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Napa Litigation SuperCourse: Wine Sips and Trial Tips

A Litigation CLE SuperCourse

November 2-5, 2023 **The Silverado Resort, Napa Valley**

Personal Jurisdiction After Mallory: An About Face?

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Personal Jurisdiction after Mallory
Lee Hollis

The recent Supreme Court case, Mallory v. Norfolk Southern Railway Co., 143. S.Ct. 2028 (2023), may lead to the expansion of the exercise of general jurisdiction over foreign corporations. Prior to Mallory, courts recognized that they could only exercise general personal jurisdiction over a corporate entity where it was "essentially at home," i.e., in the place of its incorporation and its principal place of business (general jurisdiction) and the location where the claim "arises out of or relates to" the defendants contacts with the forum (specific jurisdiction). This understanding was based on a string of personal jurisdiction cases decided by the Supreme Court over the past decade building on International Shoe Co. v. Washington, 326 U.S. 310 (1945). See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014) Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021). Justice Gorsuch's plurality opinion in Mallory, joined by Justices Thomas, Sotomayor, and Jackson, potentially opens the door to allowing a state to circumvent the "essentially at home" and specific jurisdiction analysis by requiring a corporation to submit to general jurisdiction as a condition to doing business within a state. However, only the State of Pennsylvania currently has such a unique and exacting state registration scheme with Georgia creating it through jurisprudence. Likewise, the Supreme Court's plurality opinion only garnered four votes, and Justice Alito's concurrence lays out a roadmap for how such statutes may be deemed unconstitutional in the future under the Commerce Clause.

The Background of Mallory
Plaintiff Robert Mallory worked as a mechanic for Defendant Norfolk Southern Railway Co. ("Norfolk Southern") for nearly twenty years in Ohio and Virginia. After he left Norfolk Southern, he developed cancer and sued Norfolk Southern, alleging that his cancer was caused by exposure to toxic chemicals during his employment. Mallory, a Virginia resident, brought the lawsuit in Pennsylvania, even though Norfolk Southern was "at home" in Virginia, and none of the alleged wrongdoing occurred in Pennsylvania. Norfolk Southern moved to dismiss Mallory's claims against it on the grounds that the Pennsylvania courts' exercise of personal jurisdiction over Norfolk Southern violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.

Mallory argued: (1) Norfolk Southern had extensive business dealings in Pennsylvania, and (2) Norfolk Southern registered to do business in Pennsylvania, which required Norfolk Southern to agree to appear in Pennsylvania courts on "any cause of action" against it. See 42 Pa. Cons. Stat. §5301(a)(2)(i) (providing that "qualification as a foreign corporation" constitutes a "sufficient basis of jurisdiction to enable the tribunals of [Pennsylvania] to exercise general personal jurisdiction over [a corporation].)" Mallory contended that consenting to the general jurisdiction of Pennsylvania courts was a condition to doing business in the state. The Pennsylvania Supreme Court sided with Norfolk Southern, holding that the trial court lacked personal jurisdiction under the Fourteenth Amendment but did not address Norfolk Southern's Commerce Clause argument.

The Plurality Decision
The United States Supreme Court vacated the Pennsylvania Supreme Court's decision and remanded. Relying on Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917) the Mallory plurality opined that, by registering to do business in Pennsylvania, Norfolk Southern waived any personal jurisdiction defenses. Mallory, 143 S.Ct. at 2037. The plurality reasoned that such waiver did not violate Norfolk Southern's due process rights because Norfolk Southern knowingly accepted both the benefits and burdens shared by Pennsylvania corporations by registering to do business there. Id. According to the plurality, consenting to general jurisdiction by registering to do business in a state is similar to signing a contract containing a forum selection clause or the application of the "tag" rule where a state may exercise jurisdiction

over a defendant simply because service of process was accomplished within the state's borders. Id. at 2044. The plurality also noted that similar jurisdictional defenses can be waived such as making a general appearance, failure to plead, and missing deadlines. As a result, the plurality held, Pennsylvania's consent-by-registration law did not violate the Fourteenth Amendment. Id.

Justice Barrett's Dissent

Justice Barrett dissented from the plurality opinion and was joined by Chief Justice Roberts, Justice Kagan, and Justice Kavanaugh. The dissent sharply disagreed with the plurality, claiming that its opinion "flies in the face of our precedent." Id. at 2055 (Barrett, J. dissenting). According to the dissent, International Shoe Co. v. Washington, 326 U.S. 310 (1945) established that merely doing business in a state is not sufficient to establish general jurisdiction over a foreign defendant. Id. Justice Barrett warned that the plurality's departure from this precedent invites states to manufacture consent to personal jurisdiction by refashioning their registration laws—or even their long-arm statutes. Id. at 2057. The dissent found the plurality's reliance on Pennsylvania Fire unavailing because it was decided before the "Court's transformative decision on personal jurisdiction in International Shoe." Id. at 2063. In particular, the dissent pointed to BNSF Railway Co. v. Tyrrell, 581 U.S. 402 (2017), where the Court held that Montana could not exercise general personal jurisdiction over an out-of-state defendant because "in-state business … does not suffice to permit the assertion of general jurisdiction over claims … that are unrelated to any activity occurring" in the state.

Justice Alito's Concurrence

Between the plurality and dissent lies Justice Alito's concurrence opinion —which provides a glimpse into the future application of general jurisdiction to foreign defendants. Justice Alito agreed with the plurality that Norfolk Southern waived its defense to personal jurisdiction by registering to do business in Pennsylvania; and, as a result, Norfolk Southern's due process rights had not been violated. Id. at 2047 (Alito, J. concurring in part and concurring in the judgment). However, Justice Alito suggested that the Pennsylvania registration statute runs afoul of the dormant Commerce Clause, which "prohibits state laws that unduly restrict interstate commerce." Id. at 2051.

According to Justice Alito, "there is a good prospect that Pennsylvania's assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause." Id. at 2052. He suggested that allowing one state to hail into court any and all businesses for purposes of being sued on any claim regardless of what (if any) connection that claim has to the forum discriminates against out-of-state companies, would damage the national economy, and impinge on the rights and sovereignty of sister states. Pennsylvania Supreme Court, however, decided the case on Due Process grounds alone— no Commerce Clause challenge was before the Supreme Court. Id. at 2055. As a result, Alito concurred in the judgment, which remanded the case, where it is expected that Norfolk Southern will renew its Commerce Clause argument. Id.

Going Forward

Mallory introduced uncertainty into the area of personal jurisdiction by holding that a corporation can consent to a state's jurisdiction over it simply by registering to do business in that state. Pennsylvania is the only state with a consent-by-registration statute. And Georgia is the only state that has created a similar regime through its jurisprudence. Cooper Tire & Rubber Co. v. McCall, 312 Ga. 422, 434, 863 S.E.2d 81, 90 (2021) (holding that corporate registration would be treated as consent to personal jurisdiction). The concern is that other state legislatures may be inclined to pass statutes similar to Pennsylvania's or that other state courts, like Georgia, may construe business registration as consenting to general jurisdiction.

Justice Alito's concurrence, however, suggests that this uncertainty may be short-lived. In his concurrence, Justice Alito charts the path for Norfolk Southern and other defendant corporations to challenge consent-by-registration on the grounds of the Commerce Clause. According to Justice Alito, "Pennsylvania's scheme injects intolerable predictability into doing business across state borders." Id. at 2053. Given the dissent's refusal to "work [a] sea change" and render specific jurisdiction for corporations "superfluous," it is likely that the dissenting justices will join Justice Alito in sustaining a Commerce Clause challenge and restricting a state's ability to require consent to general jurisdiction as a condition to doing business in the state. Id. at 2065 (Barrett, J. dissenting).

In the meantime, forum shopping in states like Pennsylvania and Georgia will likely increase, especially if an alternatively proper forum has a savings clause that tolls any applicable statutes of limitation in the event of a dismissal for lack of personal jurisdiction. Justice Alito's concurrence suggests that larger corporations "may resort to creative corporate structuring to limit their amenability to suit" or simply withdraw their registration in unfavorable venues. Id. at 2054 (Alito, J. concurring in part and concurring in the judgment). Of course, these strategies are enormous burdens on business,

which is why Justice Alito concludes that statutes like Pennsylvania's impose an unconstitutional burden on interstate commerce. Id.

What to Do?

At this point in time, a cautious, "wait-and-see" approach to Mallory is in order. In the meantime, corporate defendants should assert a Commerce Clause defense if sued in a venue like Pennsylvania or Georgia under a consent theory of personal jurisdiction. They should also raise venue and forum non conveniens challenges, where appropriate.

Legislatures may amend registration laws to require consent, but they may not, especially when faced with the additional burden on their state courts and with the possibility of corporations withdrawing registrations to avoid unfavorable forums. We expect to see a Commerce Clause challenge to consent-by-registration on the Supreme Court's docket relatively soon. Should that occur, most courts may reserve ruling on similar challenges until the Supreme Court has given further guidance under the Commerce Clause.

Personal Jurisdiction After *Mallory v. Norfolk Southern Railways Co.*

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Personal Jurisdiction Pre-*Mallory*

- Under recent SCOTUS opinions, a corporation generally could only be sued:
  - Where it is "at home": (general jurisdiction):
    - State of incorporation
    - State where principal place of business is located
  - Where the claim "arises out of or relates to" the defendant's contacts with the forum (specific jurisdiction)

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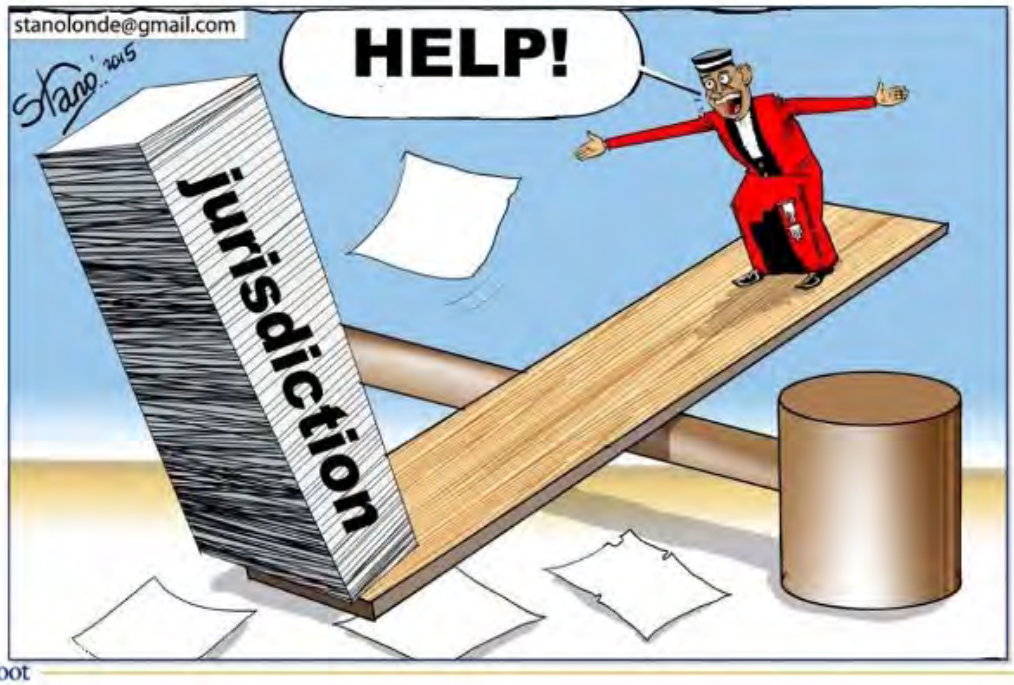

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Mallory Facts

- Mallory, a Virginia resident, sued Norfolk Southern in Pennsylvania.
- Norfolk Southern is a Virginia corporation with its principal place of business in Virginia.
- None of the alleged wrongdoing occurred in Pennsylvania.

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Parties' Positions

- Norfolk Southern Argued:
  - Due process – Lack of personal jurisdiction
    - No general jurisdiction
    - No exposure to chemicals in Pennsylvania
  - Commerce clause

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Parties' Positions

- Mallory Argued:
  - Norfolk Southern had a large presence in Pennsylvania
    - 2,000 miles of trucks
    - 11 rail yards
    - 3 locomotive repair shops
  - Norfolk Southern registered to do business in Pennsylvania, which requires out-of-state companies that register to consent to jurisdiction for "any cause of action" against them.

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Pennsylvania Supreme Court

- Held that the law requiring out-of-state companies to submit to jurisdiction in all suits brought against them, regardless of whether the suit relates to the defendant's conduct in the state violated the Due Process Clause.
- The court did not decide the commerce clause issue, and thus, the issue was not before SCOTUS.

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Mallory Holding (Gorsuch, Thomas, Sotomayor, Jackson)

- Pennsylvania's registration statute requires a foreign corporation to agree to appear in Pennsylvania courts on "any cause of action" against it.
- Held: By registering to do business in Pennsylvania, Norfolk Southern had waived any personal jurisdiction defense.

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Mallory Holding (Gorsuch, Thomas, Sotomayor, Jackson)

- The court relied on *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining Co. 243 U.S. 93 (1917)* which upheld a similar statute and had never been overruled.
- The Court reasoned that registering to do business is similar to signing a contract with a forum selection clause and analogized the situation to the "tag" jurisdiction rule.

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Justice Barrett's Dissent (joined by Roberts, Kagan, and Kavanaugh)

- Argues that the plurality decision "flies in the face of our precedent".
- *International Shoe* and its progeny established that merely doing business in a state is not sufficient to confer jurisdiction over a foreign defendant.
- Expressed concern that states can manufacture personal jurisdiction by re-fashioning their registration laws.

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Justice Alito's Dissent

- Concurred in judgement that Norfolk Southern waived its defense of personal jurisdiction and that its due process rights had not been violated.

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Justice Alito's Dissent

- Suggested that the Pennsylvania registration statute violates the Commerce Clause because allowing foreign defendants to be sued in Pennsylvania, regardless of whether the claim is connected to the forum:
  - discriminates against out-of-state companies;
  - damages the national economy; and
  - impinges on the rights of sister states.
- But the Commerce Clause issue was not before the court.

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State of Play

- Pennsylvania is the only state with a consent-by-registration statute.
- Georgia's Supreme Court has established the same scheme through case law.
- Case is on remand to the Pennsylvania trial court where the Commerce Clause argument will be decided.

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State of Play

- Then, the case will presumably go back to the Pennsylvania Supreme Court and then possibly to the U.S. Supreme Court.
- But another case could get to the Supreme Court sooner.

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What to Do?

- Watch carefully:
  - Do other states adopt consent-by-registration either by statue or judicial decision?
    - States may do so to expand their authority.
    - But they may not because of the risk of:
      - overburdening their judicial systems; or
      - companies refusing to do business in the state.

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What to Do?

- Preserve all issues
  - Challenge personal jurisdiction on due process and commerce clause grounds.
  - Raise *forum non conveniens* when appropriate.
  - Challenge venue when appropriate.

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What to Do?

- See what happens with Commerce Clause argument.
  - It seems fairly likely that the four dissenters would join Alito and find the Pennsylvania statute to be unconstitutional under the Commerce Clause.

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When clients seek solutions, Lee Hollis delivers. Over the course of 25+ years of practice, Lee Hollis has learned how to be Trial Tough and Solution Savvy®. Clients come to Lee because he is a problem-solver. Some of those problems can be solved through negotiation; others require motions, trials and appeals. Lee works with clients to determine their goals for each matter and develops a strategy to achieve them in the most efficient manner.

After successfully trying numerous product liability, personal injury and commercial cases to verdict and resolving countless more through motion practice or settlement in jurisdictions across the country, Lee has learned that if a client wants to settle a case short of trial, the best way to achieve the most favorable settlement is to be represented by an attorney with the experience, reputation and ability to take the case to trial. A credible trial threat gives the client a stronger position in settlement negotiations and the ability to take the case to trial when it can't be resolved. Too often, clients hire litigators who are happy to work a case up and settle it. When opposing counsel knows that attorney can't or won't try the case, they use that to extract a higher settlement or to obtain a large verdict at trial. The best way to prevent that situation is to hire a lawyer who is ready, willing and able to try the case if necessary.

Lee uses that Trial Tough and Solution Savvy® experience to put together the right team with the right experience and skill set needed for each case. That approach gives him leverage to negotiate favorable results for the client. But when negotiations fail, he is ready to take the case to trial and, if necessary, appeal. Lee cares about winning as much as — or more than— his clients. He brings a creative approach that ensures that his client's message is heard, and he leaves everything on the field.

Practice Area

- Commercial Litigation
- Catastrophic Injury
- Product Liability
- Appellate
- Class Actions
- Corporate Plaintiff's Litigation
- Pharma & Medical Device
- Commercial Transportation

Awards

- Benchmark Litigation, "Local Litigation Star" — General Commercial, Personal Injury, Wrongful Death (2018-21), Product Liability (2020)
- Benchmark Litigation, "Future Star" (2011-17)
- The Best Lawyers in America© by BL Rankings — Commercial Litigation, Personal Injury Litigation, Product Liability Litigation (2018-22)
- Chambers USA, "Leading Lawyer" for Litigation (Alabama)
- Martindale-Hubbell®, A-V Rating
- Mid-South Super Lawyers by Thomson Reuters — Personal Injury (2010-23)
- Louisiana State Bar Association's Pro Bono Publico Award, 2009

Education

- Vanderbilt University Law School (J.D.)
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There's an Acronym for That: Hot Topics in Environmental Litigation

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Moving Goalposts: U.S. Supreme Court Narrows Scope of Federal Protection for Wetlands
By Pierce Werner, Mary K. Stukes, and Peter McGrath

For years federal environmental regulation of waterways and wetlands has been in a state of flux, changing with political tides via agency rulemakings, but the Supreme Court of the United States may have just ended the cycle.

