

Before retaining a mediator, you must do your homework. It is not enough to simply query the mediator's assistant about comfort and proficiency with virtual mediations, which will elicit only empty reassurances. Instead, it is essential to reach out to other attorneys who have worked with this mediator to confirm effectiveness and technological proficiency with the virtual platform. Did the mediator have a positive onscreen presence? Did the mediator connect with parties and engender confidence and trust despite the remote setup? Did the mediator personally handle the virtual platform's features, or did he/she rely on an assistant to attend the proceeding and control all of the program's functions? With or without assistance, did the mediator capably handle and move between breakout rooms? Was the mediator able to reshuffle multiple parties and counsel to different breakout rooms on the fly? To the extent there were any hiccups with the technology, did the mediator have immediate access to IT support? Armed with answers to these questions, you can make a better, more informed selection.

2. Capitalize on the Lack of Geographic Barriers. Perhaps the greatest benefit of virtual mediations is the elimination of travel, which yields significant time and cost savings. But the elimination of geographic barriers also makes it possible to enrich the mediation process in several critical ways. First, the parties' options for mediators

are no longer limited to the venue where the case is pending, or even the local vicinity. Instead, the parties can engage top-flight mediators from across the country whose background and subject matter expertise are best suited for your particular case – and can do so without the burden of paying the mediator's hourly fee for travel on top of expenses for transportation and hotel accommodations.

Second, with the elimination of travel-related fees and expenses, consider inviting your expert witnesses to participate in the virtual mediation. To the extent your case is a true "battle of the experts" on highly complex scientific, medical, or technical issues, having your "ace" expert participate remotely will enable the mediator to fully understand the strengths of your case and the weaknesses of your adversary's case while also showcasing just how credible and persuasive a jury will find your expert at trial. And if your star witness is your company representative, consider whether his/her attendance for part of the remote proceeding could be worthwhile for the same reasons – for the mediator to fully appreciate and then convey to your opponent that you are ready and will try this case if a resolution cannot be reached at mediation.

Finally, the elimination of travel headaches also allows the in-house team and their outside counsel, alike, to embrace virtual mediations as impactful training opportunities for new (or newer) lawyers. In-house legal teams are constantly challenged to do more with less resources and headcount, making it incredibly difficult for a newer in-house lawyer to travel with and shadow a more experienced member of the corporate counsel team at an in-person mediation – to see how it's done. Virtual mediation permits newer lawyers to join part or all of the remote proceeding and observe seasoned in-house attorneys and their outside counsel employ various negotiation strategies, tactics, and techniques to achieve the optimal results for the client.

3. Construct Your Mediation Strategy to Optimize the Virtual Format. Designing a successful game plan for virtual mediation requires clients and their outside counsel to (a) set realistic goals; and (b) discuss the range of tactics available to achieve those goals. Consistent with traditional, in-person mediations, setting goals requires an in-depth assessment of the strengths and weaknesses of the case based on the law and the facts; the likelihood of success on dispositive motions; jury verdicts and settlements reported in similar cases in the same venue; and potential exposure if the case is tried to verdict. From there, a feasible settlement range can be calculated within the predictable outcomes of the case.

Of course, even when a specific dollar amount is granted in settlement authority, outside counsel should not assume that your client's internal business goals will be achieved if every penny of that amount is paid to resolve the case. It is therefore critical to ask for the client to breakdown the total authority number into three categories: (1) what dollar range would be a disappointing day for the company; (2) what dollar range would be an "okay" day for the company; and (3) what dollar range would be a great day for the company. With this insight, outside counsel can better understand the client's true pain tolerance and target range for resolution and devise the overall mediation strategy and potential tactics accordingly. Suffice it to say, the goal-setting process does not differ materially between in-person and virtual mediations.

The same cannot be said for tactics. And here's why: virtual mediations can be irretrievably upended by screen fatigue and the distractions of email and text messages that are constantly popping up on the mediator's computer screen and cell phone. It is all too easy to lose the mediator's focus during a caucus if you resort to a more traditional, oral recitation of the relevant facts and legal issues that support your case – even with a healthy dose of pound-your-fist-on-the-table advocacy when dismantling your opponent's position and arguments. Without the pressures of being in-person in the same conference room, mediators and parties, alike, can fall prey to these distractions while sitting in the comfort of our own offices – or even our homes. The mediator cannot be effective if he/she cannot pay attention long enough to absorb and then accurately articulate to your opponent your client's position and the underlying factual and legal bases for that position.

It is therefore important to embrace the onscreen dynamic and use the "share screen" features to

captivate the mediator's attention while spoon-feeding the highlights of your case to him/her. This will require a great deal of advanced preparation to formulate your talking points and then assemble and package the most relevant evidence for your virtual presentation. The key is to distill your entire case into its most critical components and then determine the best multimedia mix that will both entertain and educate the mediator. Consider conveying the strengths of your case -- and the most damning aspects of your adversary's case – through a mix of PowerPoint slides featuring critical dates, facts, and legal principles; video clips from important events and depositions; and excerpts from "hot documents" that go to the heart of your client's position on liability, causation, or damages. Done well, the mediator will remain engaged, see the case your way, and communicate to your opponent that your team is ready to try this case if the mediation fails. And should mediation fail, these materials can be repurposed for your eventual trial demonstratives and exhibits.

A note of caution: the virtual experience alters the communication dynamics between clients and their outside counsel. There is no ability to read non-verbal cues through eye-contact or body language, and even if you fire off an email or text that says "let's discuss before responding", there is no guarantee that your colleague will see the message in time. Certainly, the "chat" function on the virtual platform should NEVER be used for attorney-client communications.

Accordingly, in advance of the virtual mediation, clients and their outside counsel should discuss and agree to certain communication protocols for the proceeding. For example, decide whether your backchannel communications will be via email or text. Also be sure to discuss preferences for conferring outside of the mediator's presence before responding to each and every offer, and agree to clear signals that will convey a change of heart in a previously decided move (e.g., "We need a moment to discuss our response."). Finally, determine ahead of time how your client prefers to respond to direct questions that the mediator poses to him/her. Some clients welcome that opportunity; others prefer to stay absolutely silent for the duration of each and every caucus and want their outside counsel to field all inquiries from the mediator. Overall, such pre-mediation planning will assist clients and their counsel to remain on the same page throughout the proceeding.