By now, most readers of environmental law updates will be familiar with the latest, and likely most consequential, decision on federal water jurisdiction issued by the Supreme Court in recent memory — Sackett v. United States Environmental Protection Agency («EPA»). The Supreme Court issued its decision on the case heard during its October 2022 term of court on May 25, 2023, wherein all nine justices found for the Petitioners, Michael and Chantell Sackett, and in doing so, reinterpreted and narrowed the scope of «waters of the United States» under the federal Clean Water Act («CWA»).

Justice Alito delivered the opinion of the court, and was joined by Justices Barrett, Gorsuch, Thomas, and Chief Justice Roberts; and Justices Kagan and Kavanaugh each filed opinions concurring in the judgment only, rejecting the majority's narrower interpretation for various reasons. Justices Sotomayor and Jackson each joined in both opinions.

The Court's decision defines "waters of the United States" under the CWA to include (1) traditionally navigable waterways such as streams, oceans, rivers and lakes, and (2) only wetlands that are 'practically indistinguishable' from such waters, requiring a jurisdictional determination over adjacent wetlands to establish (a) that the adjacent water is a relatively permanent body of water connected to traditional interstate navigable waters and (b) "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[1]

The Court's decision is largely a readoption of Justice Scalia's plurality opinion in Rapanos,[2] thereby expressly rejecting Justice Kennedy›s «significant nexus» test from the same case — upon which many of the most recent waters of the United States rulemakings («WOTUS» rules) have been based — and removing many waters and wetlands from the jurisdiction of the EPA and Army Corps of Engineers («USACE») as a consequence.

With this decision, the Court has apparently sought to deliver a more easily understood and definite rule intended to provide landowners with a clear and simple means by which to evaluate whether a federal permit is necessary to conduct activities on their property that may alter or impact a water or wetland.

Before understanding the significance and implications of this decision, it's necessary to take a brief foray into the recent history of Supreme Court decisions and federal rulemakings on the scope of "waters of the United States" within the CWA before finally describing what is to come as a result of the decision.

What's Been Going On?
As alluded to above and discussed thoroughly by the Court in Sackett, the Supreme Court has (rather uncommonly) issued multiple decisions construing the CWA's statutory phrase "waters of the United States," two of which have occurred since the turn of the millennium. The Court's decisions on the issue take a fairly logical progression.

In United States v. Riverside Bayview Homes, Inc., decided in 1985, the Court first recognized the term "waters of the United States" could include not only traditionally navigable waters, but also certain abutting wetlands to a navigable waterway.[3]

Crossing into the 21st century, Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers ("SWANCC") was decided by the Court in 2001 and held that "nonnavigable, isolated, intrastate waters" were not

1 Sackett v. EPA, 598 U.S. __, at *22 (2023) (citing Rapanos v. United States, 547 U.S. 715 ,742 (2006)).

2 Rapanos v. United States, 547 U. S. 715 (2006).

3 474 U.S. 121, 135 (1985).

within the jurisdiction of the EPA or USACE under the CWA, rejecting the 'Migratory Bird Rule,' which had been used by the agencies to massively expand the jurisdiction of the CWA over even excavation trench ponds many miles from the closest traditionally navigable waterway on the basis of being connected through the migratory patterns of birds.[4]

Finally, and most relevant to Sackett, the Court decided the case of Rapanos v. United States in 2006; however, with a split of 4-1-4, there was no prevailing majority opinion in the case defining the test for "waters of the United States."[5] Instead, readers were left with Justice Scalia's plurality opinion, defining the phrase to include relatively permanent (i.e., not occasional, intermittent, or ephemeral) waters connected to traditional interstate navigable waters and wetlands with such a close physical connection to those waters that they were "[practically] indistinguishable from waters of the United States," evidenced by a continuous surface water connection[6] and Justice Kennedy's concurring opinion, taking the broader approach in recognizing that wetlands need not have a continuous surface water connection to be jurisdictional but must have a "significant nexus" with a traditionally navigable water, where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of such waters.[7]

With the ultimate question of what the test should be in defining a "water of the United States" remaining unanswered, EPA and USACE were essentially left with the option of choosing which Rapanos interpretation to use in promulgating rules under the CWA, setting the stage for the slew of rules that changed depending on the political leanings of the administration with power of the executive branch. Predictably then, there have been no less than five WOTUS rules in the past eight years: the Pre-2015 rules, the 2015 Rule, the 2019 Rule, the Trump Rule (2020), and the Biden Rule (2023).[8]

Vastly oversimplified: The 2015 Rule strengthened and expanded jurisdiction by broadly construing "adjacent" using the "significant nexus" framework such that a majority of water features in the United States would require a jurisdictional analysis; The 2019 Rule repealed the 2015 Rule to pave the way for the Trump Rule in 2020, which narrowed jurisdiction by shifting to reliance on Scalia's rationale in Rapanos rather than Kennedy›s test, but with a somewhat broader interpretation of adjacent wetlands to include not only those which share a surface water connection (at least once in a typical year) or abut a traditionally navigable waterway but also those which are nevertheless separated from such waterway by certain natural or artificial barriers; and The Biden Rule reversed-course back to a basis in the «significant nexus» test and functioned similarly to the 2015 Rule by re-expanding jurisdiction over much more waters and wetlands than the preceding Trump Rule.

What Does the Court's Decision Mean?

First and foremost, the Court's unanimous decision in Sackett means that Michael and Chantell Sackett can continue to backfill their lot in a subdivision near Priest Lake in Idaho, which they began back in 2007 before EPA issued an administrative compliance order to cease the operation and restore the property or face civil penalties. Secondly, it means the Sacketts can boast back-to-back wins before the Supreme Court, thanking the late Justice Antonin Scalia for both.[9]

Justice Alito's majority decision in Sackett effectively makes Scalia›s plurality opinion in Rapanos the Court›s only answer to the question of defining «waters of the United States» by expressly rejecting Kennedy›s «significant nexus» test to consider jurisdictional «only those relatively permanent, standing or continuously flowing bodies of water ‹forming geographic[al] features› that are described in ordinary parlance as ‹streams, oceans, rivers, and lakes,›»[10] and wetlands which are ‹practically indistinguishable from a water of the United States by having «›a continuous surface connection with that water, making it difficult to determine where the ‹water› ends and the ‹wetland› begins.›»[11]

Ultimately, the Court's decision in Sackett has halted the regulatory ebb and flow of EPA and USACE oscillating WOTUS rules under various presidential administrations between the available, non-controlling interpretations of Scalia and Kennedy in Rapanos. As the Court acknowledged in its opinion, with only the narrow interpretation of the Sackett majority available, EPA and USACE will have to promulgate a new WOTUS rule consistent with the decision, and any further expansion of federal protection for waters and wetlands will require action on the CWA by Congress or regulation by the various States.

4 531 U.S. 159 (2001).

5 547 U.S. at 722.

6 Id., at 742, 755.

7 Id., at 779–780.

8 See 80 Fed. Reg. 37054 (June 29, 2015); 84 Fed. Reg. 56626 (October 22, 2019); 85 Fed. Reg. 22250 (April 21, 2020) (hereinafter, the "Trump Rule"); 88 Fed. Reg. 3004 (January 18, 2023) (hereinafter, the "Biden Rule").

9 See Sackett v. EPA, 566 U.S. 120 (2012). The Sacketts were before the Supreme Court in 2012 on the issue of whether the EPA's administrative compliance order amounted to a final agency action which could be challenged by civil action under the Administrative Procedures Act ("APA"). Delivering the opinion of the Court, Justice Scalia held that the Sackett's civil challenge to EPA's order was proper, overturning the 9th Circuit Court of Appeals and remanding for proceedings — which returned to the Court on the substantive issue 10 years later.

10 Sackett, 598 U.S. at *14 (citing Rapanos, 547 U.S. at 739).

11 Id. at *22 (citing Rapanos, 547 U.S. at 742).

Where Do We Go From Here?

As mentioned previously, though it was not procedurally the impetus of the Court's decision, because the Biden Rule was based on Kennedy's framework from Rapanos, the Court's decision has effectively vacated the most-recent WOTUS rule and left EPA and USACE in an uncertain state until a new rule is published. In fact, because of its relatively broad interpretation that included wetlands physically separated from jurisdictional waters to be covered by the CWA, even the narrow Trump Rule may not be consistent with the Court's decision in Sackett — a fact acknowledged by Justice Kavanaugh in his concurrence.[12]

In light of the Court's decision, EPA announced via a dedicated page on its website[13] that it will publish a new final rule consistent with the Court's decision in Sackett on Sept. 1, 2023. Interestingly though, EPA›s announcement states the new final rule will be published as an amendment to the Biden Rule promulgated on January 18, 2023. Given the apparent pause on permitting from USACE until the amended WOTUS rule is issued, the new rule will presumably be effective immediately, though this is unclear.

Of note, the Administrative Procedure Act ("APA") does allow an agency to issue a final rule that's immediately effective without going through the complete rulemaking process; however, typically this is done only for "good cause."[14] Of course, this article does not purport to evaluate the availability or viability of any such procedural challenge to the upcoming new rule, but only illustrates the point that adversaries to the Court's decision may try to bring challenges to the agencies' rulemaking attempts via common procedural arguments.

Finally, the Court's decision leaves the door open for Congress to enact revision to the CWA to expand the definition of "waters of the United States," and for States, as the sovereign with "primary" responsibility and rights to regulate and protect water resources within their borders, to regulate all waters and wetlands which now fall out of the CWA's definition and coming WOTUS rule, though few States currently do so.[15]

12 See Sackett, 598 U.S. at *7 (Kavanaugh, J., concurring in judgment).

13 https://bit.ly/3ONySUw

14 See 5 U.S.C. § 553.

15 See Sackett, 598 U.S. at *17-18.

There's an Acronym for That: Hot Topics in Environmental Litigation

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What's Going On? (LOL)

- SCOTUS Decisions Changing the Landscape
  - *West Virginia v. EPA* (June 30, 2022)
  - *Sackett v. EPA* (May 25, 2023)
  - *Loper Bright Enterprises, et al. v. Raimondo et al.* (Pending)
- Agencies and Courts Grappling with Emerging Contaminants
  - Aqueous Film-Forming Foam (AFFF) Products Liability Multi-District Litigation
  - Traditional Tort PFAS Lawsuits
  - Impending State and Federal Regulation

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CAA OMG: *West Virginia v. EPA*

SCOTUS curtails EPA's authority to regulate without clear Congressional directive, potentially calling into question many environmental regulations

- Challenge to 2015 Clean Power Plan, which was repealed and replaced by the Trump Administration's Affordable Clean Energy Rule
- Under Major Questions Doctrine, EPA does not have the authority to issue emissions caps under section 111(d) of the Clean Air Act without "clear congressional authorization"

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CWA and WOTUS: Pre-*Sackett*

- WOTUS Decisions Through the Years
  - 1985 – *United States v. Riverside Bayview Homes, Inc.*
    - certain abutting wetlands to a navigable waterway can be a "water of the United States"
  - 2001 – *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers* ("*SWANCC*")
    - Not "nonnavigable, isolated, intrastate waters"
  - 2006 – *Rapanos v. United States*
    - **Scalia**: relatively permanent waters connected to traditional interstate navigable waters and wetlands that are "[practically] indistinguishable from waters of the United States,"
    - **Kennedy**: waters need not have a continuous surface water connection to be jurisdictional but must have a "significant nexus" with a traditionally navigable water

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Sackett v. EPA – CWA TKO

SCOTUS significantly narrows the reach of the Clean Water Act, paving the way for decreased regulation and increased development

- Defined WOTUS (again)
  - Held invalid the 2023 WOTUS Rule, endorsing Scalia's *Rapanos* plurality decision
  - "Waters of the United States" include:
    - (1) traditionally navigable waterways such as streams, oceans, rivers and lakes, and
    - (2) wetlands that are "practically indistinguishable" from the above.
      - (a) that the adjacent water is a relatively permanent body of water connected to traditional interstate navigable waters and
      - (b) "that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

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Post-*Sackett*: Ball in USACE and EPA's Court

- Revised definition of "Waters of the United States" largely revised the categories and definitions of the 2023 WOTUS Rule to remove significant nexus standard, remove certain wetlands and streams, and revise "adjacent" to require contiguous surface connection
- Pre-publication notice issued August 29, 2023, by EPA and USACE
- Rule effective upon publishing in the Federal Register
- What's Next?

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Agency Deference TBD: *Loper Bright Enterprises, et al. v. Raimondo et al.*

Traditional deference to administrative agency decisions is under attack

- Petition for writ of certiorari filed November 10, 2022

- Challenge to *Chevron USA v. NRDC, Inc.*, 467 U.S. 837 (1984)
- Magnuson-Stevens Act & National Marine Fisheries Service (NMFS) regulate the New England Atlantic herring fishery
- Regs require regulated vessels to "arrange [and pay] for monitoring by an [NMFS-approved] observer" on the vessel during trips intended to land 50 metric tons or more of Atlantic herring
- District Court held Magnuson-Stevens Act unambiguously authorizes NMFS to adopt rules requiring industry-funded monitoring of Atlantic herring fishery and even if not, NMFS's interpretation/rule is reasonable

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Emerging Compounds – Regulation OTW

As science advances, PFAS and other emerging contaminants are now a problem that EPA and the states are simultaneously trying to solve

- Per- and Polyfluoroalkyl Substances (PFAS)
  - EPA proposing to regulate six compounds
    - Perfluorooctanoic acid (PFOA)
    - Perfluorooctane sulfonic acid (PFOS)
    - Perfluorononanoic acid (PFNA)
    - Hexafluoropropylene oxide dimer acid (HFPO-DA, commonly known as GenX Chemicals)
    - Perfluorohexane sulfonic acid (PFHxS)
    - Perfluorobutane sulfonic acid (PFBS)
- 1,4-Dioxane
- California State Water Resources Control Boards also list:
  - 1,2,3-trichloropropane
  - NDMA and other nitrosamines
  - "endocrine disruptors"

Moore&VanAllen

Aqueous Film-Forming Foam (AFFF)

- Multi-District Litigation (MDL) No. 2873
  - United States District Court for the District of South Carolina – Charleston Division
- Nearly 5,000 total claims in MDL
- *City of Stuart v. 3M* Bellwether Case & Settlements
  - DuPont Parties Settlement (Preliminary Approval Order 8/22/23) - **$1.2B**
  - 3M Settlement (Preliminary Approval Order 8/29/23) - **$10.3-12.5B**

Moore&VanAllen

NC Case Study: GenEx and the CFPUA

Chemours Fayetteville Works Facility

Consent Order, *State of NC & Cape Fear River Watch v. The Chemours Company FC, LLC*

Moore&VanAllen

Chaos Reigns…IDK, TBH!

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Mary Katherine Stukes

Member | Moore & Van Allen (Charlotte, NC)

Mary Katherine helps manufacturers, real estate developers, lenders, local governments, and other clients find creative solutions in real estate, financing, and corporate transactions involving environmental risk.

In addition, Mary Katherine regularly leads her clients through the process of obtaining Brownfields agreements for redevelopment of contaminated properties. She negotiates agreements with environmental agencies and counsels clients on eligibility, assessment, tax benefits, and effective structuring of associated real estate and financing transactions.

She also counsels manufacturers, lenders, and other corporate clients on a broad range of environmental risk and compliance issues. Her work in this area includes release investigation and remediation oversight, incident closure, environmental permitting, audits, reporting, and self-disclosure, participation in CERCLA potentially responsible party (PRP) negotiations, appeals of agency orders, defense of notices of violation and enforcement actions, assistance with waste and materials handling and disposal practices, stormwater and wastewater management issues, state and federal wetlands and other natural resource issues, and other aspects of regulatory compliance across a variety of state and federal regulatory programs.

Capabilities

- Civil Litigation
- Commercial Real Estate
- Environmental
- Environmental, Social & Corporate Governance
- Litigation, Regulatory & White Collar
- Transportation, Infrastructure & Logistics

Representative Experience

- Obtained numerous Brownfields agreements and associated tax incentives on behalf of clients redeveloping contaminated sites, including high-density commercial sites in the downtown cores of Charlotte, Raleigh, Durham, Greensboro, and Wilmington, each valued between $50 million and more than $600 million. Her projects involve the development of various multifamily residential, hotel, office, governmental, hospitality, community development and industrial projects, including the transformation of former landfills, drycleaners, and gas stations into high-density developments such as a minor league baseball stadium, a free-standing emergency department, a police station, a large-scale youth soccer complex, a national craft brewery, and other adaptive reuse projects
- Advised lenders on environmental aspects of loan initiation, foreclosure, and bank-owned property portfolios
- Guided a manufacturer in the acquisition of a company subject to an EPA consent order in connection with its use of certain Toxic Substances Control Act (TSCA) “new chemicals”
- Counseled manufacturers in managing environmental risk associated with legacy assets

Awards

- Best Lawyers in America, Environmental Law “Lawyer of the Year,” 2023
- Chambers USA – North Carolina, Environmental Law, 2017-2023

Education

- J.D., University of North Carolina at Chapel Hill, 2007, with honors
- B.A., Duke University, 2004

From CSI to QAnon: Managing Jurors' Changing Attitudes Toward Science

Derek Stikeleather
Goodell DeVries Leech & Dann (Baltimore, MD)

From CSI to QAnon: Managing Jurors' Changing Attitudes Toward Science
By Derek Stikeleather

The COVID-19 pandemic touched nearly every aspect of modern life. Our families, schools, workplaces, religious institutions, and healthcare providers were all affected by the worst global healthcare crisis in 100 years. Even though the worst of the pandemic is (hopefully) behind us, some of its effects are just now becoming clear. One example is the change in jurors' attitudes towards scientific evidence, experts, and institutions. A decade ago, attorneys and legal commentators were concerned about the "CSI" effect, where TV-inspired jurors unreasonably demanded scientific DNA evidence to prove claims. Now the concern is with the growing skepticism and even hostility towards broadly accepted scientific principles and mainstream scientists. This article will examine why the pandemic has given rise to what we will call the "QAnon Juror," how you can spot a "QAnon Juror," and what, if anything, you can do to persuade them.

The COVID-19 pandemic's effect on our decision-making and worldview: the rise of the "QAnon Juror." Research shows that when people are confronted with death and their own mortality, they often gravitate toward their pre-existing belief system and worldview as a way to manage anxiety.[1] Known as "Terror Management Theory," social scientists have found that in times of prolonged turmoil and uncertainty, this desire to seek comfort in one's own worldview can lead to an ideological shift toward extremism and, on a societal level, increased polarization.[2] During the COVID-19 pandemic, this natural tendency to lean into extreme versions of one's pre-existing belief system led some people to minimize the threat of the virus and ignore the warnings of public health professionals.[3] These same people grew distrustful of scientists and other experts, eschewed expert opinions in favor of "doing their own research," and ultimately resorted to conspiracy theories when faced with evidence of sky-rocketing COVID infection rates and death.[4]

The pandemic's existential threat to global public health and the related economic and social upheaval pulled most people from their routine face-to-face interactions with community institutions and public events and drew many into online communities. While this ability to communicate digitally allowed a remote-work revolution that saved the economy, it also allowed online fringe conspiracy groups to thrive.

One of the most highly publicized online fringe groups is QAnon, which emerged in 2017 among far-right Americans. QAnon revolves around a core belief that a cabal of Satanic, cannibalistic, pedophiles operate a global child sex-trafficking ring that supports the Democratic Party and opposes Donald Trump. It is fed by anonymous postings of an individual (or individuals) called "Q," ostensibly a federal government insider willing to leak the deepest secrets about the United States government and the Democratic Party. Consumers of Q's posts then spread its salacious conspiracy theories among their social and political networks, a process that takes a life of its own and creates dozens of different versions of each post and can reach tens of millions of people.

Although QAnon preceded the pandemic and it is unlikely that, even today, a large percentage of any jury pool fully embraces all that QAnon promotes, the pandemic helped QAnon and other online extremist groups gain a previously unimaginable level of acceptance. Two in five Americans say that it is definitely or probably true that "regardless of who is officially in charge, there is a single group of people who secretly control events and rule the world together."[5] Many elected officials and even

1 Pyszczynski, Tom, et. al, Terror Management Theory and the COVID-19 Pandemic, J. Humanist Psychol., 2021 March; 61(2); 173-89.

2 Lorie Sicafuse, PhD., Impact of the COVID-19 crisis on jurors' attitudes & decisions, Part I of IV, available at https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-133 (last visited Sept. 3, 2023).

3 Pyszczynski, supra note 1.

4 See Chris Barncard, During pandemic, proponents of 'doing your own research' believed more COVID misinformation, University of Wisconsin-Madison News (Aug. 15, 2023), available at https://news.wisc.edu/during-pandemic-proponents-of-doing-your-own-research-believed-more-covid-misinformation/ (last visited Sept. 3, 2023).

5 https://today.yougov.com/topics/politics/articles-reports/2022/03/30/which-groups-

members of Congress trade in QAnon conspiracies and solicit the support of QAnon adherents. This is consistent with a more polarized social landscape that appears less like a bell curve and more like a barbell.

For purposes of this article, a "QAnon juror" is not someone who shows up to jury selection wearing a QAnon t-shirt and chanting some political slogan. More broadly, the shorthand label defines jurors who are not merely conservative or liberal, but extreme and almost unreachable. They exist on both ends of the political spectrum, and their numbers are growing. But our focus tilts to those on the far right because they have traditionally been considered defense-friendly in civil trials, whereas the far-left juror has always been considered reliably plaintiff-friendly.

The Importance of Identifying the "QAnon Juror."

Post-COVID research shows that belief in conspiracy theories is the strongest predictor of a plaintiff-friendly juror.[6] Other influential factors include a general distrust of institutions, anti-corporate sentiment, low levels of education, and a willingness to rely on one's intuition as opposed to facts.[7] Combined, this makes identifying potential "QAnon Jurors" critical to defense counsel's litigation success.

Further complicating matters, the "QAnon Juror" has turned the conventional wisdom about political affiliation on its head. It is no longer the case that conservative or Republican jurisdictions are reliably defense-friendly. Jury consultant Nick Polavin's research shows that only when the conspiracy theory variable was controlled for were Republicans significantly more likely than Democrats to side with the defendant.[8] When belief in conspiracy theories was factored in, Republicans became more likely to side with the plaintiff than Democrats.[9]

In fact, far-right Republicans were found to be almost as plaintiff-friendly as far-left Democrats.[10] This makes sense given the importance of the above factors. Not only are far-right Republicans most likely to believe in conspiracy theories, but they are also most likely to have less formal education and, post-COVID, most likely to distrust medical science.[11] Lower-educated conservatives also harbor the strongest anti-corporate beliefs of any potential jurors.[12] All in all, learning how to recognize and avoid the "QAnon Juror" could fundamentally change a trial.

Using Voir Dire and Social Media to Identify "QAnon Jurors."

Social media and background research can be very helpful when evaluating potential jurors, but post-COVID the inquiry must be more nuanced than simple political orientation.[13] The good news is that conspiracy theorists are typically very open about their beliefs. If you are in a jurisdiction where social media research into potential jurors is possible, you should consider looking for posts supporting far-right political candidates, posts spreading COVID misinformation or expressing distrust for public health officials, or posts expressing support for other conspiracy theories.

Through voir dire or a juror questionnaire, information about the following factors should be sought to the extent possible:

- Unvaccinated for COVID-19
- Lack of trust in government institutions such as the EPA or FDA
- Lack of trust in scientists or public health institutions
- Belief in an intuitive ability to tell if information is true or false
- Less formal education
- Low income
- High religiosity
- Ingroup loyalty (i.e., importance of loyalty to the groups with which one identifies)

These factors have been most closely identified with a belief in conspiracy theories.[14] By adjusting previously held beliefs about political affiliation and plaintiff-friendly jurors, and by looking for signs of conspiracy theorists, it is possible to spot and strike "QAnon Jurors."

What to do if a "QAnon Juror" Slips Through

Jury selection is not foolproof and is admittedly reliant on snap judgments that factor likely associations between limited pieces of a potential juror's biographical data and the juror's likely views about the case. The key is realizing which data points are reliably helpful and which are unhelpful misconceptions; a conspiracy-minded juror can slip through the most careful selection process. Fortunately, once a "QAnon Juror" is seated, there are ways that defense counsel can tailor their trial strategy accordingly.

americans-believe-conspiracies

6 Nick Polavin, Who Needs Evidence? The Rise of Conspiracy Minded Jurors, For The Defense, May 2023, at 39, available at https://digitaleditions.walsworth.com/publication/?m=55594&i=791404&p=40&ver=html5 (last visited Sept. 4, 2023).

7 Id.

8 Id.

9 Id.

10 Id.

11 Id. According to a Pew study, Republicans' confidence in medical scientists fell from 83% in 2016 to 66% in 2021. The number is likely far lower among far-right Republicans.

12 Stratton Hores, et. al, Jury Selection is Critical in Preventing Shock Verdicts, Reuters, Aug. 3, 2022, available at https://www.reuters.com/legal/legalindustry/jury-selection-is-critical-preventing-shock-verdicts-2022-08-03/ (last visited Sept. 3, 2023).

13 Polavin, supra at n. 5.

14 Id.

One tactic defense counsel may choose is an appeal to the processing style of the "QAnon Juror." Research has identified two general processing modes, logical and intuitive.[15] People in logical processing mode carefully analyze facts and evidence to arrive at a rational conclusion. Intuitive processing, on the other hand, relies on "gut feelings," emotional reactions, and heuristics. The "QAnon Juror" is more likely to engage in intuitive processing, relying on their instincts and weighing feelings over facts.[16]

Defense counsel can tailor their approach to appeal to intuitive information processors. Carefully constructed, fact-intensive refutations of the plaintiff's allegations will not be effective.[17] Rather, a simple, relatable narrative that focuses on the conduct of the key parties is essential.[18] So is timing. Defense counsel cannot wait until after the plaintiff's case to introduce their message. The narrative should begin immediately, during voir dire and opening statements.[19]

Another tactic defense counsel might choose, particularly in liberal jurisdictions, is to lean into the remaining jurors' belief in scientific consensus and government institutions. Emphasizing the importance of embracing evidence-based scientific principles and resisting emotional decision-making can give liberal jurors a way to feel good about supporting the defense.[20] Themes leveraging this belief in science have proven particularly persuasive among liberal jurors since the pandemic.[21]

Conclusion

The pandemic changed everything, and litigation is no exception. Much of the conventional wisdom about defense-friendly jurors has expired. Now, identifying and striking the "QAnon Juror" is crucial to defense counsel's litigation success. If, despite social media research and careful voir dire questions, a "QAnon Juror" ends up on the jury, defense counsel must tailor their litigation strategies accordingly. Counsel must choose whether to appeal to the intuitive processing of the "QAnon Juror" or appeal to the remaining jurors' belief in evidence-based, scientific analysis.

15 CSI-Courtroom Sciences, Inc., Impact of the COVID-19 crisis on jurors' attitudes & decisions, Part III of IV, available at https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-134 (last visited Sept. 3, 2023).

16 Id. Some research suggests that, in the wake of the pandemic, jurors are generally more likely to make decisions using intuitive processing. Defense counsel may want to consider adopting some strategies for persuading intuitive processors regardless of whether there is a "Q-Anon Juror" present.

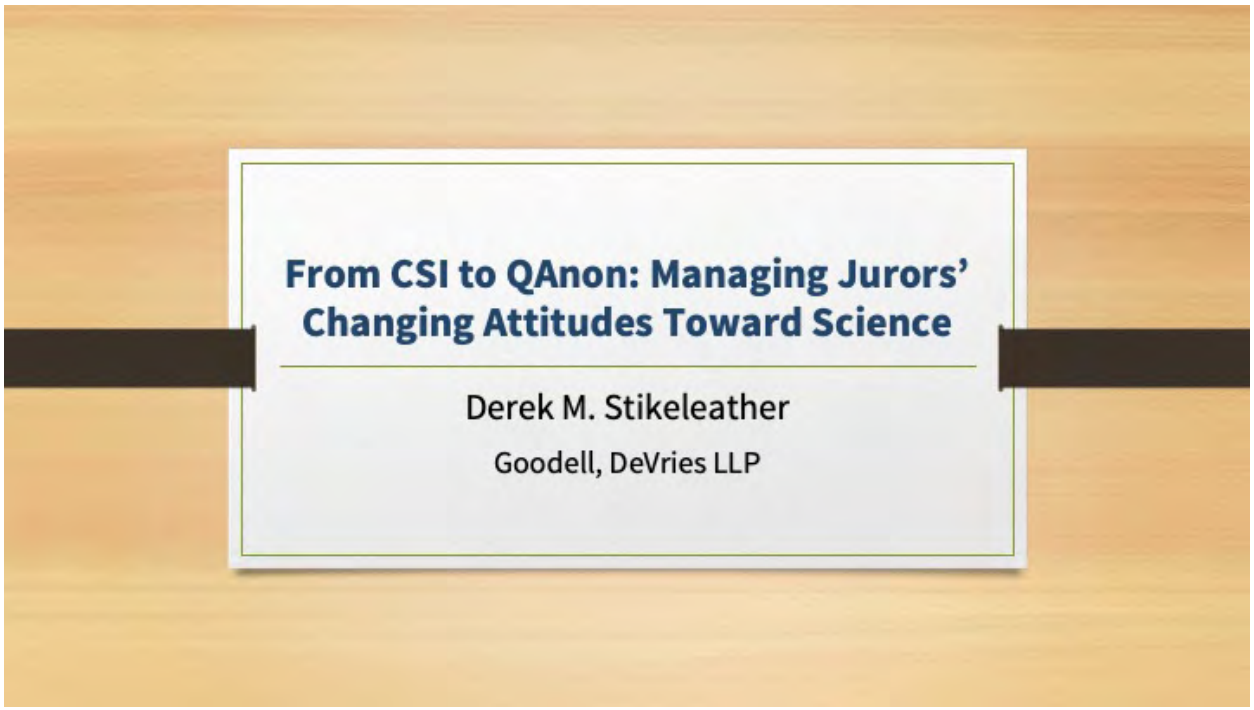
17 Id.

18 Id.

19 Id.

20 Id.

21 Id.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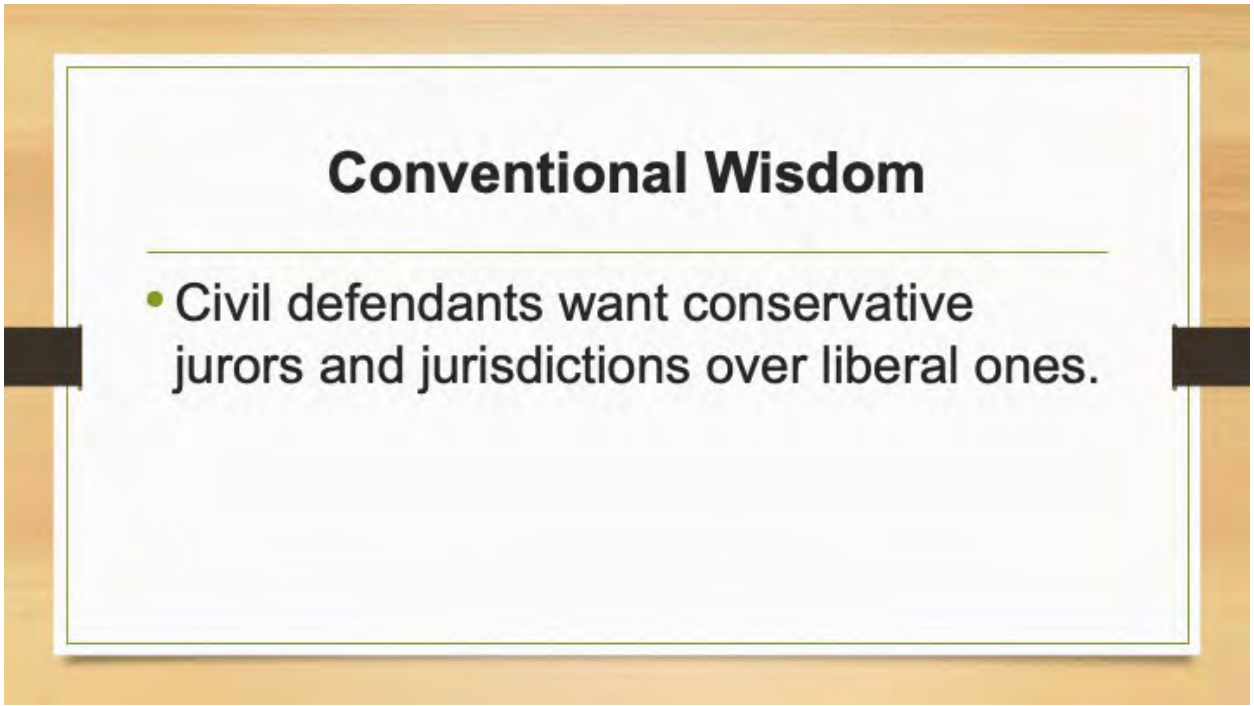
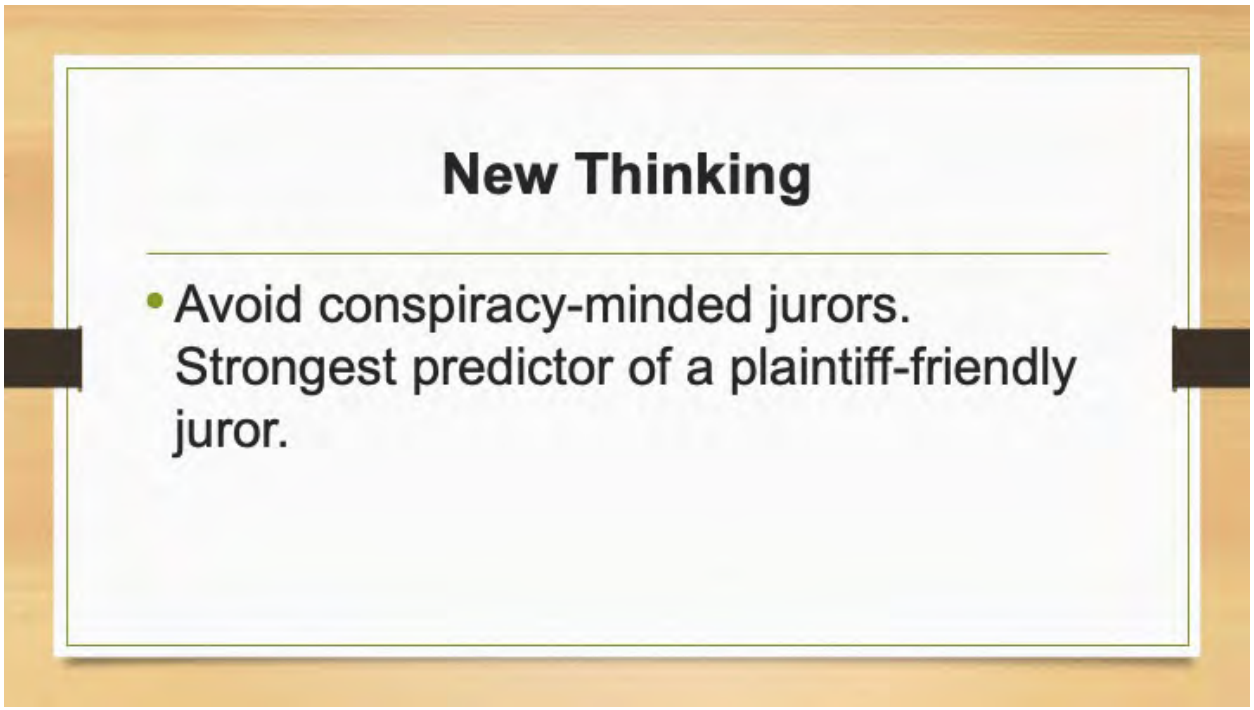
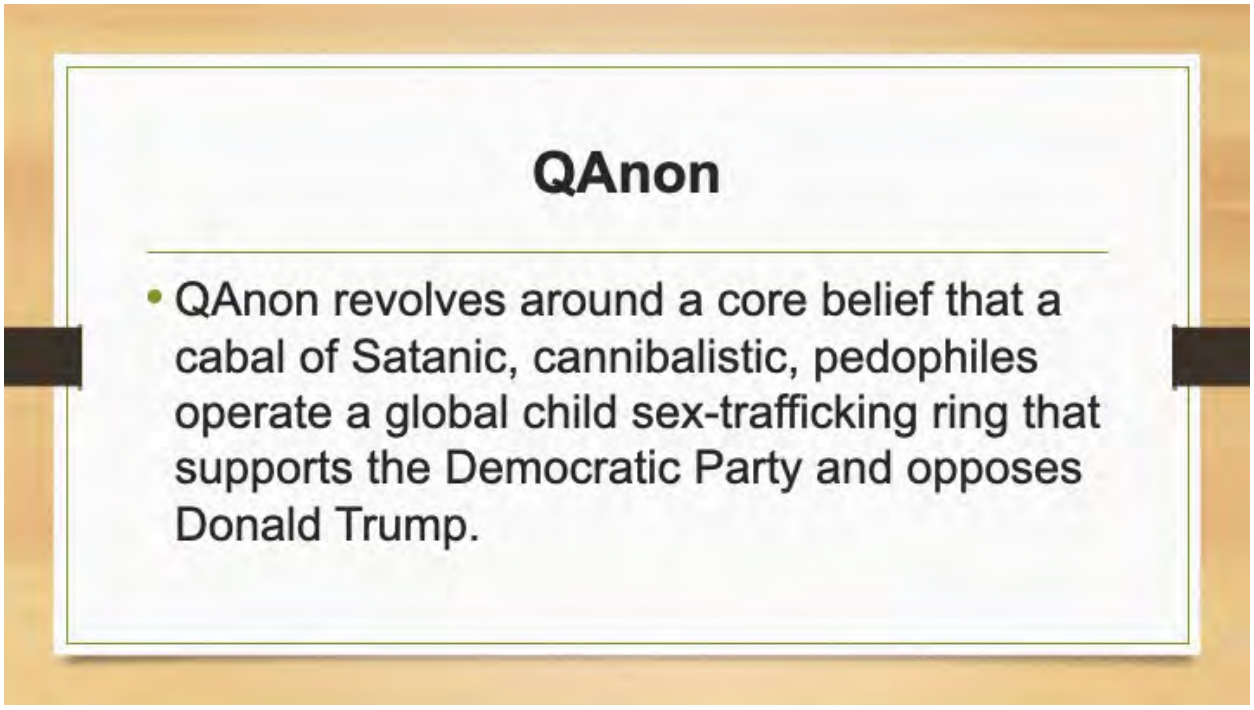
Goodell, DeVries LLP