4. Call the Mediator Before and During the Virtual Mediation. Showing up early for an in-person mediation is a great way to begin establishing rapport with the mediator and talking strategically about your case. Virtual mediations eliminate this relationship-building exercise, and so it is necessary to call the mediator ahead of your scheduled proceeding to begin establishing rapport. Use these conversations to educate the mediator about the basics of your case and the details of any settlement discussions to date, but also to provide your insight on the greatest obstacles to resolution. Describe for the mediator the personalities of the advocates and the clients, warn him/her about "hot button" issues that could upend negotiations if presented in the wrong manner during caucuses, and ask the mediator how he/she approaches the issues that worry you most about the upcoming mediation. Offer to walk through your mediation statement and exhibits and answer his/her questions on this call, or another call before the mediation. Address any questions you have about the virtual platform, allocation of parties across breakout rooms, and your ability to use the "share screen" features during caucuses. Provide your cell phone number to the mediator, and ask for his/hers, and confirm that the mediator is open to receiving texts and calls throughout the proceeding. Most mediators will welcome these advanced phone calls as a time-saving measure that will allow the parties to get to work immediately after appearing onscreen. Overall, this investment of time will allow you to build mutual trust and respect with the mediator before the virtual session begins, and set you apart as "the reasonable one" who will truly partner with the mediator to reach a resolution.

During the virtual mediation, use phone calls to keep tabs on how much time the mediator is spending in caucuses with the various parties. During an in-person mediation, advocates can take a walk to the restroom or the coffee station to assess the location of the mediator and how much time he/she is spending with each of the parties before returning to their assigned conference rooms. Checking in with a receptionist or administrative assistant also can

help you in this regard. Virtual mediations, however, remove all of these options. Long bouts of silence, unchecked, can generate pessimism, uncertainty, and frustration among your negotiation team. You should feel free to text or call the mediator during extended absences to gage progress and reassure your team.

Be sure to use a combination of virtual caucuses and off-screen telephone calls to push the mediator to work for your client. This requires the mediator to get beyond the parties' typical disagreement over the facts and law, and drill down into the parties' relative motivations and expectations for settlement. Provide the mediator with a list of questions to raise with your opponents to unearth the real story behind the numbers and terms they are demanding. If the numbers demanded do not align with jury verdicts in the jurisdiction or fail to reflect the actual damages supported by evidence in the case, ask the mediator to secure a breakdown of the demand that identifies each component of damages and the value assigned to it. If your adversary refuses to do so, then you know that the numbers are not anchored to concrete components of claimed damages; rather, the demand is based on expectations of a "take-home" number that may not be grounded in reality—and certainly not palatable for your client. Engineer a reality check by suggesting talking points that the mediator can use to educate your opponents and drive home the message that their expectations likely will not be met by trying this case. Work with the mediator to develop creative approaches to changing the expectations of your opponents to better align with the realistic case value, while also gaining important concessions that will move the parties' respective positions closer together. Encourage the mediator to utilize both onscreen sessions and private phone calls with counsel, alone, to maintain momentum, better understand the dynamics between counsel and their clients, and overcome obvious and not-so-obvious impediments to striking a deal.

5. Recognize "We're Done" No Longer Has the Same Impact. It can be a herculean undertaking to coordinate the busy schedules of the mediator, practitioners, and their clients, and identify dates that work for all parties to travel and appear for a traditional, in-person mediation. Add to that the hefty expense of the mediator's hourly fee, the outside lawyers' hourly fees, plus travel and hotel expenses, and it is clear that an in-person mediation can be a complicated and costly endeavor. Accordingly, time pressures are real, and the parties are motivated to close the deal through one session. And so when the parties reach an impasse in a traditional, in-person mediation, there is tremendous weight to the threat "We're done. We're Leaving." Often such pronouncements refocus the parties and break the impasse, even if there is ample suspicion that the threat is empty. Walking away from the negotiating table can be a tough, unnerving call for clients to make with their outside counsel. There is no guarantee that another session can or will be scheduled in the near term, which can be daunting if a trial date is fast approaching.

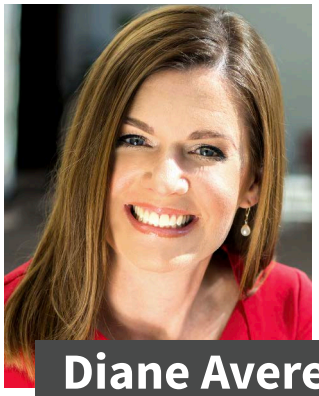
Virtual mediations have all but eradicated the "We're Leaving" tactic. Because of the supreme convenience and substantially lower costs of virtual mediations, it is almost assumed that the parties can easily schedule another session and reconvene negotiations in the not too distant future. As a result, the parties can seem less motivated to work through and break an impasse. Parties are less likely to tolerate ridiculous "non-starter" offers or waste time with opponents who refuse to negotiate in good faith. The remote format removes the burden of enduring the blowhard opponent who, in-person, might otherwise trigger emotional volatility among the parties. Through the filter and emotional distance afforded by the virtual platform, the parties can disengage and save their powder for another day. Accordingly, the parties are quick to call it a day and simply click "Leave" on their screens when an impasse occurs.

That said, "take it or leave it" still gets the job done in a virtual mediation. The timing of this pronouncement is key and, as an advocate, you should never use those words unless you and your client truly mean them. Indeed, it is critical to identify when the parties have reached a point in negotiations where the numbers are close enough to settle. Consider advising the mediator when your client is close to a "take it or leave it" position and probe whether the timing is right to make your last offer. Also request the mediator's feedback on your proposed final number; after all, the mediator has

spent hours with your adversary and can better gage the right number that will be feasible, tolerable, and facilitate a compromise. Experience in mediation demonstrates that the first party to make a final offer has greater success in settling the case for its number – but the number has to make sense.

***

Virtual mediations remain common in this post-pandemic environment, where courts are struggling to overcome an historic backlog of pending cases. Court-ordered mediations are becoming the norm in cases big and small, and the parties routinely opt for remote proceedings due to the sheer convenience and the cost-efficiencies enjoyed with the elimination of travel and attendant fees and expenses. Against this backdrop, in-house lawyers and their outside advisors should partner to develop a winning strategy to maximize opportunities presented by the virtual format, while also constructing tactics to overcome some of the limitations of the remote proceeding.



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Diane Averell

Principal | Porzio Bromberg & Newman (Morristown, NJ)

Diane Averell is a member of the firm's Management Committee. Diane strives to serve the best interests of her clients by understanding their specific business, vision, and strategic goals. She works to understand the business environment behind the case in order to define what will constitute a "win" for her clients. Armed with this insight, Diane is a fearless advocate and works tirelessly to defend her clients while respecting their business objectives.