Conventional Wisdom
• Civil defendants want conservative jurors and jurisdictions over liberal ones.


New Thinking
• Avoid conspiracy-minded jurors. Strongest predictor of a plaintiff-friendly juror.

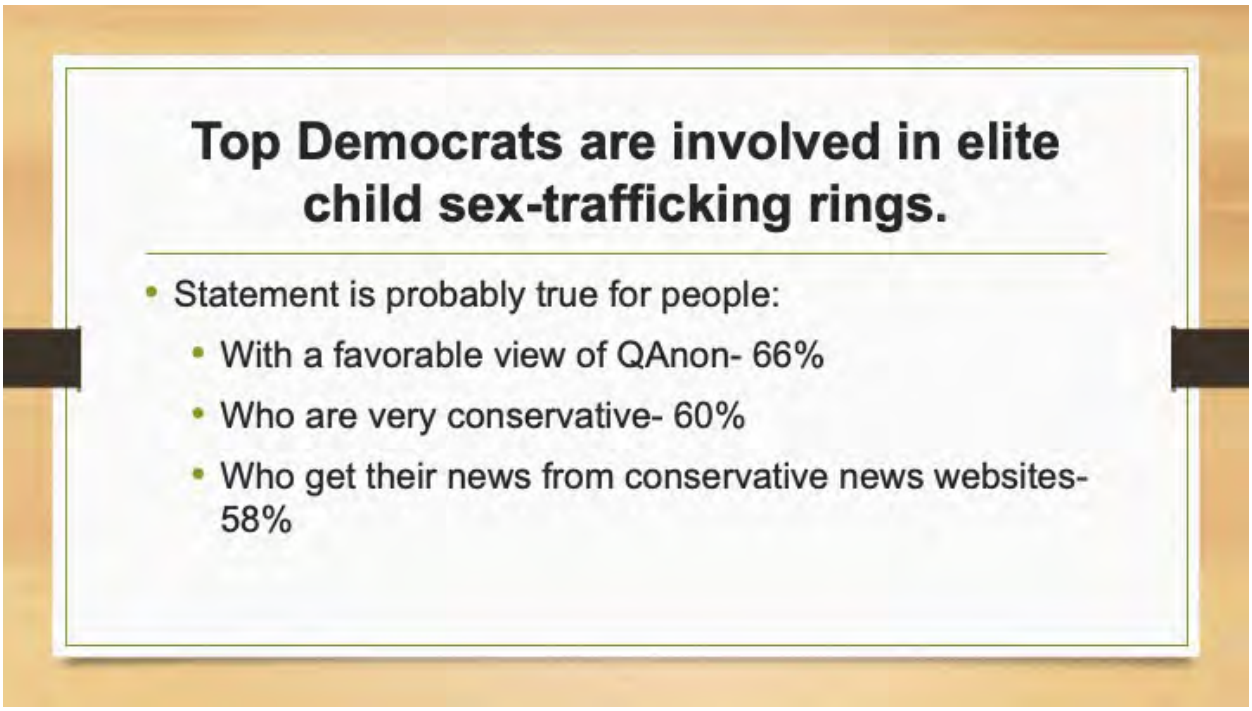

QAnon
• QAnon revolves around a core belief that a cabal of Satanic, cannibalistic, pedophiles operate a global child sex-trafficking ring that supports the Democratic Party and opposes Donald Trump.

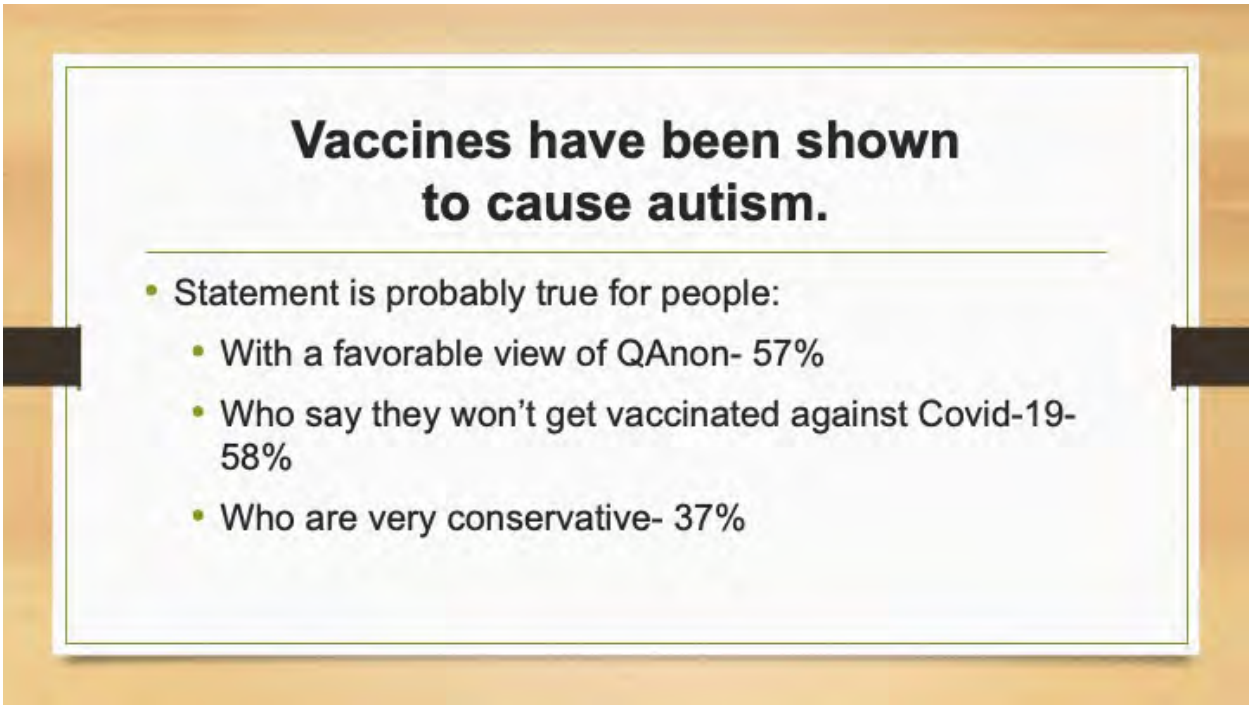
Do QAnon Jurors Exist?

- Two-thirds of Americans say they have heard about QAnon.
- 14% of the 2/3 have a somewhat or very favorable opinion of QAnon.

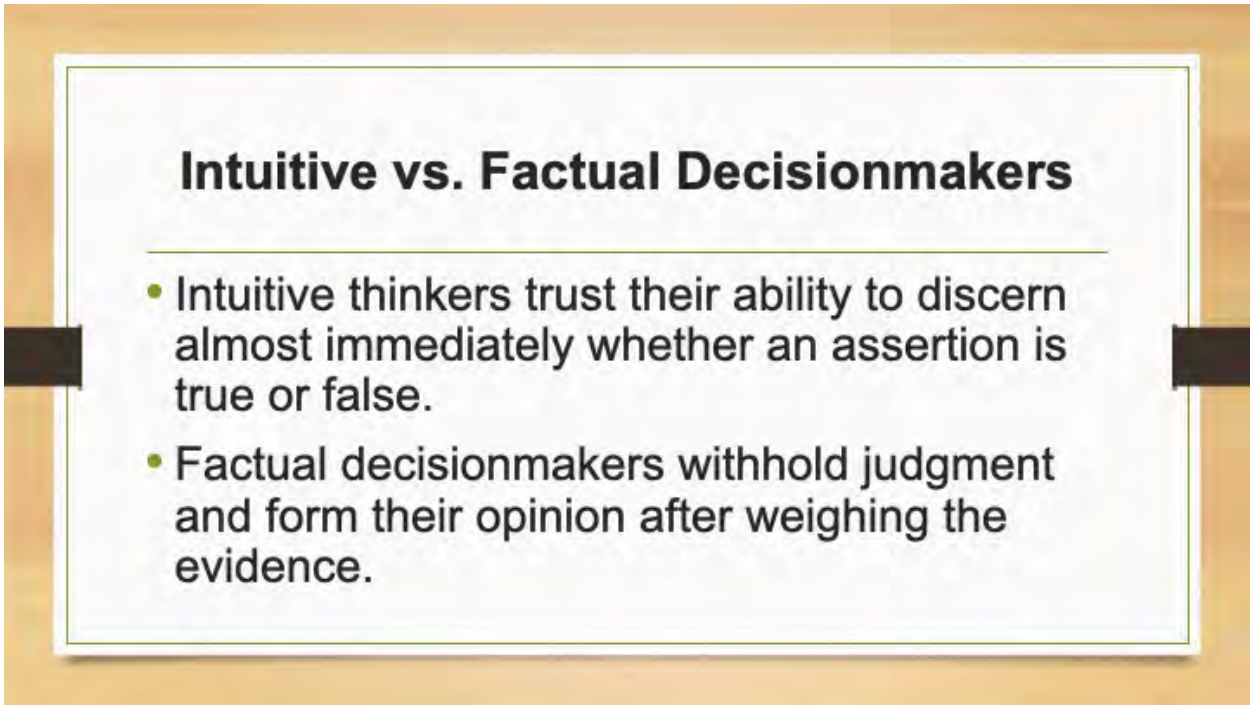
Regardless of who is officially in charge, a single group of people secretly control events and rule the world.

- Statement is probably true for people:
  - With favorable view of QAnon- 74%
  - Who get their news from conservative news website- 63%
  - Who say they won't get Covid vaccines- 61%

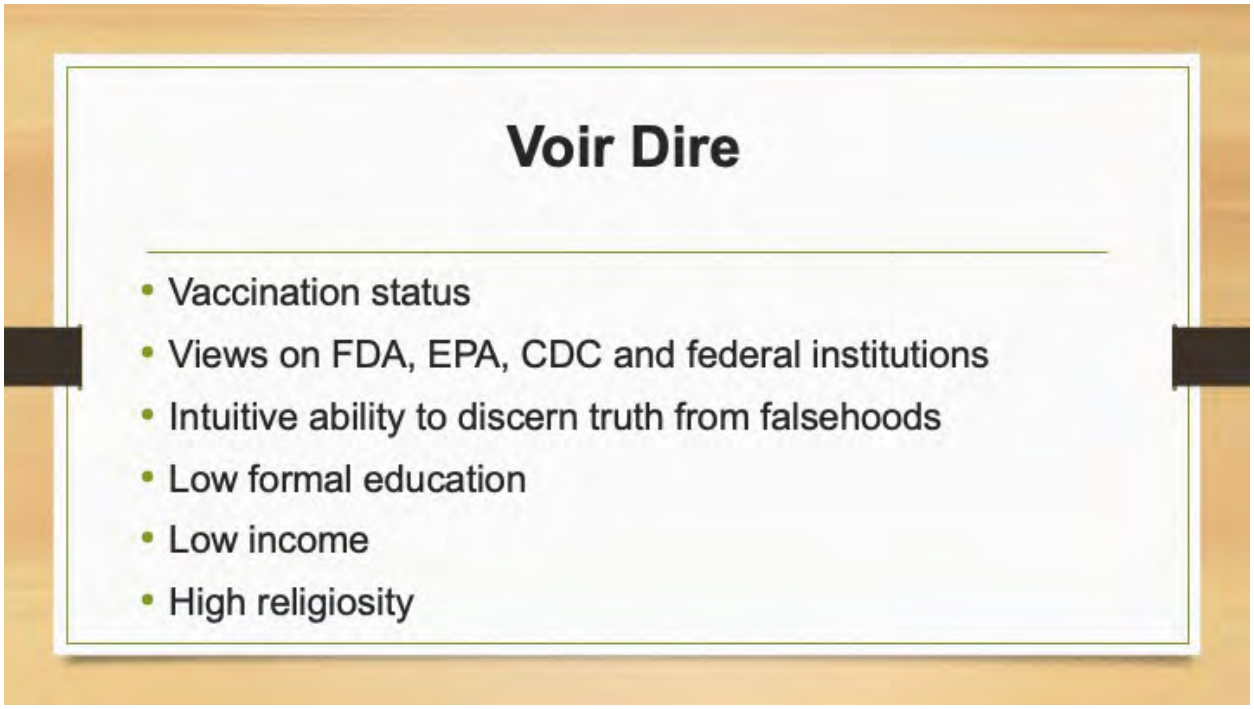

Top Democrats are involved in elite child sex-trafficking rings.
Statement is probably true for people:
With a favorable view of QAnon- 66%
Who are very conservative- 60%
Who get their news from conservative news websites- 58%


Vaccines have been shown to cause autism.
Statement is probably true for people:
With a favorable view of QAnon- 57%
Who say they won't get vaccinated against Covid-19- 58%
Who are very conservative- 37%


Red Flags for Civil Defendants
• General distrust of institutions
• Anti-corporate sentiment
• Little formal education


Intuitive vs. Factual Decisionmakers
• Intuitive thinkers trust their ability to discern almost immediately whether an assertion is true or false.
• Factual decisionmakers withhold judgment and form their opinion after weighing the evidence.


Social Media
• Extremists often advertise
• Covid misinformation
• Other conspiracy theories
• Far-right fringe candidates


Voir Dire
• Vaccination status
• Views on FDA, EPA, CDC and federal institutions
• Intuitive ability to discern truth from falsehoods
• Low formal education
• Low income
• High religiosity

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Derek Stikeleather

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

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

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

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

Representative Matters
- Rochkind v. Stevenson, 236 A.3d 630 (Md. 2020). Persuaded the Supreme Court of Maryland to formally recognize that the evolution of Maryland evidence law warranted formal adoption of the Daubert standard and retirement of the Frye-Reed test. The ruling sets the threshold that proposed expert witnesses must meet under Rule 5-702 in any civil or criminal proceeding in Maryland where the rules of evidence apply.
- Univ. of Md. Medical System Corp. v. Muti, 44 A.3d 380 (Md. 2012). Briefed and argued high court appeal addressing consequences of plaintiffs' failure to include all primary beneficiaries as plaintiffs or use plaintiffs in statutory Maryland wrongful death claim.

Honors and Awards
- Litigation Counsel of America (LCA) – Fellow (2023)
- Chambers USA - Litigation: Appellate (Maryland), Band 1 (2022-2023)
- Best Lawyers in America - Baltimore Lawyer of the Year, Appellate Practice (2024); Appellate Practice (2023-2024); Medical Malpractice Law - Defendants (2024)
- Maryland Super Lawyers - Appellate Law (2017-2023)

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

Panel: Arbitration - A Better Alternative or Path to More Costly Litigation?

Henry Willett

Christian & Barton (Richmond, VA)

Arbitration - A Better Alternative or Path to More Costly Litigation?
By Henry Willett

History of Arbitration
The concept of arbitrating disputes has existed for hundreds of years. There is evidence that arbitrations were used in ancient times and, believe it or not, Greek mythology even refers to arbitration. In 1925 Congress passed the Federal Arbitration Act ("FAA") to codify a standard framework for the conduct and confirmation of arbitrations. Congress enacted the FAA in response to a perceived need for a streamlined and efficient alternative to traditional judicial systems. As is the case today, backlogged courts led to lengthy and extremely costly legal battles. The enactment of the FAA sought to promote arbitration as a viable alternative to court proceedings and to ensure that arbitration agreements and the arbitration process would be upheld by the courts.[1]

In 1955 the Uniform Law Commission ("ULC") proposed the Uniform Arbitration Act ("UAA"), based on the FAA.[2] The American Arbitration Association adopted and approved the UAA the following year in an effort to promote consistency and uniformity in arbitration laws in the various states. The UAA's purpose was "to validate arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary."[3] Thirty-five states directly adopted the UAA and 14 additional states enacted statutes similar to the UAA.[4] In August 2000, the ULC proposed the Revised Uniform Arbitration Act ("RUAA"), which adds several provisions governing whether an arbitrator or a court decides the question of arbitrability, how arbitrability is decided, arbitral procedure, and awards and costs. So far, 21 states and the District of Columbia have adopted the RUAA.[5]

Throughout history, businesses have relied on the arbitration process to promote fairness, expertise, and cost-effectiveness in the resolution of disputes. Today, most individuals or entities arbitrate disputes because they must—based on mandatory arbitration provisions. Indeed, in any contractual dispute, there are two provisions that litigators gravitate to as they first peruse a disputed agreement—arbitration and attorneys' fees. Accurate or not, there is a perception that arbitration is a preferred venue for defendants. Why is this? The process is largely confidential, cost efficient, more likely to result in a compromise award, and, critically, it is intended to be final. The process also tends to be more relaxed than traditional litigation, certainly litigation in federal court, as strict rules of evidence are not adhered to, depositions are typically only permitted where agreed upon, and motions practice is limited to non-existent.

While nearly all the "benefits" of arbitration have a corresponding downside, this article explores the "benefit" of finality, whether such finality is a reality, and steps to ensure that your arbitration award is upheld.

Moving to Confirm or Vacate an Award
The FAA provides a relatively streamlined process for confirming arbitration awards in federal courts where the federal courts would otherwise have jurisdiction over a dispute.[6] Specifically, Section 9 of the FAA provides:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified

1 Thompson Reuters Practical Law, Federal Arbitration Act.

2 Practical Law Arbitration, Revised Uniform Arbitration Act.

3 Unif. Arbitration Act, Prefatory Note 1 (1955).

4 Practical Law Arbitration, Revised Uniform Arbitration Act.

5 Id.

6 The Supreme Court has held that the FAA applies to the full extent of the Commerce Clause. Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003).

in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding.[7]

But, what the FAA giveth, it also (potentially) taketh away, in Section 10, which provides the following potential grounds for vacating arbitration awards:

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[8]

The UAA includes virtually identical grounds for vacating awards, and likewise critically requires that a motion to vacate be submitted within 90 days of the entry of the award.[9]

Good News for the Victor—Did the Arbitrators Do Their Job or Not?

"The scope of judicial review of an arbitration award 'is among the narrowest known at law.'"[10] Courts in reviewing arbitration awards have held that "a district or appellate court is limited to determine whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it."[11] "When a party moves to vacate an arbitration award, the district court does not conduct a de novo review of the award's legal or factual findings. Rather, the court's review is limited to applying the standards created under the FAA and relevant case law in order to determine whether the remedy of vacating the arbitration award is appropriate."[12] Courts have further explained that the review of an arbitrator's decision is "among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation."[13]

Pro Tip: Preserve Your "Record" in the Arbitration.

Courts have held that "when a party consents to arbitration it cannot attack the award on grounds not raised before the arbitrator."[14] Specifically, "failure to raise [an] issue below precludes this Court from considering it as a basis to vacate the arbitrator's award."[15] So, whether through disfavored motion practice or a pre or post-hearing brief, make sure that you have presented your panel with all arguments you may want considered in challenging an award.

Objection Sustained!!

As noted above, one of the distinguishing factors of arbitration is that strict rules of evidence typically are not applied. So, where an arbitration panel excludes evidence from being presented at a hearing, both sides should be on high alert. Yes, you may have prevailed in your objection, but you may have opened the door for the other side to challenge an award. The flip side of this, of course, is that if you are denied the ability to present material evidence by an arbitration panel, then you should consider making a proffer of the relevance and materiality of the evidence on the "record" and back that up with a written submission, where possible, to ensure that you have preserved the argument in the event of an adverse award.

Potential Challenges—Evident Partiality

Imagine engaging in an arbitration for more than a year, enduring a two-week hearing, and then obtaining an award in your favor only to receive a motion to vacate filed 30 days later claiming evident partiality by one of the arbitrators. The basis for the motion being the arbitrator's purported failure to disclose service on an advisory board of a related entity that contracted with one of the parties many years ago.

Respondent has the burden of demonstrating "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration."[16] Moreover, "[w]hen considering each factor, the court should determine whether the asserted bias is 'direct, definite and capable of demonstration rather than remote, uncertain or speculative.'"[17] "The movant carries a 'heavy'

7 9 U.S.C. § 9.

8 9 U.S.C. § 10.

9 UAA, Section 10.

10 UBS Fin. Servs., Inc. v. Padussis, 842 F.3d 336, 339 (4th Cir. 2016) (citing Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 193 (4th Cir. 1998)).

11 Three S Delaware, Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 527 (4th Cir. 2007) (quoting Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994)).

12 Singh v. Interactive Brokers LLC, No. 2:16CV276, 2019 WL 6883794, at *3 (E.D. Va. Dec. 17, 2019) (internal citations omitted).

13 Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998).

14 Dist. 17, United Mine Workers of Am. V. Island Creek Coal Co., 179 F.3d 133, 140 (4th Cir. 1999).

15 Id.

16 ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493, at 500 (4th Cir. 1999)(quoting Consolidation Coal Co. v. Loc. 1643, United Mine Workers of Am., 48 F.3d 125, 129 (4th Cir. 1995).

17 Id.

burden in order to meet this 'onerous' standard."[18]

Nevertheless, Arbitration awards will be overturned where the arbitrator's failure to disclose is egregious.[19] In an example of a particularly egregious case, the Supreme Court of Texas overturned an award on evident partiality grounds where the neutral arbitrator disclosed some, but not all, facts concerning his connection to one of the parties' law firms, including that he was actively soliciting business from the law firm on behalf of a company that he owned shares in and his contacts concerning that business were with the two lawyers representing the party in the arbitration, and that he allowed one of the two lawyers to edit his disclosures to minimize the contact.[20] So, yes, there can be a valid basis for vacating an arbitration award.

Potential Challenges—Exceed Power/Engaged in Misbehavior.

What if the arbitrators simply get it wrong and misinterpret the law? Does that mean that they have exceeded their powers? Likely not, but that does not mean that the losing party will not give it a try. Before diving into the basis for vacatur under the FAA, remember that the argument must have been presented in the underlying arbitration, giving the arbitrators an opportunity to address the issue. Assuming this hurdle can be overcome, it does not get much easier for the party moving to vacate. As stated by the Supreme Court, "'It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable ... In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.'"[21] Accordingly, in the absence of a showing that the arbitration panel "imposed its own conception of sound policy" as opposed to interpreting the law, this standard cannot be met.

Parties may also rely on Section 10(a)(3) of the FAA "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."[22] This has been interpreted to require a finding that the arbitrators "intentionally contradicted the law."[23] Again, this requires that the party moving to vacate presented the arbitration panel with the applicable law and the panel intentionally disregarded that law, not that they misinterpreted it.24

Consequence of Challenges

While these challenges are more likely than not to prove futile, they are having an impact on the arbitration process by throwing arbitration awards into the backlogged appellate process. This threatens not only the finality of awards, but many of the other perceived attributes of arbitration, such as cost and time efficiency and, depending on the nature of the motion to vacate, confidentiality.

18 Id. at 501 (citing Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996)).

19 See, e.g., Burlington Northern R. Co. v. TUCO, Inc., 960 S.W.2d 629 (Tex. 1997) (holding that the neutral arbitrator's failure to disclose his acceptance of a substantial referral from the law firm of the nonneutral arbitrator during the arbitration established evident partiality); Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp., 751 A.2d 426 (Del. Ch. 1999) (vacating an award where the law firm representing a party to the arbitration simultaneously represented the arbitrator who cast the decisive vote in a 2-1 split panel as local counsel in another matter); Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP, 219 Cal. App. 4th 1299 (2013) (holding that vacatur was warranted in an arbitration between a law firm and a client claiming legal malpractice when the arbitrator did not disclose that he named a partner in the party-law firm as a reference on his resume); Municipal Workers Compensation Fund v. Morgan Keegan & Co., 190 So.3d 895 (Ala. 2015) (finding evident partiality when an arbitrator failed to disclose substantial business relationships between his financial firm and party to the arbitration, including, inter alia, that his financial firm and party to the arbitration had participated together as co-underwriters on 36 issuances of multi-million-dollar securities).

20 Tenaska Energy Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518 (Tex. 2014).

21 Sonic Automotive, Inc., No.3:10-CV-382, 2011 WL 3564884, *11 (quoting Stolt–Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S.Ct 1758, 1767 (2010)).

22 9 U.S.C. §10(a)(3)(emphasis added).

23 Wachovia Securities, LLC v. Brand, 671 F.3d 472, 479 (4th Cir. 2012).

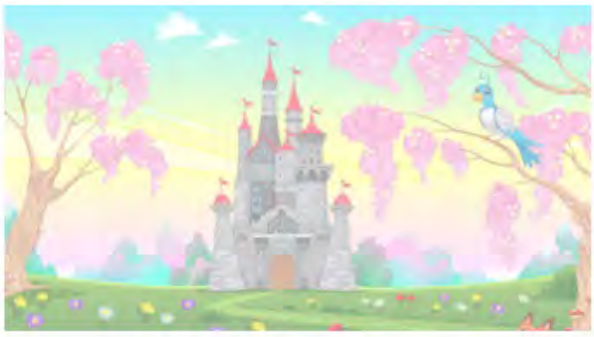
24 Id.

Arbitration Awards: Are They Really Final?

History of Arbitrations

Which Path?

Federal Rules of Civil Procedure



Arbitration Rules

3

Benefits of Arbitration

4

But is it *really* FINAL?

Who do you choose?

- Judge?
- Industry Expert?
- Lawyer?

Confirmation of Arbitration Award

UAA

Upon *application* of a party any time after an award is made, **the court shall confirm** an award. Section 9

FAA

Any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon **the court must grant** such an order unless the award is vacated, modified, or corrected. 9 U.S.C. § 9

Standard of Review Pursuant to UAA

- "The scope of judicial review of arbitration awards 'is **among the narrowest known at law.**'"
  - *UBS Fin. Servs., Inc. v. Padussis, 842 F.3d 336, 339 (4th Cir. 2016) (citing Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 193 (4th Cir. 1998)).*

Motion to Confirm

Steps for confirmation in the Court	
	Application
	Agreement to Arbitrate
	Award

Petition to Vacate

- Respondent bears the responsibility of satisfying the "**heavy burden of conclusively proving the [Arbitration Award's] invalidity**."
  - *Gen. Excavation Inc. v. Najla Assocs. Inc.*, No. 134308 (Fairfax 1994) (citing *Howerin Residential Sales v. Century Realty*, 235 Va. 174, 179 (1988)).

Misconduct

- Section 10→
  - Respondent must establish "misconduct prejudicing the rights of any party"
- Case law→
  - Courts look at (1) the Arbitrator's Conduct at the Hearing *and* (2) Actual Prejudice

11

Misconduct

- Courts look at:
  - (1) the Arbitrator's Conduct at the Hearing *and*
  - (2) Actual Prejudice

Hearing Conduct	• Any Allegations?
Actual Prejudice	• Any Evidence?

12

Evident Partiality

Standard of Review

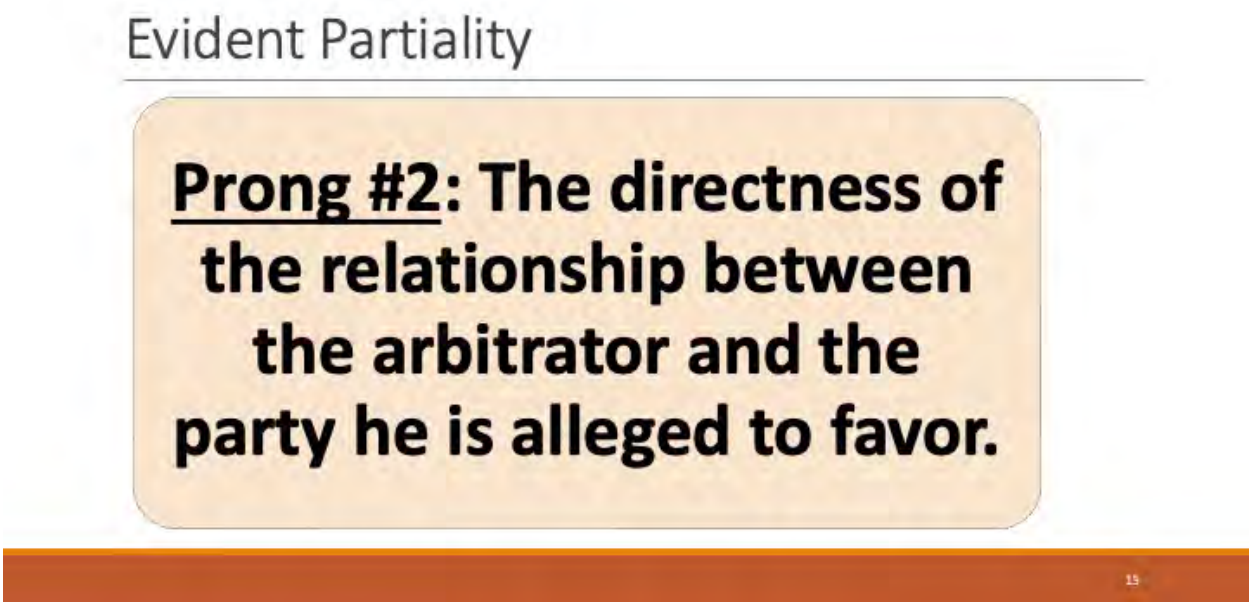
- Respondent has the burden of demonstrating:
  - **"That a *reasonable person* would have to conclude that an arbitrator was partial to the other party to the arbitration."**
    - *ANR Coal Co. v. Cogentrix of N. Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999).

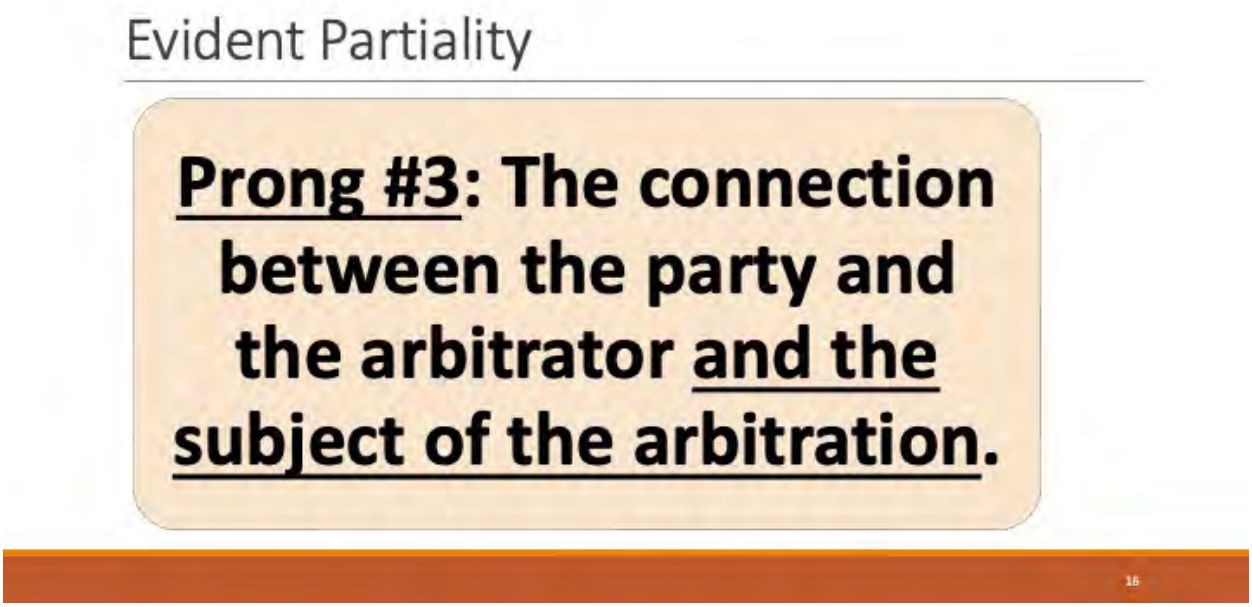
13

Evident Partiality

Prong #1: The extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding.

14


Evident Partiality
Prong #2: The directness of the relationship between the arbitrator and the party he is alleged to favor.
15


Evident Partiality
Prong #3: The connection between the party and the arbitrator and the subject of the arbitration.
16

Evident Partiality

<u>Prong #4</u>: The *proximity in time* between relationship between arbitrator and the party he is alleged to favor and the arbitration.

Respondent's Burden: Evident Partiality

A trivial relationship → Even if undisclosed → Will **not** justify vacatur

Exceeded Powers

- "'It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable'"
- "'In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.'"
  - *Sonic Automotive, Inc.*, No.3:10-CV-382, 2011 WL 3564884, *11 (*quoting Stolt–Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct 1758, 1767 (2010))

19

Engaged in Misbehavior

- "[W]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; *or of any other misbehavior by which the rights of any party have been prejudiced.*" Section 10(a)(3) of the FAA (emphasis added).
- This has been interpreted to require a finding that the arbitrators "intentionally contradicted the law."
  - Wachovia Securities, LLC v. Brand, 671 F.3d 472, 479 (4th Cir. 2012).