Diane has handled business-to-business disputes and defended personal injury claims on behalf of publicly traded companies, privately held corporations, and family-owned enterprises. She has significant experience defending corporations in wide-ranging industries as national, regional, and local counsel in asbestos and other toxic tort related litigation in jurisdictions across the U.S. Diane also manages and litigates a wide variety of transportation matters involving passenger and commercial vehicles. She served as national coordinating litigation counsel to a global manufacturer of advanced engineered solutions and services for transportation, logistics, and distribution industries. Representing manufacturing companies, Diane has defended product liability claims related to prescription and over-the-counter drugs, industrial chemicals and minerals, petroleum products, automotive parts, trucking equipment, industrial machinery, construction equipment, power tools, and tobacco products. Although she handles all aspects of complex litigation, her passion is working with toxicologists, epidemiologists, and physicians to defend her clients' products on the issues of general and specific causation. Diane has tackled medical and scientific literature related to a wide range of human cancers (bladder, liver, kidney, prostate, breast, ovarian, uterine, lung, leukemia and non-Hodgkin's lymphoma) as well as stroke and cardiac disease. The culmination of her careful research and preparation is the strategic and surgical depositions of the plaintiffs and their experts, always with an eye towards summary judgment or eliminating the claims remaining for trial.

Areas of Focus

- Life Sciences Litigation
- Product Liability
- Toxic and Environmental Tort
- Transportation and Motor Carrier Defense

Recognitions

- Recognized in BTI Client Service All-Stars 2022 & 2020.
- A description of the selection process can be found here.
- Recognized in The Best Lawyers in America, Mass Tort Litigation / Class Actions - Defendants, 2020-2023.
- A description of the selection process can be found here.
- Recognized as one of 2018 NJBIZ Best Fifty Women in Business.
- A description of the selection process can be found here.
- Recognized on the New Jersey Super Lawyers List, Personal Injury-Products: Defense, 2016 - 2022; New Jersey Super Lawyers "Rising Stars" List, 2009-2010, 2013.
- A description of the selection process can be found here.
- Recognized by New Jersey Law Journal in their annual "40 Under 40" list of attorneys, 2011.

Education

- Villanova University Charles Widger School of Law - J.D., 2000
- Villanova University - B.A., 1997; cum laude

Break-Out B: Compelling Arbitration under the New York Convention

Wes Gilchrist
Lightfoot Franklin & White (Birmingham. AL)

Compelling Arbitration under the New York Convention
Wesley B. Gilchrist

Rarely do litigators in personal injury and commercial litigation in American courts get to flex the muscle of an international treaty, but the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1], also known as the "New York Convention" or the "Convention," provides such an opportunity in the right case. Not only does the Convention require American courts to recognize international arbitration agreements, its implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), provides for original jurisdiction in federal court for any case "falling under the Convention" and a fast-track from state court to federal court through "one of the broadest removal provisions … in the statute books."[2]

That is the path our client took in a case filed in Alabama state court that culminated in the Supreme Court's most recent decision interpreting the New York Convention, GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct 1637 (2020). This article will cover the basics of the Convention, Chapter 2 of the FAA, and some pointers for invoking the Convention in American courts.

Overview of the New York Convention

The New York Convention was the product of a conference convened by the Economic and Social Council of the United Nations in 1958. With the accession of Timor-Leste (East Timor) earlier this year, 172 nations have now adopted the Convention. The United States acceded to the Convention in 1970 and enacted Chapter 2 of the FAA[3] to implement it, providing broad jurisdiction to federal courts to develop "uniform body of law under the Convention."[4]

As explained by the Supreme Court in 1974, "[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced by the signatory countries."[5] The Supreme Court has further pronounced that there is an "emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession to the Convention, … that federal policy applies with special force in the field of international commerce."[6]

That said, and as its full title suggests, the Convention is focused primarily on "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."[7] Article III requires that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."[8] As discussed further below, Article IV

1 June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997. Available online at https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf.

2 Acosta v. Master Maint. & Constr. Inc., 452 F.3d 373, 377 (5th Cir. 2006).

3 Pub. L. No. 91-368, 84 Stat. 692 (1970), codified at 9 U.S.C. § 201 et seq.

4 Beiser v. Weyler, 284 F.3d 665, 672 (5th Cir. 2002).

5 Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974)).

6 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

7 21 U.S.T. 2517, Art. I(1).

8 Id.

sets out requirements for obtaining recognition and enforcement of foreign arbitral awards, and Article V provides grounds for refusing recognition and enforcement.

Article II alone addresses arbitration agreements and compelling arbitration, and, as the Supreme Court noted in Outokumpu v. GE Energy, it "contains only three provisions, each one sentence long."[9] Article II(1) requires "[e]ach Contract State [to] recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Article II(2) then defines "agreement in writing," and Article II(3) requires the courts of each "Contracting State" to compel arbitration "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article," with certain exceptions. Despite being only one sentence long, or perhaps because of it, it is these two provisions that perhaps have been the most heavily litigated in American courts.

Federal Jurisdiction of Cases under the New York Convention

In Section 203 of the FAA, Congress gave original jurisdiction to federal district courts over any "action or proceeding falling under the Convention," "regardless of the amount in controversy."[10] Venue for such an action is proper "in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States."[11]

Section 205 of the FAA broadly allows a defendant to remove an action to federal court at any time before trial "[w]here the subject matter of an action or proceeding pending in State court relates to an arbitration agreement … falling under the Convention." Under the plain language of § 205, a removing defendant must establish two requirements: (1) that the dispute "relates to" an arbitration agreement and (2) that the agreement "fall[s] under the Convention." Multiple federal circuit courts "have recognized that the plain and expansive language of the [§ 205] removal statute embodies Congress's desire to provide the federal courts with broad jurisdiction over Convention Act cases in order to ensure reciprocal treatment of arbitration agreements by cosignatories of the Convention."[12] "So generous is [§ 205's] removal provision that the general rule of construing removal statutes strictly against removal 'cannot apply to Convention Act cases because in these instances, Congress created special removal rights to channel cases into federal court.'"[13]

The Four Jurisdictional Prerequisites

Our circuit courts have summarized the requirements to obtaining federal jurisdiction under Chapter 2 of the FAA and compelling arbitration as "four jurisdictional prerequisites"[14] or "preliminary questions."[15] First, there must be "an agreement in writing within the meaning of the Convention."[16] This requirement is perhaps the most contentious and is discussed further below.

Second, the agreement must "provide[] for arbitration in the territory of a signatory of the Convention."[17] So long as the place specified in the contract for the arbitration is in a signatory nation, then this prerequisite is satisfied. So long as you are not seeking to arbitrate in North Korea, Libya, or Yemen, you should be fine.