20

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Henry Willett

Partner | Christian & Barton (Richmond, VA)

Henry Willett is a partner in the firm's Litigation and Health Care departments. He represents clients in litigation involving the enforcement of non-compete and non-solicitation agreements, intellectual property matters, products liability claims, business and construction disputes, professional malpractice claims, and financial services disputes. Mr. Willett has tried cases and arbitrated matters in state and federal courts and before FINRA Dispute Resolution, the National Association of Securities Dealers, the New York Stock Exchange and the American Arbitration Association.

Mr. Willett represents and advises clients in a variety of health care related matters, such as denial of benefits claims under ERISA, claims under the Mental Health Parity and Addiction Equity Act (MHPAEA), contract negotiations and disputes, professional malpractice claims and regulatory enforcement actions.

Mr. Willett is chair of the firm's Associate Training and Evaluation Committee.

Practice Areas

- Trials / Appeals / Alternative Dispute Resolution
- Products Liability and Torts
- Financial Services Litigation
- Intellectual Property Litigation
- Health Care
- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Medical Malpractice

Experience

- Representation of a large national securities firm and individual clients in state and federal court injunction and arbitration proceedings involving the enforcement of non-compete and non-solicitation agreements.
- Representation, in the U.S. District Court for the Eastern District of Virginia, of an avionics firm in a products liability lawsuit involving a plane crash.
- Representations of companies and individual clients in actions involving the enforcement of non-compete and non-solicitation agreements.
- Defense of benefit claims actions against health plans and third-party administrators under ERISA and the MHPAEA before courts in the 2nd, 4th, 6th, 9th, 10th and 11th Circuits.

Honors and Awards

- Virginia Super Lawyers - Civil Litigation Defense, 2014-2023
- Legal Elite (Virginia Business) - Civil Litigation, 2010, 2015-2022; Young Lawyer, 2009, 2011-2014
- Virginia Rising Stars - Civil Litigation Defense, 2007-2008, 2010-2013

Education

- University of Richmond School of Law, J.D., 1999 Cum Laude - The Order of the Barristers; Editorial Board, University of Richmond Law Review; Vice President, National Moot Team, Moot Court Board; National Negotiations Team, Client Counseling and Negotiations Board
- University of Virginia, B.A., History, 1996

Panel: Big Brother Is Suing You - Trends in Government Enforcement Actions

Steve Schleicher

Maslon (Minneapolis, MN)

Big Brother Is Suing You: Trends in Government Enforcement Actions
By Steve L. Schleicher and Stephanie M. Laws

No company welcomes government scrutiny into their operations. Whether it is a formal subpoena, investigative demand, or informal request for information, inquiries from the government disrupt business as usual and cost money. And when government investigations become enforcement actions, they can create public relations nightmares and potentially expose the company—and its employees—to civil and criminal liability.

In this article, we discuss current trends in government enforcement actions to highlight areas where increased enforcement activities are expected and robust compliance programs are particularly worthwhile.

Corporate Criminal Enforcement
There has been a massive increase in public corruption enforcement, both criminal and civil, focusing not just on government officials but companies and corporate executives connected to government funds. Public corruption is a top priority for the U.S. Department of Justice ("DOJ"), which has shown its willingness to use aggressive tactics to combat the issue.

We have also seen more forceful corporate criminal enforcement generally, with a focus on public corruption but spanning all areas. In a 2021 address to the ABA's National Institute on White Collar Crime, Deputy Attorney General Lisa O. Monaco announced changes in the government's corporate criminal enforcement policies. She reaffirmed that the DOJ would hold those who break the law accountable, and that accountability "starts with the individuals responsible for criminal conduct." See Press Release, US Dep't of Just., Remarks As Prepared for Delivery, Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime, available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute. Accordingly, she directed the department to "restore prior guidance making clear that to be eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue," regardless of their position, status, or seniority. Id. Deputy Attorney General Monaco re-emphasized the DOJ's focus on corporate crime during her 2023 remarks. See Press Release, US Dep't of Just., Remarks as Prepared for Delivery, Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime, available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national.

Deputy Attorney General Monaco also emphasized the importance of companies to actively review their compliance programs and proactively invest in them to ensure they adequately monitor for and remediate misconduct. Id. The government is increasingly scrutinizing corporate compliance policies to determine whether corporations themselves should be held criminally liable for individual conduct. The Serious Fraud Office has been increasing enforcement, and has noted that large corporations will be held criminally liable if an employee commits fraud for the corporation's benefit and the corporation does not have reasonable procedures in place to prevent fraud.

Along with that stick, there is also a carrot: those companies that voluntarily self-disclose potential wrongdoing by employees or agents "prior to an imminent threat of disclosure or government investigation" will receive "resolutions under more favorable terms than if the government had learned of the misconduct through other means," according to the government. See U.S. Attys' Offices Voluntary Self-Disclosure Policy, available at https://www.justice.gov/usao-edny/press-release/file/1569406/download. Time will tell how this is applied in practice; in actuality, cooperation may not gain companies much, particularly where the government is looking to create a general deterrence effect.

Foreign Exports, Sales, and Connections

Export control and sanctions enforcement has increased, affecting both domestic companies and those with foreign affiliates. This includes investigation of illegal diversion of technology to China, Iran, Russia, and North Korea, with particular focus surrounding enforcement of export controls on Russia in response to its invasion of Ukraine. See, e.g., US Dep't of Comm., Resources on Export Controls Implemented In Response to Russia's Invasion of Ukraine, available at https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/russia-belarus.

Moreover, there is a significant uptick in Foreign Corrupt Practices Act (FCPA) enforcement, and global cooperation among law enforcement agencies is growing. Again, companies are incentivized to self-disclose and do so promptly.

Antitrust

There has been a general decrease in criminal antitrust enforcement in volume, size of fines, and length of prison sentences. See US Dep't of Just., Antitrust Division, Criminal Enforcement Trends Charts, available at https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts. Criminal enforcement has generally shifted away from corporate liability, correlated with decreased funding since 2010. See Washington Center for Equitable Growth, The State of U.S. Federal Antitrust Enforcement, available at https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true.

One glaring exception, however, appears to be with respect to large corporations, particularly in tech, where antitrust scrutiny has increased. A much-publicized example is regulators' attention to Ticketmaster's dominant position after the company's sale of Taylor Swift tickets in 2022 was riddled with problems. At the time, U.S. Senator Amy Klobuchar, chair of the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, said, "The high fees, site disruptions, and cancellations that customers experienced shows how Ticketmaster's dominant market position means the company does not face any pressure to continually innovate and improve." See Press Release, U.S. Senator Amy Klobuchar, Chairwoman Klobuchar, Ranking Member Lee Announce Hearing on Lack of Competition in Ticketing Markets, available at https://www.klobuchar.senate.gov/public/index.cfm/2022/11/chairwoman-klobuchar-ranking-member-lee-announce-hearing-on-lack-of-competition-in-ticketing-markets.

Additionally, there has been scrutiny of large mergers in many industries as a draft of new merger guidelines was recently released for public comment. Assistant Attorney General Jonathan Kanter of the Antitrust Division commented, "As markets and commercial realities change, it is vital that we adapt our law enforcement tools to keep pace so that we can protect competition in a manner that reflects the intricacies of our modern economy." See Press Release, Federal Trade Comm., FTC and DOJ Seek Comment on Draft Merger Guidelines, available at https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

Healthcare

U.S. Food and Drug Administration ("FDA") inspections have returned to pre-pandemic levels and are expected to increase, affecting the food and healthcare industries. At the same time, the FDA's use of Remote Regulatory Inspections, instituted during COVID, will continue. All types of inspections may be problematic for industries where key personnel may have left or are inexperienced in inspections after years of not experiencing them. Companies should take steps to ensure they are ready to respond to any inspection, whether in person or remote. They should also ensure they respond thoroughly to whistleblowers, thoroughly documenting the efforts they have taken to address whistleblowers' concerns, as the number of large investigations of these concerns is likely to rise. The FDA has also begun to conduct unannounced inspections of pharmaceutical manufacturers in India, where, along with China, most overseas drug facilities are found. (Unannounced inspections in China are expected to follow.)

Life sciences companies are expected to see a higher level of enforcement activities directed against them under the FCPA, including overseas clinical trials. Even routine healthcare sector activities such as arranging for foreign nationals to attend overseas conferences, educational events, or facility visits have been targeted for enforcement action, as happened with a major multinational corporation this year. See US Securities & Exchange Comm., SEC Enforcement Actions: FCPA Cases, available at https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases.

Meanwhile, state attorneys general are becoming increasingly active, especially on trade and pricing practices, as well as anticompetitive practices enforcement, particularly in the healthcare space. See, e.g., Minnesota House of Representatives, House Oks Beefed-Up State Oversight of Proposed Health Care Sales, Mergers, available at https://www.house.mn.gov/sessiondaily/Story/17988.

Data Preservation

The federal government is targeting financial institutions for failure to follow preservation obligations, including

preservation of communications made on high ranking executives' personal devices—i.e., smartphones. For example, the SEC charged sixteen Wall Street firms in September 2022 with widespread recordkeeping failures. It found that the firms' employees "routinely communicated about business matters using text messaging applications on their personal devices," and the firms did not maintain or preserve the majority of those off-channel communications, in violation of federal securities laws. See Press Release, U.S. Securities & Exchange Comm., SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures, available at https://www.sec.gov/news/press-release/2022-174.

Child Labor

The nationwide problem of underage migrant workers being put to work illegally was exposed by the New York Times in early 2023, sparking a swift response from the Biden administration. See Hannah Dreier, Biden Administration Plans Crackdown on Migrant Child Labor, N.Y. Times, Feb. 27, 2023, available at https://www.nytimes.com/2023/02/27/us/biden-child-labor.html. In a February 2023 statement, the U.S. Department of Labor ("DOL") reported seeing a nearly seventy percent increase in children employed illegally by companies since 2018, and pledged to target not just the factories that illegally hire children but the larger companies whose supply chains use child labor. See Press Release, U.S. Dep't of Health and Human Servs., Department of Labor and Health and Human Services Announce New Efforts to Combat Exploitative Child Labor.

The DOL and parallel state agencies have increasingly cracked down on child labor violations starting in early 2023, including by obtaining an unprecedented and well-publicized $1.5 million fine against a Wisconsin-based sanitation company that allegedly employed more than 100 children ages 13 to 17 to clean meat processing facilities on overnight shifts. See Press Release, US Dep't of Labor, More Than 100 Children Illegally Employed In Hazardous Jobs, Federal Investigation Finds; Food Sanitation Contractor Pays $1.5M In Penalties, available at https://www.dol.gov/newsroom/releases/whd/whd20230217-1.

From a compliance perspective, the issue of child labor is particularly troubling given the trend for underage workers to use false identification that passes the U.S. government's E-Verify system to circumvent the age requirement. See, e.g., Hannah Dreier, Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S., N.Y. Times, Feb. 28, 2023, available at https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html. Verifying age is particularly difficult in the migrant context where individuals may misrepresent their age upon entering the country to gain more favorable treatment. Verifying age is so challenging, in fact, that one major media source recently retracted a story claiming to interview an underage migrant worker after traveling to Guatemala to obtain official documentation showing he was twenty-one. See NBC News, Migrant Worker In NBC News Interview Is Older Than Previously Reported, Apr. 12, 2023, available at https://www.nbcnews.com/news/us-news/migrant-worker-older-than-previously-reported-rcna78539.

Environment

Environmental enforcement has seen a slight uptick recently amid a general downward trend of civil enforcement actions. The U.S. Environmental Protection Agency ("EPA") reported its staffing resources have declined thirty percent in the last ten years. Yet the agency says it is determined to target "the most serious water, air, land, and chemical violations and hazards that impact communities across the country." See US Environmental Protection Agency, Enforcement and Compliance Annual Results for Fiscal Year 2022, available at https://www.epa.gov/enforcement/enforcement-and-compliance-annual-results-fiscal-year-2022.

Securities

The U.S. Securities and Exchange Commission ("SEC") announced that its FY2022 enforcement actions had increased by nine percent, with a record-breaking $6.4 billion in penalties. See Press Release, US Securities & Exchange Comm., SEC Announces Enforcement Results for FY22, available at https://www.sec.gov/news/press-release/2022-206. FY2022 saw the second-highest number of whistleblower awards in terms of both the number of individuals awarded and the total dollar amounts. Id.

These numbers reflect a much more aggressive approach with respect to investigations and willingness to litigate cases to trial. Such cases involve accounting and investing, cryptocurrency, "meme stocks," mergers and acquisitions, Special Purpose Acquisition Companies (SPACs), cybersecurity, digital assets, insider trading, and more. Id. In one controversial approach, the SEC has once again insisted on factual and legal admissions of guilt in some settlements.

Additionally, we have seen increasing SEC enforcement of the healthcare industry, especially for insider trading, accounting, and disclosure-related offenses. One area that is likely to be a focus is so-called "channel stuffing," in which companies ship inventory ahead of schedule and record those shipments as sales, thereby inflating their revenue numbers.

Data Privacy
FTC has increased enforcement both for data privacy violations as well as civil actions against companies for data breaches. In many of these cases, the FTC has charged the defendants with violating Section 5 of the FTC Act, which bars unfair and deceptive acts and practices in or affecting commerce. In a recent example from this year, the agency required a major software company to pay $20 million to settle charges that it violated the Children's Online Privacy Protection Act (COPPA) by collecting personal information from children who signed up to its Xbox gaming system unbeknownst to their parents.

Price Gouging
Several state attorneys general have taken increasing action on price gouging, especially as it pertains to companies allegedly using the pandemic to justify price increases. These officials have varied in how they have used their authority to pursue enforcement, but in general, businesses that have maintained the proper paperwork regarding costs and promptly provided it when asked, as well as fully cooperated in other ways, have avoided drawn out investigations and minimized the threat of litigation.

Conclusion
Companies and in-house counsel should be aware of these enforcement trends and consider them when reviewing and enhancing existing compliance programs to ensure they are appropriately limiting risk that a government inquiry will turn into a company-wide crisis.

Big Brother Is Suing You: Trends in Government Enforcement Actions

PRESENTED BY

Steve Schleicher, Stephanie Laws, James Melendres, Ann Claire Phillips and Marcy Heronimus

November 3, 2023

STEVE SCHLEICHER

STEPHANIE LAWS

JAMES MELENDRES

MARCY HERONIMUS

ANN CLAIRE PHILLIPS

HIGHLY REGULATED INDUSTRIES ARE UNDER THE HEAVIEST SCRUTINY

"CRIMINALIZATION OF ADMINISTRATIVE VIOLATIONS"

- Financial Services
- Energy Extraction and Production
- Defense Contractors
- Insurance
- Health Care Providers
- Life Sciences
- More Recently: Food, Motor Vehicles

HIGH RISK AREAS FOR GOVERNMENT INVESTIGATION

- Off-Label Promotion
- Anti-Kickback Statute ("AKS 2.0")
- Global Anti-Corruption/FCPA
- FCA/Retaliation
- FCA/Quality
- SOX Whistleblower Complaints
- Import/Export Issues
- Government Contracting Issues

SOME TRENDS IN GOVERNMENT ENFORCEMENT

- **Aggressive investigation/enforcement on health care fraud cases – especially against "big-industry"**
- **Expansion of whistleblower provisions/incentives**
  - False Claims Act
  - Dodd/Frank (SEC Violations)
  - SOX
- **International corruption investigations**
  - GSK, Pfizer/Wyeth
  - Biomet, Smith & Nephew, J&J, Stryker
- **More aggressive law enforcement tactics**
  - Employee visits
  - Undercover appearances at trade shows/conferences
  - Proactive investigative techniques
  - Data mining
  - Physician prosecutions

OTHER TRENDS

- **Liability for third party agents and M&A targets**
- **Lots of talk about Park prosecutions and exclusion authority**
- **Settlements often look way back**
- **Lots of settlements – but poor government success rate at trial (mostly against individuals)**

AND, SIGNIFICANTLY. . .

- **Constantly moving bar on compliance, monitoring, auditing expectations**

CORPORATE CRIMINAL ENFORCEMENT

FOREIGN BUSINESS TRANSACTIONS

"No matter which country the crime occurs in, the FBI is steadfast in pursuing those who violate the Foreign Corrupt Practices Act."

ANTITRUST

PRESS RELEASE

Five Amazon Marketplace Sellers and Four Amazon Marketplace Companies Sentenced for Price Fixing

Wednesday, August 23, 2023

Share

For Immediate Release

Office of Public Affairs

Five individuals and four companies have been sentenced for participating in a conspiracy to fix the prices of DVDs and Blu-Ray Discs sold on the Amazon marketplace. This investigation has resulted in a total of six individual guilty pleas and four corporate guilty pleas.

Victor Btesh, of New York, was sentenced to 18 months in prison incarceration followed by two years of supervised release and a fine of $38,000. Btesh's three companies – Michelle's DVD Funhouse, MJR Prime and Prime Brooklyn – were sentenced to $156,520, $125,688 and $61,844 in criminal fines, respectively, in the U.S. District Court for the Eastern District of

DOJ Probe of Overlapping Board Members Fuels Governance Concerns

Clara Hudson

- DOJ further scrutinizes companies on overlapping directors
- Recent enforcement should be "a wake up call" to businesses

Companies with directors sitting on competitors' boards have found it easier to part ways with those members rather than fight the Biden administration's aggressive probe of board overlaps for potential antitrust violations.

The Department of Justice announced last week that five board directors at three companies stepped down after the antitrust division asked them about their "interlocking" directors. The resignations were at Qualys Inc., software firm N-Able Inc., and Sun Country Airlines Holdings Inc.

The DOJ isn't stopping there: in a speech earlier this month, antitrust chief Jonathan Kanter said the department has 17 active investigations into possible overlapping board violations.

HEALTHCARE

PRESS RELEASE

National Enforcement Action Results in 78 Individuals Charged for $2.5B in Health Care Fraud

Wednesday, June 28, 2023

Share

For Immediate Release

Office of Public Affairs

The Justice Department, together with federal and state law enforcement partners, announced today a strategically coordinated, two-week nationwide law enforcement action that resulted in criminal charges against 78 defendants for their alleged participation in health care fraud and opioid abuse schemes that included over $2.5 billion in alleged fraud.

The defendants allegedly defrauded programs entrusted for the care of the elderly and disabled, and, in some cases, used the proceeds of the schemes to purchase luxury items, including exotic automobiles, jewelry, and yachts. In connection with the enforcement action, the Department seized or restrained millions of dollars in cash, automobiles, and real estate.

$1.2 billion healthcare fraud crackdown linked to telemedicine

$1.2 billion healthcare fraud crackdown tied to telemedicine

36 individuals were charged for their alleged participation in schemes that involved charges of more than $1 billion in false billings related to telemedicine.

10 months ago

The U.S. Justice Department announced a $1.2 billion healthcare fraud crackdown Wednesday, revealing charges against 36 defendants for fraudulent billing schemes related to telemedicine and equipment.

The FBI published charges this week in 13 districts to seek convictions against clinical lab owners, marketers, medical professionals, and telemarketing executives.

Prosecutors estimate that the schemes intended to defraud Medicare of $1.2 billion, but they only ended up taking $440 million.

FINANCIAL INSTITUTIONS

PRESS RELEASE

UBS Agrees to Pay $1.435 Billion for Fraud in the Sale of Residential Mortgage-Backed Securities

Monday, August 14, 2023

Share

For Immediate Release
Office of Public Affairs

Settlement Brings Total Amount of Civil Penalties Paid by Banks, Originators, and Ratings Agencies for Such Securities to Over $36 Billion

UBS AG and several of its U.S.-based affiliates (together, UBS) have agreed to pay $1.435 billion in penalties to settle a civil action filed in November 2018 alleging misconduct related to UBS' underwriting and issuance of residential mortgage-backed securities (RMBS) issued in 2006 and 2007. This settlement resolves the last case brought by a Justice Department working group

CHILD LABOR

News Release

MORE THAN 100 CHILDREN ILLEGALLY EMPLOYED IN HAZARDOUS JOBS, FEDERAL INVESTIGATION FINDS; FOOD SANITATION CONTRACTOR PAYS $1.5M IN PENALTIES

Packers Sanitation Services Inc. employed minors to use caustic chemicals to clean razor-sharp saws, other high-risk equipment at 13 meat processing facilities in 8 states

KIELER, WI – One of the nation's largest food safety sanitation services providers has paid $1.5 million in civil mon
after the U.S. Department of Labor's Wage and Hour Division found the company employed at least 102 children –
years of age – in hazardous occupations and had them working overnight shifts at 13 meat processing facilities in

The employer's payment of civil money penalties is the result of the division's investigation of Packers Sanitation S
LTD, based in Kieler, Wisconsin. The division found that children were working with hazardous chemicals and clea

Food Safety Company Employed More Than 100 Children, Labor Officials Say

Packers Sanitation Services Inc. paid a $1.5 million penalty this week for employing children as young as 13 in dangerous jobs at meat-processing plants.

COOPERATION AND "CREDIT"

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

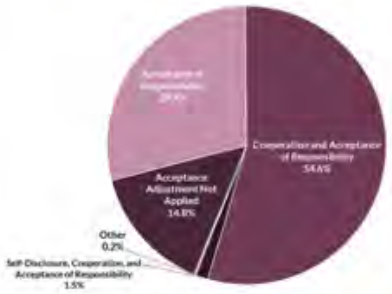
(Updated March 2023)

Introduction

The "Principles of Federal Prosecution of Business Organizations" in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to

Culpability Score Decrease for Self-Reporting, Cooperation, and Acceptance of Responsibility (§8C2.5(g))

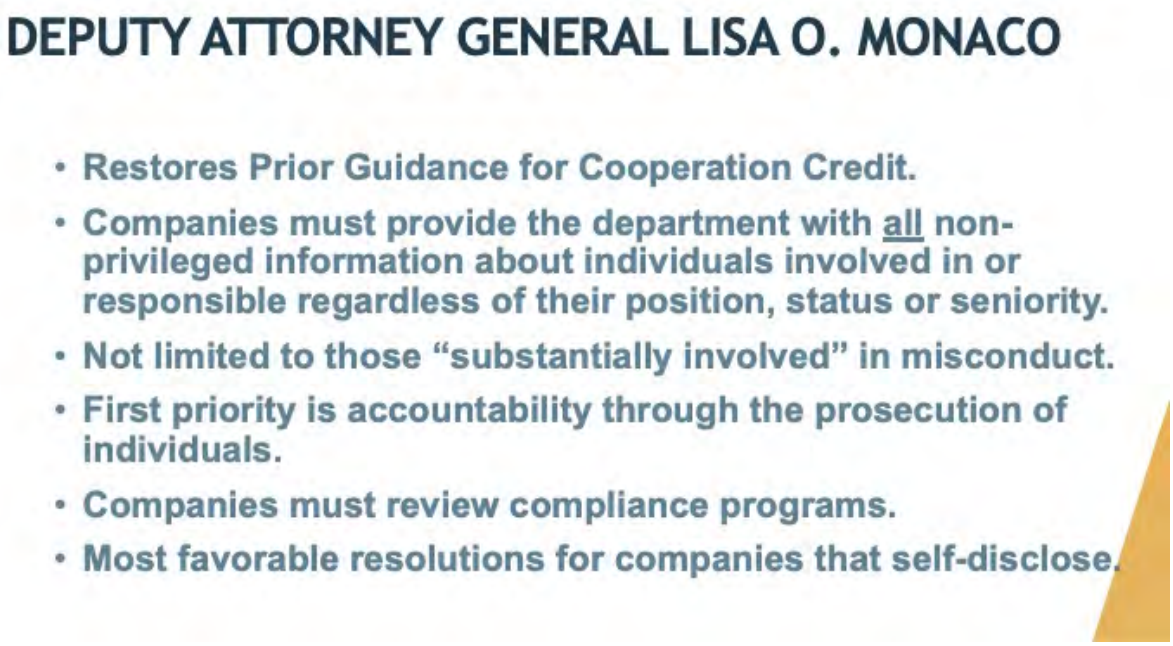
Fiscal Years 1992-2021



EVOLUTION IN DOJ ASSESSMENT OF CORPORATE PROSECUTION AND "COOPERATION"

- Holder Memo (1999)
- Thompson Memo (2003)
- McNulty Memo (2006)
- Filip Memo (2008)
- Yates Memo (2015)
- Rosenstein policy (2018)
- Monaco policy (2021/2022)

U.S. Attorney's Manual


DEPUTY ATTORNEY GENERAL LISA O. MONACO
• Restores Prior Guidance for Cooperation Credit.
• Companies must provide the department with all non-privileged information about individuals involved in or responsible regardless of their position, status or seniority.
• Not limited to those "substantially involved" in misconduct.
• First priority is accountability through the prosecution of individuals.
• Companies must review compliance programs.
• Most favorable resolutions for companies that self-disclose.

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Steve Schleicher

Partner | Maslon (Minneapolis, MN)

Steve Schleicher is a renowned trial lawyer with deep experience in high profile cases. He concentrates his work on high stakes criminal and civil litigation, government and internal investigations, and appellate practice, and leads Maslon's Investigations & White Collar Defense Group.

Steve's extraordinary trial skills are well known throughout the United States and the world. He was recognized for his role as a special prosecutor in the internationally televised homicide trial of former Minneapolis police officer Derek Chauvin for the murder of George Floyd. Steve received high praise for his prominent role conducting jury selection and witness examination. His devastating cross-examination of the defense use-of-force expert received national acclaim, and his powerful closing was viewed as a pivotal factor in the trial verdict.

Practice Areas

- Appeals
- Business Litigation
- Investigations & White Collar Defense
- Tort & Product Liability

Experience

- As a former federal prosecutor, conducted hundreds of investigations on behalf of the United States, including complex fraud matters, money laundering, organized crime, and violent crime.
- Investigated a security company holding a multimillion-dollar contract at a major NFL venue on behalf of a worldwide venue management company.
- Investigated a data security breach and complex intellectual property theft conspiracy on behalf of a major automobile manufacturer.
- Represents health care providers and pharmacies in investigations conducted by government agencies.
- Assists financial institutions with Bank Secrecy Act and Anti-Money Laundering Act compliance to include investigation and reporting.
- Represented leading medical device manufacturer in nationwide lawsuits involving both implanted and external medical devices in multiple state and federal courts across the country.

Honors

- Recognized in Chambers USA: America's Leading Lawyers for Business, Litigation: White Collar Crime and Government Investigations, Minnesota, 2022-23
- Recognized on Minnesota Super Lawyers® list, 2022-2023 (Minnesota Super Lawyers® is a designation given to only 5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Selected for inclusion in The Best Lawyers in America®, 2022-2024
- 2021 Attorney of the Year, Minnesota Lawyer
- 2021 Distinguished Service Award, Pennsylvania Innocence Project
- 2021 Outstanding Service Award, Minnesota Justice Foundation

Education

- William Mitchell College of Law - J.D., cum laude, 1995
- University of Minnesota, Duluth - B.A., magna cum laude, 1992; Criminology and Political Science

Breakout: Pressure Points - Navigating a Path to Lawyer Well-Being

Ashley Hardesty Odell

Bowles Rice (Morgantown, WV)

Pressure Points – Navigating a Path to Lawyer Well-Being

By Ashley Hardesty Odell

Lawyer stress is here to stay and unfortunately continues to increase as the legal profession evolves in complexity. The nature of our work requires us to internalize our clients' struggles and troubles. Work and life never feel balanced. Our time is never our own. This article aims to help lawyers prioritize their personal wellness by identifying barriers to well-being, exploring different ways to navigate those barriers, and highlighting ways that law firms and in-house legal departments can fuel and facilitate lawyer wellness to ensure continued growth, productivity, and overall success of their firm and in-house team.

Any lawyer scoffing at the suggestion that their well-being is critical to their work should be reminded that lawyers have an ethical obligation to provide competent and diligent representation of their clients.[1] If a lawyer's "physical or mental condition materially impairs the lawyer's ability to represent a client," the lawyer must withdraw from that representation.[2] Recognizing that mental health problems and substance abuse significantly impact a lawyer's ability to ethically represent clients and maintain a legal practice, several entities[3] joined together to create the National Task Force on Lawyer Well-Being.[4]In 2017, the National Task Force on Lawyer Well-Being issued a report titled The Path to Lawyer Well-Being: Practical Recommendations for Positive Change. In prelude to their report, the Task Force stated:

> To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being….[T]oo many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise many troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.

The Task Force relied on a 2016 study of 13,000 practicing lawyers conducted by the ABA CoLAP and the Hazelden Betty Ford Foundation, which found that 28% of lawyers struggled with some level of depression, 19% struggled with some form of anxiety, and 23% struggled with some form of stress. Additionally, up to 36% of lawyers qualified as "problem drinkers." The study indicated that "younger lawyers in the first 10 years of practice and those working in firms experience the highest rates of problem drinking and depression."

Likewise, in 2020, a study of approximately 3,000 lawyers sponsored by the California Lawyers Association and the D.C. Bar found 34% of female lawyers, and 25% of male lawyers, reported "hazardous drinking." Alarmingly, 8.5 % of lawyers report suicidal ideation. In fact, lawyers are twice as likely as the general population to experience suicidal ideation. The highest risk category were men in the legal profession who felt socially isolated, had a history of mental health problems, and were overcommitted at work. Moreover, lonely lawyers are three times more likely to have suicidal thoughts, and lawyers who are highly overcommitted to work are more than twice as likely to have suicidal thoughts. Of lawyers aged 30 or younger and working between 61 and 70 hours per week, 14.3% reported suicidal ideation.

Gender Gap in Lawyer Wellness

The 2020 California Lawyers Association and D.C. Bar study also noted that that 24% of female lawyers, and 17% of male lawyers, considered leaving the legal profession due to mental health problems, burnout, or stress; 67% of female lawyers, and 49% of male lawyers, reported moderate to severe stress; 23% of female

1 ABA Model Rules of Prof'l Conduct R. 1.1, 1.3.

2 ABA Model Rules of Prof'l Conduct R.1.16.

3 ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL).

4 Entities participating in the Task Force include ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; NOBC; APRL; National Conference of Chief Justices; and National Conference of Bar Examiners.

lawyers, and 15% of male lawyers, reported moderate or severe anxiety.[5] The gender disparity with respect to stress, anxiety, and depression is noteworthy and likely connected to the ongoing imbalance in division of labor at home and at work, including the invisible workload and decision fatigue shouldered primarily by women. When surveyed, 58% of women said caretaking commitments are the number one reason they left their law firm, and 63% of women in law firms reported being perceived as less committed to their career.[6] Women, particularly mothers, also have less time for recovery and self-care because of their commitments caring for others both at home and at work.

Indeed, women who experienced more conflict between work and family were four times more likely to leave or consider leaving the profession due to mental health, burnout, and stress.[7] This problem is perpetuated by concerning gender wage gaps in the legal profession. In 2020, women associates and non-equity partners in law firms earned 95% of male compensation, and women equity partners in law firms earned 78% of male compensation.[8] Also, in 2020, the highest paid attorney was female in only 2% of law firms (down from 8% in 2005), and 54% of women lawyers in firms reported being denied a salary increase or bonus (compared to 4% of men).

Root Causes of Lawyer Unhappiness

Why is there such a disconnect between lawyers and well-being? The problem is extremely complex, but there are several characteristics inherent in the legal profession that heighten the risk for stress and unwellness. First, our profession is rooted in conflict. Our legal system is an adversarial system dependent on zealous and effective advocacy of inconsistent and contradicting positions and arguments. In the interest of advocating for our clients, we are required every day to engage in conflict. Second, easy answers are few and far between, and lawyers know that when they choose this profession. In fact, most lawyers have an unquenchable thirst for new and different challenges. Challenging mental work, whether sought after or not, is highly stressful. Third, lawyers are natural born victims to the well-established stigma associated with seeking help. Lawyers are supposed to be problem solvers – if they cannot solve their own problems, they may be viewed as incapable of solving their clients' problems or perceived as weak. Fourth, lawyers are prone to overworking and have less opportunity for recovery, which leads to burnout. Lawyers who overcommit to work often feel that their time is never their own, and that work, and life are never balanced. Over time, the chronic stress and anxiety of practice without meaningful rest and recovery leads to depression and, in severe cases, suicide or other mental health crises. Lawyers who burnout and suffer from a "physical or mental condition" that materially impairs the lawyer's ability to represent a client" are also often subject to lawyer discipline.

Help Is Available to Lawyers

There are resources available to assist when a lawyer's mental and physical health is suffering. Nearly all states have a Lawyer Assistance Program with an aim to confidentially support lawyers suffering from depression, stress, anxiety, and other mental or physical health problems impacting their legal practice. The ABA provides an online directory of all Lawyer Assistance Programs.[9] Whether utilizing services provided through a Lawyer Assistance Program or not, individual lawyers should invest the time to assess their own needs for balance and wellness and incorporate changes to ensure they are protecting themselves against the risk of burnout. Lawyers can evaluate their priorities and reorganize them as needed, improve their time and resource management skills to free up time for themselves, and shift their perspective on the obligations of both work and life from "I have to" to "I get to."

Many law firms and in-house legal departments are also developing or expanding support for lawyer wellness in the interest of risk management and to ensure productivity and growth. Indeed, they can and should support each individual lawyer's wellness path. Leaders should model behaviors that encourage lawyers to focus on their own wellness, including supporting rest and recovery time for lawyers. Law firms and legal departments have created or are providing further support to wellness committees and activities sponsored by such committees, including training and education on wellness and healthy habits. Another way that the profession can start to support wellness is surveying the culture for wellness among lawyers and staff, focusing on generational identities, and understanding the differing viewpoints on work life balance. And part of that assessment can help leaders monitor and identify at-risk lawyers who are overcommitting to work, isolated, or under-committing to rest and recovery.

Despite the alarming statistics showing a true disconnect between lawyers and well-being, there are resources and opportunities to improve lawyer wellness. Doing so serves to build confidence in our profession and the

5 Stress, drink leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys, May 2021.

6 Walking Out the Door, 2019 study by ABA and ALM Intelligence; Stress, drink leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys, May 2021.

7 Id.

8 Id.

9 https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/

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Partner | Bowles Rice (Morgantown, WV)

Ashley Hardesty Odell focuses her practice on complex mass litigation matters, including serving as co-lead national litigation counsel for a retail chain grocery store and pharmacy. She also handles complicated insurance extra-contractual and bad faith litigation, and employment litigation. Ashley also enjoys counseling and advising employers on many workplace issues, including discrimination and harassment, wage and hourly issues, employee handbooks, workplace safety and employment agreements.

Ashley has experience litigating many types of matters in both state and federal courts. In addition to her practice area focuses above, she continues to manage other litigation matters involving business disputes, commercial collections, construction litigation, property damage and personal injury defense. Her strong evaluation, management and advocacy skills allow her to routinely resolve her clients' disputes efficiently, avoiding unnecessary litigation costs.

She leads both the firm's Extracontractual/Bad Faith and Coverage Team and serves on the firm's Insurance Defense team. She was a co-author of the West Virginia section of Defense Research Institute's 2015 State by State Insurance Bad Faith Law Compendium.

In 2016, she was selected as a West Virginia Wonder Woman by West Virginia Living magazine. The award recognized women "who, through hard work and determination, have made West Virginia a better place to live." She was also selected as a 2008 "Generation Next: 40 Under 40" award winner and as a 2010 Generation West Virginia Regional All-Star. In 2014, she received the Young Alumni Award from West Virginia University. She has served as president of the Monongalia County Bar Association, and is a graduate of Leadership Monongalia.