Third, the agreement must "arise[] out of a legal relationship, whether contractual or not, which is considered commercial."[18] The "commercial"

9 140 S. Ct at 1644.

10 9 U.S.C. § 203.

11 Id., § 204.

12 Acosta, 452 F.3d at 376; see also Beiser, 284 F.3d at 673 ("[B]road federal jurisdiction over Convention questions fosters uniformity by reducing the number of final decisionmakers on a given question.") (citation omitted).

13 Acosta, 452 F.3d at 377 (quoting McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1213 (5th Cir. 1991)).

14 Bautista v. Star Cruises, 396 F.3d 1289, 1295 (11th Cir. 2005) (citing Std. Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003).

15 Ledee v. Ceramiche Ragno, 684 F.2d 184, 185–86 (1st Cir. 1982); see also Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144–45 (5th Cir. 1985).

16 Bautista, 396 F.3d at 1295, n.7

17 Id.

18 Id.

prerequisite has been broadly construed to include any "matters or relationships, whether contractual or not, that arise out of or in connection with commerce."[19] This applies to all manner of contracts and agreements for goods and services, employment, real property, and securities and other investments.

The final prerequisite is that "a party to the agreement is not an American citizen" or "the commercial relationship has some reasonable relation with one or more foreign states."[20] If the parties are of different citizenship, then this prerequisite is easily satisfied. Note that FAA § 202 expressly instructs that in assessing jurisdiction for Convention actions, a corporation is a U.S. citizen if it is incorporated or has its principal place of business there.[21]

The somewhat trickier issue is whether, if the parties are both U.S citizens, the commercial relationship has a "reasonable relationship" with a foreign state. It is not enough that the contract invokes foreign law.[22] Rather, the inquiry focuses on the parties' relationship and its relationship to another county. FAA § 202 gives two examples of a reasonable relationship with a foreign state: the "relationship involves property located abroad" or "envisages performance or enforcement abroad."[23]

Importantly, this means that this prerequisite may be satisfied by a contract between two U.S. citizens, that calls for arbitration in the U.S., so long as the subject matter of the contract involves performance or property in another country.[24] Stated conversely by the Second and Seventh Circuits, "'any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention.'"[25]

The "Agreement in Writing" Requirement and Non-Signatories

The Convention's definition of "agreement in writing" in Article II(2) reflects the age in which it was adopted, stating that it "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[26] That definition has been expanded in recent years to allow for new technologies, notably fax and email.[27] Proving the existence of an agreement that qualifies under the Convention requires an evidentiary submission. This is easy enough if there is an agreement with all parties' signatures, but in the absence of such an agreement, the inquiry may require evidence of the parties' communications, conduct, and collateral agreements, if any.[28]

At issue in Outokumpu v. GE Energy was whether the inclusion of "signed by the parties" in the Convention's definition of "agreement in writing" precludes a non-signatory to a contract containing an arbitration provision from invoking equitable estoppel and similar theories to obtain jurisdiction under Chapter 2 of the FAA and compel arbitration under the Convention. The agreements at issue were between Outokumpu Stainless USA, LLC (f/k/a ThyssenKrupp Stainless USA, LLC) and F.L. Industries, Inc. for the construction of three cold rolling mills at a steel plant in Mobile County, Alabama. F.L Industries, the general contractor, entered a subcontract with our client, GE Energy Power Conversion France SAS, Corp. ("GE Energy"), then known as Converteam SAS, for the provision of the motors for the mills. GE Energy is a French company, and the design and manufacture of the motors took place in France.

In 2016, Outokumpu sued our client, GE Energy, in the Circuit Court of Mobile County, Alabama.

19 E.g., Belize Social Development Ltd. v. Belize, 794 F.3d 99, 103-04 (D.C. Cir. 2015) (quoting Rest. 3d of U.S. Law of Int' Comm. Arb. § 101 (2012).

20 Bautista, 396 F.3d at 1205, n.7.

21 9 U.S.C. § 202.

22 See, e.g., Jones v. Sea Tow Servs. Freeport NY Inc., 30 F.3d 360, 366 (2d Cir. 1994) (holding that dispute between "U.S. citizens engaged in a purely domestic salvage dispute" did not have a reasonable relation to a foreign state even though the agreement at issue required arbitration in London under English law).

23 9 U.S.C. § 202.

24 See, e.g., Freudensprung v. Offshore Technical Servs., Inc., 379 F.3d 327, 340-41 (5th Cir. 2004) (affirming order compelling arbitration in Houston, Texas, pursuant to consulting agreement between Texas citizen and Texas company where contract involved barge services in West Africa); Lander Co. v. MMP Investments, Inc., 107 F.3d 476, 481 (7th Cir.1997) (action to enforce award rendered in United States and between U.S. Companies but involving distribution of products in Poland).

25 Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir.1997) (quoting Jain v. de Méré, 51 F.3d 686, 689 (7th Cir.), cert. denied, 516 U.S. 914, 116 S. Ct. 300, 133 L.Ed.2d 206 (1995)).

26 21 U.S.T. 2517, Art. II(2).

27 See Glencore Ltd. v. Degussa Engineered Carbons L.P., 848 F. Supp. 2d 410, 437 n.27 (S.D.N.Y. 2012); Chloe Z Fishing Co. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236, 1250 (S.D. Cal. 2000); Polytek Eng'g Co., Ltd. V. Jacobson Cos., 984 F. Supp. 1238, 1241 (D. Minn. 1997).

28 See, e.g., Glencore, supra.

GE Energy removed under FAA § 205's broad "relates to" jurisdiction and moved to compel arbitration in Germany under the contracts between Outokumpu and F.L. Industries, invoking both the contracts' definition of "parties," which included subcontractors, and equitable estoppel. Outokumpu argued, inter alia, that because GE Energy did not sign the contracts, it could not satisfy the Convention's "agreement in writing" requirement, and non-signatory doctrines do not exist under the Convention. The district court sided with our client, but the Eleventh Circuit reversed.

The Supreme Court reversed again, holding that "the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines."[29] The Court left open whether our client had satisfied the doctrine of equitable estoppel and what law applied to that issue.[30] On remand, the Eleventh Circuit adopted the district court's view that because the definition of the parties to the contracts included subcontractors such as GE Energy, Outokumpu was bound by the contracts to arbitrate its claims against GE Energy, and the court did not need to address equitable estoppel or address the choice-of-law issue.[31]

Defenses to a Motion to Compel Arbitration under the Convention

If the jurisdictional prerequisites are met, a federal court must order arbitration unless "one of the Convention's affirmative defenses applies."[32] Article II(3) of the Convention provides that a court may decline to send the parties to arbitration if it finds that the parties' agreement "is null and void, inoperative or incapable of being performed."[33] This opens up the proffered "agreement in writing" to attack along multiple lines, each of which presents multiple legal and evidentiary burdens. However, given the strong federal policy in favor of enforcing arbitration agreements, especially under the Convention, these defenses see limited success.

Some Lingering Questions

As noted above, the Supreme Court left open in Outokumpu v. GE Energy the question of what law applies to an equitable estoppel inquiry under the Convention. Many courts look to the governing law specified in the contract. This creates a significant issue (and evidentiary burden) if that is foreign law, requiring submission of testimony to inform the court.[34] An alternative to the law specified in the contract is the "federal substantive law of arbitrability."[35] This would appear to be the better reasoned view because it comports with Congress's intent to create a uniform body of federal law governing Convention cases in federal courts.

Another unanswered question is whether jurisdiction may exist pursuant to Chapter 2 of the FAA even if the case is not ultimately compelled to arbitration. This issue is pending before the Eleventh Circuit in a companion case to Outokumpu v. GE Energy.

Confirmation of Arbitral Awards under the Convention

Article III of the Convention requires that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."[36] Article IV(1) requires a party seeking enforcement of an arbitral award to submit "[t]he duly authenticated original award or a duly certified copy thereof" and "[t]he original agreement referred to in article II or a duly certified copy thereof."[37] If the award and agreement are not in the official language of the company where enforcement is sought, then a certified translation must also be provided.[38]

Finally, Article V of the Convention allows a court to refuse to enforce an arbitral award in various situations, including, inter alia, where the resisting party proves (i) the agreement is not valid; (ii) the resisting party was not given "proper notice" of the

29 140 S. Ct. at 1648.

30 Id.

31 Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 WL 2643936 (11th Cir. 2022) (misspelling of "Converteam" is in the court's style).

32 Bautista, 396 F.3d at 1295.

33 Id.

34 See Fed. R. Civ. P. 44.1.

35 Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

36 21 U.S.T. 2517, Art. III.

37 Id., Art. IV(1).

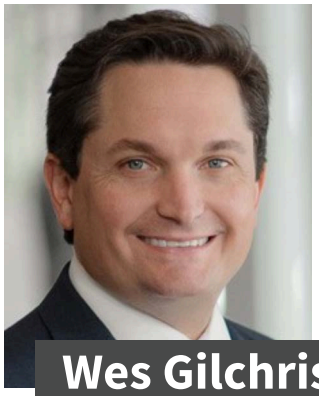
38 Id., Art. IV(2).

arbitration proceedings or "was otherwise unable to present his case"; (iii) the award exceeds the scope of the parties' agreement to arbitrate; (iv) the arbitration panel or procedure "was not in accordance with the agreement of the parties" or "the law of the country where the arbitration took place"; and (v) "[t]he recognition or enforcement of the award would be contrary to the public policy" of the country where recognition and enforcement is sought.[39]

Conclusion

The New York Convention is not just for lawyers who regularly represent parties to international disputes. In the right case, including between U.S. companies or citizens, the Convention provides an expedited and advantageous avenue to federal court and arbitration that should not be overlooked.

39 Id., Art. V(1)(a)-(d), Art. V(2)(b).



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Wes Gilchrist

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Wes Gilchrist applies Wall Street knowledge and economic savvy to his business litigation practice.

Wes is really good with numbers — an ability that sets him apart from many other litigators. After earning an economics degree from Harvard, he worked on Wall Street for four years in investment banking and equity research covering IT and software companies. He enjoys analyzing financial statements, can run a discounted cash flow model, and knows the value of a dollar and the importance of a good return — something his clients greatly appreciate.

Wes leverages this unique experience when advising plaintiffs and defendants in business and financial disputes. He has represented individual investors, private equity firms, broker dealers, investment banks, national and regional commercial banks, and insurance companies in a variety of matters. He has particular experience in cases involving stock and asset purchase agreements, accountant liability, fraudulent transfers of assets, misappropriation of trade secrets, noncompetition and nonsolicitation provisions, and interference with contractual relations.

In addition to his banking and finance practice, Wes also has significant class action and complex litigation experience. He has represented defendants in antitrust, insurance and consumer protection class actions, as well as in cases involving the Telephone Consumer Protection Act (TCPA), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA) and the Americans with Disabilities Act (ADA).

Practice Areas

- Antitrust
- Appellate
- Banking & Financial Services
- Class Actions
- Commercial Litigation
- Construction
- Corporate Plaintiff's Litigation
- Directors' & Officers' Liability
- FINRA Securities Arbitration
- Professional Liability
- Securities & Shareholder Disputes
- Software & Technology
- White-Collar Criminal Defense & Corporate Investigations

Awards

- Alabama Super Lawyers by Thomson Reuters, "Rising Star" — Business Litigation (2011-15)
- Benchmark Litigation, "Future Star" (2020-21)The Best Lawyers in America© by BL Rankings — Mergers and Acquisitions Litigation (2021-22), Commercial Litigation (2022)
- Mid-South Super Lawyers by Thomson Reuters — Business Litigation (2017-21)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Business Litigation (2016)

Education

- University of Alabama School of Law (J.D., summa cum laude)
- Harvard College (A.B., cum laude)

Break-Out C:
The Good, the Bad and the Ugly:
Trial Tips from Inside the Chambers

Jessica Salisbury-Copper
Thompson Hine (Dayton, OH)

The Good, the Bad, and the Ugly: Tips from Inside the Chambers, and Why Hiring Judicial Clerks Can Add Tremendous Value
Jessica Salisbury-Copper

Seasoned trial lawyers who are honest and candid will admit that they learned more from their mistakes than they did from any of their successes, and that on-their-feet experience was more crucial to their development than any amount of research, writing or, dare I say it, document review. But in a world where trials are rare because the costs of a trial often outweigh any potential recovery, the experiences of the trial lawyers of yesteryear are fewer and further between. One way to overcome this experience gap is to hire and retain former judicial clerks, who have likely seen a case through from beginning to end. They can often provide an insider's perspective on effective advocacy and can be a true asset to any trial team.

Tips from Inside the Chambers

Trial attorneys always want the "inside scoop" from judicial clerks. They are presumably seeking some sort of playbook on winning the court's favor or avoiding its ire following a misstep. Most of the tips that can be offered are or should be common sense. See e.g., Amanda E. Heitz, Keep the Judicial Law Clerk on Your Side, DRI, For the Defense, February 2020. Three tips that are consistently offered, however, involve preparation, presentation, and avoiding misconception.

Be Prepared – Most, if not all, attorneys think their cases are important and should be given extra attention. Yet far too often, attorneys appear in court unable to explain what the parties are fighting over. While judges and their judicial clerks usually review the pleadings before a hearing begins, they are also responsible for hundreds of cases at a time. And if those with a stake in the outcome have not taken the time to know and understand what brought them all together, why should anyone else? If attorneys want a court to find them competent and convincing, being the most prepared people in the room is the first best step. As Judge Michael Krumholtz of the Montgomery County, Ohio Court of Common Pleas said when presenting to a group of attorneys, "preparation is persuasion."

Make Things Easy to Find and Even Easier to Understand – Courts are responsible for hundreds of cases of various types and sizes, and a criminal defendant's constitutional right to a speedy trial will always take precedent over a breach of contract dispute with volumes of transcripts to review. Give the court everything it needs to make a decision, but in a way that does not require the court to go searching for anything. Because the law clerk will be the one searching for what is missing, "[i]t should be obvious…that to keep the law clerk on your side, you should do everything you can to make this job easier…If the law clerk isn't spending all his or her time fact-checking the record, he or she will have more time to analyze the substantive issues and your argument." Amanda E. Heitz, Keep the Judicial Law Clerk on Your Side, DRI, For the Defense, February 2020.

Attorneys are highly educated and often seem compelled to draft briefs full of symbolism and hyperbole. Resist that urge. Even if a case involves a complex business dispute or a product with which most are unfamiliar, describe it in a way even a high school student could understand.

Avoid requesting extra pages unless it is absolutely

necessary. "Though a court may grant your motion to exceed length, it doesn't mean that anyone is happy about it—least of all the law clerk. If your request proved unwarranted, and you have thoroughly annoyed the court with pointless, fat briefing, a law clerk will be only too pleased to help the judge find blistering case law to chastise you in a written opinion." Amanda E. Heitz, Keep the Judicial Law Clerk on Your Side, DRI, For the Defense, February 2020. "In a standard-length filing, the reader will likely remember the third of three strong arguments. But if you file an oversized document containing three strong arguments, four okay points, two fairly weak claims, and one Hail Mary pass, you will have buried those three strong arguments in seven additional arguments that probably won't win the day." And if you can effectively explain why you should prevail without using all of the pages allotted to you, do it.

If you are writing a brief for a court with published decisions, review those decisions to see how the court cites to certain information. If those decisions include citations to a specific legal research platform like Westlaw or Lexis, give the court the citation it will need to review the case and write its decision, and if you cannot tell or do not know, provide both. A court cannot rely on that which it cannot find, and it cannot agree with something it cannot understand. As a result, the simplest and most effective way to advocate for your client is to keep it simple.

Do Not Misconstrue the Facts or Overstate the Validity of Your Legal Authority – Deception can be the quickest catalyst for a negative outcome. And because lawyers love loopholes, it is notable that deception can include omission, mischaracterization, or overstatement. In addition to impacting your reputation and credibility as a practitioner, acts of deception, even if miniscule, can cause the court to question the strength of your case. It is never worth it.

Lawyers can easily lose credibility by overstating or mischaracterizing a fact. Arguing with an opponent over something that should easily be provable can detract from the client's goal. Since the court will likely "look behind the curtain" anyway, overstating a fact is often futile. There is a simple solution to avoid the issue altogether. In the words of Magistrate Judge Michael Merz of the U.S. District Court for the Southern District of Ohio, when possible, "don't characterize it, just quote it."

Every case has weaknesses—take them head on. Rather than attempting to hide a bad fact or acting as if negative legal authority does not exist, acknowledge the issue and explain why your client should prevail in spite of it.

The Value of Hiring Former Judicial Clerks

Serving as a judicial clerk "is among the most prestigious and competitive jobs available to recent graduates." Judge Willie J. Epps, Jr. and Jonathan M. Warren, The Who, What, When, Where, Why, and How of Clerking, as Told by a Federal Judge and His Former Law Clerk, 90 UMKC L. Rev. 295, 297 (Winter 2021). Former judicial clerks get experience that is "invaluable," gaining "remarkable legal knowledge, [a] unique perspective of judges and the court system, and [an] aptness to evaluate cases from the court's perspective."

"A judicial clerkship presents a young lawyer with the opportunity to work one-on-one with an accomplished and respected jurist, to hone writing and decision-making skills, to gain an inside perspective on the court system, and often, to make a trusted friend and mentor." Adam S. Lurie, Judicial Law Clerk: The Legal Experience of a Lifetime, Pass It On, Vol. 11, No. 1 (Fall 2001). As a result, "[f]ormer law clerks are a terrific investment in the future of your firm. They've spent a year or more learning from judges how to write for judges: that's on-the-job training that didn't cost you a dime." Amanda E. Heitz, Keep the Judicial Law Clerk on Your Side, DRI, For the Defense, February 2020. At the risk of belaboring the point, former judicial clerks bring a lot to the table.

While they still have a lot to learn about the practice of law, they already have a keen understanding of the rules of procedure. Former judicial clerks have the benefit of knowing and understanding many judges' pet peeves and how to avoid them in practice, and when, why, and how to ask the court questions as a case proceeds. Having watched numerous cases from beginning to end, former clerks have an understanding of each step in the process with an

ability to consider how each step or filing contributes to the overall goal.

Judicial clerks work on a variety of cases, adapting quickly from one case to the next while mastering novel legal concepts. They have a rounded skillset and a demonstrated ability to learn new things. Often preparing the first draft of opinions, judicial clerks are adept at explaining complex theories and issues in a way a non-expert can understand. And because reasonable minds will inevitably disagree, former judicial clerks have honed their advocacy skills by persuading a judge or a panel of judges with effective storytelling.

Those former clerks who worked in trial courts have observed how a trial is run in person, and those who clerked at the appellate level have reviewed transcripts or videos of the same types of proceedings. Former judicial clerks have had the chance to analyze jury instructions and jury questionnaires, to consider the impact of the questions asked in voir dire, and they have gained an understanding of the rules of evidence that is unmatched by their peers. Finally, former clerks have the benefit of being able to learn from others' mistakes, having observed the consequences of failing to follow the rules of procedure or the rules of evidence, or exactly how easy it can be to waive an argument on appeal.

Conclusion

Judicial clerkships have historically been recognized as a steppingstone in a young lawyer's career, but experienced lawyers often overlook or understate the true value of a judicial clerk's experience. With the benefit of learning from others' mistakes and a behind-the-scenes pass to the judicial system, judicial clerks can often avoid the mistakes of other lawyers their age, and their unique perspective can add real value to a trial team.

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Jessica Salisbury-Copper

Partner | Thompsin Hine (Dayton, OH)

Jessica's practice focuses on consumer financial services litigation and compliance, product liability litigation, and complex commercial disputes. Her willingness to dig deep and get her hands dirty allows her to unravel complex situations. Jessica focuses on outstanding client care, which makes her the choice for many of the firm's clients. She is known in the litigation practice group for her intelligence, organizational skills, and dedication to clients who are facing complex litigation issues. Her ability to collaborate and work as part of a team allows her to identify the appropriate Thompson Hine lawyers to support clients' needs in every aspect of running their businesses.

Jessica's consumer financial services practice focuses on individual and class action litigation in mortgage, credit card, debt collection, auto loan, and servicing matters. She regularly counsels national and local providers of consumer credit on regulatory and litigation matters. Her clients include banks and nonbank lenders, mortgage lenders and servicers, third-party service providers, auto lenders, and debt buyers.

Jessica's product liability litigation practice focuses on representing manufacturers and suppliers in product liability cases throughout the country. Jessica also provides counseling to clients regarding risk management, national litigation coordination and management services, contract terms and conditions (with a focus on risk analysis, compliance, and documentation), and the protection of confidential and proprietary information.

Clients regularly call on Jessica to defend them in all aspects of litigation both in Ohio and nationwide. Jessica is proud to have been selected for inclusion in Rising Stars by Ohio Super Lawyers magazine from 2014 to 2018.

Focus Areas

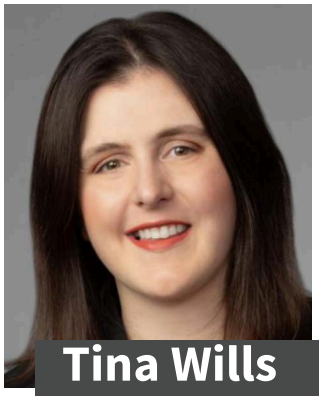
- Business Litigation
- Product Liability Litigation
- Financial Services Litigation

Represntative Cases

- Richissin v. Rushmore Loan Mgmt. Servs., 2020 U.S. Dist. LEXIS 223128 (N.D. Ohio Nov. 30, 2020) (dismissing RESPA claim because alleged notice of error did not relate to servicing or a covered error as set forth in applicable statutes and regulations).
- Iler v. Wells Fargo Bank, N.A., 2020 U.S. Dist. LEXIS 216261 (S.D. Ohio Nov. 18, 2020) (overruling objections to magistrate's decision dismissing FDCPA claim against the bank finding that the allegations of the complaint failed to plausibly allege that the bank was a debt collector).
- Frank v. Autovest, 2020 U.S. App. LEXIS 18082 (D.C. Cir. June 9, 2020) (finding debtor lacked standing to pursue FDCPA claim when she admitted that she did not take, or refrain from taking, any action as a result of the alleged misrepresentation).
- Iler v. Wells Fargo Bank, N.A., 2020 U.S. Dist. LEXIS 94052 (S.D. Ohio May 29, 2020) (granting motion to dismiss FDCPA and CSPA claims asserted against the bank).
- Frank v. Autovest, LLC, 2019 U.S. Dist. LEXIS 169021 (D.D.C. Sep. 29, 2019) (granting summary judgment in favor of debt buyer and its servicer because alleged misrepresentation in violation of the FDCPA was not material)

Education

- Ohio Northern University College of Law, J.D., 2009, with high distinction
- Morehead State University, B.A., 2006, magna cum laude



Break-Out D: "Battle of the Forms": Tips to Avoid Disputes in UCC Sales Contracts

Tina Wills
Smith Gambrell & Russell (Chicago, IL)

"Battle of the Forms" - Tips to Avoid Disputes in UCC Sales Contracts
Tina Wills

If supply chain problems, the COVID-19 pandemic, and tariff wars have taught us anything, it is that unanticipated, external problems can impact the sale of goods. While buyers and sellers of goods may have had years-long, productive relationships prior to 2018, the confluence of external pressures lead parties to experience unprecedented turmoil and disruption. When that occurred, buyers and sellers needed to rely less on their mutual trust of one another to relying on the specific terms and conditions in the contract governing their business relationship.

Adopted in some form by the vast majority of states, , Article 2 of the Uniform Commercial Code ("U.C.C.") provides guidance on the contractual terms involving the sales of goods. The U.C.C. defines a "good" is generally something moveable and identifiable at the time of sale (in short, a "thing" versus a service). As between buyers and sellers who hold themselves out as having specialized knowledge or who deal in goods of a kind, the U.C.C. may help the parties identify the operative contractual terms and may even supply additional terms not addressed by the parties—i.e., U.C.C. "gap fillers."

When a buyer and seller of goods have their own competing or conflicting terms and conditions related to a sale a battle of the forms dispute arises often resulting in costly and time-consuming litigation. As a recent case illustrates,[1] even decades of uninterrupted, stable business between a buyer and seller does not guarantee that the parties understood the terms of their own contract. In that case, a buyer issued a purchase order with language stating that its terms and conditions applied. The seller issued an invoice stating that it was conditioning acceptance on the application of its own competing terms and conditions. The parties continued performing the sale of goods for decades before the COVID-19 pandemic interrupted their relationship. When a dispute arose, the buyer sought to enforce its terms and conditions. The seller objected, claiming its terms and conditions applied and brought a declaratory judgment action. The court found that it could not, on the face of the pleadings, determine the operative terms of the contract. In short, by allowing the question of which terms applied to linger unresolved for decades, the parties bought themselves a costly lawsuit.

This scenario is common. To avoid a battle of the forms dispute, Parties at the onset of the relationship or business transaction should pay particular attention to clarifying the applicable contract terms that will govern their relationship. Likewise, parties should analyze existing contracts to determine where and if conflicts exist that could lead to a battle of the forms dispute. Here are best practices to consider in avoiding battle of the forms disputes:

Review or Revise Terms and Conditions

Before a buyer or seller can seek to enforce its own contractual terms, it must have contractual terms to enforce. Often, the most efficient procedure is to prepare terms and conditions that are universal in application. Those general terms and conditions should be included in the set of the contract offering documents or incorporated by reference within any specific contract involving the sale of goods. If incorporated, however, the terms and conditions

1 TE Connectivity Corp. v. Sumitomo Elec. Wiring Sys., Inc., No. CV 22-10283, 2022 WL 17416677 (E.D. Mich. Dec. 5, 2022)

must be made available to the other party.

The face of any offer, along with the terms and conditions, should contain language making clear that the terms and conditions and other specified documents are the only contractual terms and represent the entire contract between the parties.

Require Written Acknowledgement of Terms and Conditions

A party seeking to enforce its own terms and conditions will have a much stronger basis to do so if the opposing party has expressly accepted application of those terms and conditions. While some courts have found language in offers stating that performance constitutes acceptance of the terms and conditions, it may be prudent to require written acknowledgement in some form. This express acknowledgement can be accomplished in many ways. For instance, a party may require its suppliers to physically sign an acknowledgement, agreeing to be bound by the party's terms and conditions. For merchants with an online ordering system, a party may also require the other party to click on a check box acknowledging its agreement to the terms and conditions.[2]

In addition, even before making an offer, a party requesting quotations should consider including language in the request stating that all quotations submitted pursuant to the request will be subject to that party's terms and conditions. That way, a paper trail for establishing the governing terms and conditions begins before any performance occurs.

In Purchase Orders, Expressly Limit Acceptance to the Terms of the Offer

Most versions of the U.C.C. provide that a party can limit acceptance of its offer to the terms of the offer, which should include the desired terms and conditions. Typically, purchase orders are considered "offers" under the U.C.C.

A purchase order should include language that the terms of the offer control, including any incorporated terms and conditions. The purchase order should also state that any additional terms offered by the other party are expressly rejected. Courts have recognized such limitations are effective.[3]

Review Documents Responding to Offers for Additional or Different Terms, or Conditional Acceptance

A party accepting an offer may attempt to vary the terms of the contract through its acceptance. This may be accomplished through conditional acceptance or the addition of non-material terms. A conditional acceptance must demonstrate that the accepting party is unwilling to proceed with the transaction unless the offering party accepts the modified terms. Courts hold that language amounting to a conditional acceptance must be sufficiently clear, such as stating that the accepting party's terms "are the only ones upon which we will accept orders."[4] If an "acceptance" is so conditioned, no written contract is formed unless the offering party assents to the accepting party's terms.

Likewise, if the offering document des not expressly limit acceptance to the terms of the offer, an accepting party may attempt to add terms so long as they do not materially alter the contract and no objection is made to their inclusion. Whether a proposed different or additional term is considered "material" is a subject of debate in case law.[5]

If the accepting party proposes conflicting terms, there is a chance that the conflicting terms between the offer and acceptance nullify each other. In that scenario, the U.C.C. gap-fillers would govern the applicable term.[6]

Object to Conditional Acceptances or Additional Terms

Whether you are a buyer or seller, if a party offers terms, conditionally accepts an offer, or adds additional terms, you must object to those terms at

2 Demag Cranes & Components Corp. v. Pinnacle Indus. Servs., No. 1:19CV2209, 2021 WL 1525427, at *9 (N.D. Ohio Apr. 19, 2021)

3 See, e.g., Stemcor USA, Inc. v. Trident Steel Corp., 471 F. Supp. 2d 362, 369 (S.D.N.Y. 2006).

4 Holbrook v. Prodomax Automation Ltd., No. 1:17-CV-219, 2021 WL 4582161, at *6 (W.D. Mich. Oct. 6, 2021) (quoting Ralph Shrader, Inc. v. Diamond Int'l Corp., 833 F.2d 1210, 1215 (6th Cir. 1987)).

5 S. Illinois Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co., 302 F.3d 667, 676 (7th Cir. 2002

6 Hydraulics Int'l, Inc. v. Amalga Composites, Inc., No. 20-CV-371, 2022 WL 4273475, at *6 (E.D. Wis. Sept. 15, 2022)

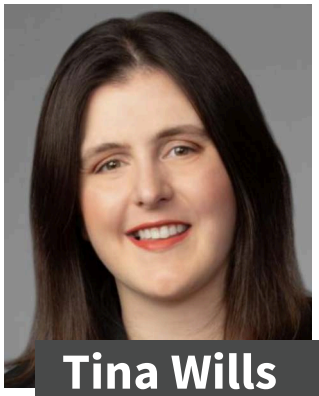
the outset if you hope to control the contract. Then, if the parties cannot agree, the goods may need to come from or to a different source. Otherwise, you risk litigating the issue of which contract terms govern.

Offer Training to Sales Staff

Often, in-house counsel and outside counsel are not on the front lines in the exchange of purchase orders, invoices, and acknowledgments. Rather, sales personnel are tasked with keeping projects moving and supply chains flowing. As such, it is important that companies train sales personnel on the process and implications of these exchanges, including drafting requests for bids/quotations, providing them with precise language in purchase orders, reviewing offers and acceptances with an eye towards identifying varying terms, and objecting to unacceptable terms. .

Conclusion

The more parties address contract formation issues and defining the material terms at the onset of a supply arrangement, the lower the chances of becoming embroiled in prolonged and expensive litigation in the future involving the battle of the forms.



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Ms. Wills focuses her practice on complex commercial lawsuits, critical motions designed to resolve cases before trial, trials, and appeals. She is known for her attention to detail, cogent legal briefs, and effective oral advocacy. She counsels clients on strategic matters at all stages of litigation, from the initiation of lawsuits through and including proceedings before state and federal appellate courts and the U.S. Supreme Court. She has briefed appeals before four different court of appeals and supreme courts.

Ms. Wills represents corporations, small businesses, and individuals in a wide range of complex commercial matters, including contract disputes, fraud claims, employment disputes, breach of fiduciary duty claims, discrimination claims, pursuing claims against former employees, False Claims Act cases, and environmental mass tort litigation. These cases frequently implicate complex issues of pleading, class and collective action certification, contract interpretation, preemption, standing, and statutory construction. Tina's ability to manage highly complex cases draws from her extensive litigation experience.

Areas of Practice
- Litigation / Trial Practice
- Energy Law
- Environmental / Natural Resources Law

Represntative Experience
- Prevailed in action to reform contract terms, successfully barring most of defendant's affirmative defense before trial and using defendant's own expert in client's case-in-chief at trial.
- Defeated False Claims Act complaints against clients at the pleading stage.
- Successfully obtained dismissal of lawsuit against client based on claims of private nuisance at the pleading stage.
- Prevailed in the defense of a corporate client in a matter involving federal preemption and the transportation of hazardous materials at both the trial court and appellate levels.
- Defeated dispositive motions related to client's lawsuit claiming breach of fiduciary duties by former employee.

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