Practice Areas
- Extra-Contractual / Bad Faith and Coverage Litigation
- Labor and Employment
- Litigation
- Insurance Defense
- WE Mean Business: Women Executives and Entrepreneurs

Honors
- Recognized in the 2024 Edition of Best Lawyers in America for Litigation - Insurance; Litigation - Labor and Employment; and Product Liability Litigation - Defendants
- "Young Guns" Class of 2020, West Virginia Executive Magazine
- Fellow, Leadership Council on Legal Diversity, 2019
- Recognized among West Virginia's Wonder Women, presented by West Virginia Living, 2016
- Margaret Buchannan Young Alumni Award, WVU Alumni Association, 2014
- Generation West Virginia Regional All Star award winner, 2010
- "Generation Next, 40 Under 40" award winner, 2008
- West Virginia University Mountain Honorary
- Queen Silvia LXIII, WV Forest Festival, Elkins, West Virginia

Education
- J.D., West Virginia University College of Law (2003)
- B.A., West Virginia University (2000) - Leadership Scholarship

Breakout: Alphabet Soup - Navigating Federal Agencies' Involvement Following Industrial Incidents

Bob Fulton
Hill Ward Henderson (Tampa, FL)

Alphabet Soup – Navigating Governmental Agencies' Involvement in Industrial Incidents
By Bob Fulton

> "Hoping for the best, prepared for the worst, and unsurprised by anything in between." - Maya Angelou, I Know Why the Caged Bird Sings
>
> "Hope is not a strategy." - Rudy Giuliani in response to Barack Obama's Message of Hope and Change.

No one—company or individual—wants an industrial incident to occur. No one wants any employee to suffer injury, for property damage to happen, or for the environment to be harmed. Yet in 2020, OSHA reported that 4,764 workers died on the job, with transportation, construction, and material moving/extraction employees accounting for almost 50% of those fatalities.[1] The Chemical Safety Board[2] investigates multiple incidents every year, as do other agencies. These statistics show that industrial incidents occur with some regularity and, while everyone hopes that such incidents will never happen, that "hope" is not an appropriate response strategy when anticipating the worst-case scenario. Companies and individuals take steps to reduce the likelihood of such events happening, as they should, but they must also establish plans to respond to those potential events. Those plans will help secure the safety and well-being of employees, determine root causes of the incident, reduce litigation risks, and navigate the minefields of responding governmental agencies.

After an industrial incident, governmental agencies (state, local, and federal) find their way to the scene—whether invited or not. Agents from the various authorities frequently outnumber company representatives (employees and counsel) and turn industrial incidents into even more stressful and chaotic sites for all involved. Effectively managing the site, the incident, and the responding agencies requires planning and the ability to be nimble because no two incidents are the same. Companies, with the assistance of in-house counsel, outside counsel, and subject matter consultants (internal and external), should develop plans to handle incident management, site management, and the responding governmental agencies well before an incident occurs. While industrial incidents inevitably include surprises, the company response strategy should not. The company and its counsel benefit from pre-developed plans that can be adjusted to the circumstances. This article is not intended to develop an exact plan for a particular company or a particular incident, as those will differ from industry to industry and product to product. This paper instead identifies issues to consider when planning for an industrial incident.

"Plans Are Worthless, But Planning is Everything" – Dwight D. Eisenhower

There is a difference between planning for an incident and dealing with an incident. An incident is an urgent situation, so very little is likely going to go the way you planned. As Mike Tyson famously said, "Everybody has plans until they get punched in the mouth." Despite that, it remains critical that companies prepare for these incidents to occur, as the planning process and plans themselves, even if not ultimately strictly adhered to, help them deal with fluid situations.

These plans are even more important in situations where multiple governmental agencies respond. While local law enforcement and fire personnel will be dispatched to the scene immediately after an industrial incident, other agencies such as the DEP, MSHA, CSB, EPA, OSHA, and ATF[3] likely will not arrive for a few hours or even a few days. Using the time between the incident and the arrival of the alphabet soup of agencies who are not first responders is crucial to preserve evidence and protect the company and employees. Once the property is secured and there is no further risk to the health or safety of employees, that time period should be used to focus the

1 www.osha.gov

2 The Chemical Safety Board (CSB) "is an independent, non-regulatory federal agency that investigates the root causes of major chemical incidents." (www.csb.gov).

3 The Department of Environmental Protection, The Mine Safety and Health Administration, The Environmental Protection Agency, Occupational Safety and Health Administration, and Bureau of Alcohol, Tobacco, Firearms and Explosives

investigation and to gather information: who was there, what were they doing, what happened, were statements taken, is there video, were photographs taken, what documents exist, and what agencies have responded so far? It is equally important, if not more so, to know what agencies need to be notified and time requirements for those notifications. Who will timely handle those notifications and what needs to be conveyed? All of this needs to be part of the plan.

In the immediate aftermath of an incident, the cause is frequently unknown. Thus, companies are searching for answers in parallel with investigating agencies. Information learned during the period shortly after the incident allows companies to better control the agencies and better respond to their requests by providing what they want and need without disclosing more than necessary. The scene should be secured and employees and managers should be prepared for the arrival of the governmental agencies. The scene needs to be preserved to allow for investigation and so that no evidence is lost. Managers need to be aware that what they say can bind the company and that they have the right to have counsel present if they so choose. Managers and employees should be counseled to provide factual information only—not opinions, hypothesis, or speculation. This helps in the investigation so the agencies get what they need to do their work but is also valuable preparation for later litigation.

To utilize the pre-arrival period effectively, the client must have a crisis response strategy in place. To whom are initial calls made about the incident? When is in-house counsel advised of the incident? Do they retain outside counsel or handle internally? Are external consultants hired to assist in the investigation? These decisions need to be made in advance so it is imperative that clients provide crisis training to employees, not only to enhance security and safety, but also to trigger a company response so that investigations and notifications can be done properly and timely.

Hope for the Best but Plan for the Worst –Select a Site Lead and Train Them on the Plan

Every year before hurricane season starts in Florida, meteorologists, local officials, and state officials tell residents to develop plans and to begin preparations for the upcoming season. That rarely, if ever, happens as evidenced by long lines at gas stations, grocery stores, hardware stores, and even liquor stores once a storm is actually approaching. Preparing during an approaching storm is the worst time to prepare and induces unnecessary chaos. The same is true in the case of an industrial incident. You do not want to be planning for how to handle the investigation when the investigation is happening. Instead, the plan needs to be prepared in advance so that those on-site and off-site can execute the plan under stressful conditions.

Establishing an on-site chain of command is the first step in successfully responding to incidents and to handling governmental agencies when they arrive. Agencies responding to incidents and ongoing emergencies want immediate responses to their questions and information requests so that they can protect public health and safety, and so they can determine what caused the event to happen. Having a trained site lead to interface with responding agencies improves response times, improves the accuracy and consistency of responses, limits the number of employees interacting with governmental agencies, and improves relationships with agencies by developing trust. Furthermore, a site lead helps minimize future discovery and depositions in litigation by limiting the individuals in apparent decision-making positions. While you cannot necessarily limit the employees with whom agencies speak, having a site lead and one person the agencies can go to with questions typically limits other employee interactions.

Thus, it is very important for companies to identify and train a site lead to meet with and assist responding agencies. Identifying this person (and likely several persons if there are multiple shifts) is a crucial first step and one often forgotten. Many companies just have the supervisor on site designated as the person who will work with responding agencies. However, that may not be the right person. While they may be a good supervisor, they may not be good as the site lead talking to and dealing with outside agencies. For example, a company may not want to put an employee up as a deponent for numerous reasons—perhaps they talk too much; perhaps they are prone to speculation because they do not like to say they do not know an answer; or perhaps they lack interpersonal skills. While the employee may be a great supervisor, and potentially someone with significant relevant knowledge, those individuals would not be put up as 30(b)(6) witnesses and they should not be trained as site leads. They may be in the background, supporting front-facing personnel, but not interacting with investigators. Similarly, C-Suite members of the company may inspire confidence during stressful times, but those C-Suite individuals may not be the best choice for a site lead. They often do not have the day-to-day knowledge of the operations, do not typically like to be challenged by others as government agents tend to do, and typically do not like to say that they do not know an answer to a question. This can be problematic because anything they say can bind the company. They also open themselves up to discovery that the Apex Doctrine might otherwise limit or prevent.

Thus, the first part of the plan should be identifying who will be the site lead to interact with responding agencies. Once that is determined, then that employee can be trained on how to respond. This training should, at a minimum, address:

1. Who is next up if the site lead is injured or otherwise unavailable;
2. What steps does the site lead take to prevent additional incidents, to make sure all employees are located, and that all injured employees are helped;
3. Who does the site lead call after calling 911and in what order – supervisors, in-house counsel, in-house technical experts, OSHA/MSHA/CSB/DEP/EPA, carriers (Worker's Comp and General liability) and what is the timing requirements for those calls;
4. How do they preserve the site –
   a. Secure cameras and servers so video is preserved
   b. Take photographs
   c. Take statements
   d. Keep non-essential employees, non-employees, and on-lookers away from the site.

Other employees then need to be trained on their responsibilities and to whom they refer responding agencies to if they are questioned or if they interact with them.

I'm Speaking for All of Us – Preparing a Company Liaison

In addition to a site lead, a company should consider designating a company liaison to deal with the multiple responding agencies in the days following the event. The site lead may be that liaison, but it also could be someone else. A technical expert may be better at dealing with the CSB, ATF, DEP or EPA. More of a generalist may be better in dealing with OSHA or MSHA. While the majority of communications between agencies and the company should proceed through attorneys, there are many instances where employees and agencies must communicate directly, but hopefully with counsel present. Choosing a designated company representative as an agency liaison again limits future discoverable communications and potential depositions.

Communicating with agencies through the site lead in the immediate aftermath of the incident, and then one identified representative with counsel present going forward, puts the company in the best position to respond to agencies and to limit exposure. When choosing an individual as the liaison, consider whether the individual should have a connection to the incident and personal knowledge of the facility and procedures, or whether it would be better for the person to have some separation from the event. An individual without personal knowledge is potentially advantageous, as the individual serves as a conduit rather than a vessel of information. They may need to take the time to find answers instead of just answering on the spot. They can ask for written requests so that the information sought is memorialized and so that responses can be crafted narrowly and appropriately. Agencies can obtain the information and documents they need without the company necessarily revealing the source of the information. Additionally, the company liaison should have experience communicating with government entities, giving depositions, or making presentations to supervisors so that they know how to answer questions succinctly. Once the company choses a liaison, all employees, especially management, need to know that they must direct all governmental requests for information to the individual and the attorneys. Funneling requests through the attorneys and company liaison promotes a consistent response to requests and allows attorneys to track the information provided.

Preparing the Incident Site and Materials for Governmental Agencies and other Potentially Interested Parties

Once site leads and agency liaisons are selected and prepared, other issues must be addressed and prepared for, including how to allow access to the site. After the injured are cared for and the hazard is mitigated, the site needs to be secured and preserved. Governmental agencies must first determine that a crime did not occur. Thus, unless necessary to eliminate hazards, the scene should not be altered before investigating agencies arrive. Even after agencies complete their site investigation and relinquish the scene, other potentially interested parties may still require scene preservation. Instructing managers, employees, and counsel of their duty to preserve and the requirements to preserve is critical to avoiding costly spoliation claims or potential criminal charges. Similarly, documentation and evidence preservation should be implemented as early as possible. Employees need to understand that any information they have relating to the incident needs to be preserved, even on their cell phones, whether company issued or personal. The company needs to issue a litigation hold for relevant and potentially relevant information. Systems should also be put in place to be able to track what is provided to responding agencies in response to information requests - anticipate agency requests for information with limited timeframes to comply. Collecting and preserving records ahead of time can prevent scrambling to comply with deadlines.

"Never Bring a Knife to a Gun Fight" - Retain Experts Early

Do not be caught bringing a knife to a gunfight.

Governmental agencies will bring their investigators and technical experts to the scene. Companies and their counsel should do the same. In-house or outside counsel should typically retain experts to respond to the scene with them. Depending on the type of industrial incident, experts may be crucial to the company's internal investigation and potential future litigation. Early retention of desired and sought-after experts prevents other parties from potentially retaining those experts. Early retention also allows experts to gain firsthand knowledge of the investigation with unfettered access. Agency employees and experts are more likely to share information with outside experts/consultants in similar fields than they would with the company or with company lawyers. Early in the investigation, agencies may be more willing to share information and their preliminary findings with experts while there are ongoing safety concerns. If the experts gain the trust of the responding agencies, they may also be able to document the scene contemporaneously with the governmental investigators. Experts often respond to many scenes of similar nature and may already have a working relationship with some of the responding agencies. Attorneys and clients can leverage the established relationships between their experts and the agencies to build trust and acquire more information. Later in litigation, experts can lean on the advantage of attending the investigation to earn credibility.

While there are clear advantages to retaining experts and consultants early, it can be a double-edged sword. Communications with outside consultants potentially create more discoverable communications that may not be privileged. While the client may desire to be involved in the expert's process and reports, carefully consider the distribution of expert materials to preserve privilege and give the expert the independence to conduct their investigation without influence from the company. Importantly, only disclose expert reports and findings to those who need to know and to those who can assist in the determining the root cause of the incident.

Voluntarily Cooperate or Require Warrants?

All the preparation leads up to the moment when the first agency arrives at the door (or hopefully security guard you've hired to secure and limit access to the scene). The initial encounter is instrumental to developing and defining the working relationship. Do you require that they have a warrant or do you voluntarily cooperate? Does demanding search warrants or subpoenas that judges are certain to grant escalate tensions and cause divisiveness? Will demanding a subpoena or warrant limit or expand agency acquired evidence? Will requiring a warrant expand the scope of what the agency desires? Will it make the client look like they are hiding something? Will "antagonizing" the agents make them less cooperative? Thus, the plan needs to encompass the level of cooperation to make sure the site lead and all company representatives know if they are to cooperate or require warrants/subpoenas. If a company chooses to go the "less cooperative route" the site lead should simply be trained to refer all inquiries to counsel and provide necessary contact information if counsel is not on site.

Even if a company goes with the cooperative route, the governmental agents should be treated like all other visitors to the site and extended no other courtesies. They should be provided with standard safety briefings, site rules/regulations, and appropriate personal protective equipment. They should be told that all inquiries and document requests must be funneled through counsel or the site lead if counsel is not present. Approaching the interactions cooperatively while simultaneously making the government agents aware that counsel is present helps to establish appropriate boundaries. If multiple agencies are involved, it is imperative to know the lead agency and who is in charge of that agency, and request that the lead make all requests to the company so that requests are not coming from different people and to different people. Try to use the cooperative conversations to determine how the government agencies view the company—is the company a target of the investigation, a witness, or a victim of the incident? Different agencies may view your client differently. ATF may want to determine if a crime was committed while OSHA may want to determine if any safety violations contributed to the incident. Early understanding of the goals and views of the different agencies will guide your future interactions.

Shhh! It's a Secret!

Most sites of industrial incidents contain proprietary and trade secret information. Companies need to treat the dissemination of information to responding agencies in a manner similar to how they would view production of information in discovery. The agencies need to be made aware that documents they are receiving and information they are gathering is confidential and should be treated as such. This should be put in writing to the lead agents on scene and also to their organizations. Prepare letters notifying each agency of the need for confidentiality and that the documents are exempt from public record disclosure.[4] Informing agencies ahead of any public record requests helps prepare them for future requests.

"Whoever Listens to a Witness, Becomes a Witness" - Elie Wiesel How and When To Speak to Employees

Once the scene is secured (including preservation of

4 5 U.S. Code § 552(b) of The Freedom of Information Act includes provisions to keep information relating to national security/defense, trade secret, finances, and other types of information safe from public disclosure.

videos) and there is no continuing threat to safety, the investigation needs to begin. Companies, however, need to balance the desire for information with the need to make sure employees are physically and emotionally safe. Once it is determined that an employee is not injured and is psychologically fit to talk about the incident, statements should be obtained so that employee witnesses are not influenced by the recollection of others or by what others tell them. It is invaluable to gather this information to understand who was where and who was doing what at the time of the incident. It is preferable that counsel be involved in taking these statements, even if by phone. Counsel are typically better at asking questions, following up on statements made by witnesses, and their presence may provide some privilege over the conversation.

As part of the plan, companies need to consider the manner in which statements are taken from employees and witnesses. Do you just have an employee write out all they remember? Do you do a question and answer session where an attorney takes notes? Do you take a recorded statement? Will OSHA want to see that the company itself interviewed employees in the cause analysis? Could a plaintiff attorney compel a recorded statement? Will the employee become an adverse witness and the client need recordings as future impeachment material? If attorney notes documenting the conversation contain exact quotations, could work product privilege claims be overruled? Have agencies already spoken to the employee and documented the employee's testimony? Will employee statements need to be disclosed in the aftermath of any internal investigations? What is best manner of preserving privileged conversations with employees? How do you maintain the privilege?

Upjohn Warnings and Ethical Considerations

In Upjohn Co. v. United States, the United States Supreme Court provided guidance to companies conducting internal investigation by outlining requirements company counsel and outside counsel hired by the company should follow to preserve privilege.[5] The Court maintained that attorney-client privilege does not only apply to high-level management; rather, "middle- level—and indeed lower-level-employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties."[6] In Upjohn, the Court held the attorney- client privilege existed where communications by employees were made to corporate counsel at the direction of corporate superiors in order to secure legal advice from counsel, and employees were aware that they were being questioned so that corporation could obtain advice.[7]

The Upjohn case also helped develop "corporate Miranda warnings." The "corporate Miranda warnings" maintain the company's privilege when taking employee statements. To preserve privilege when taking employee statements, company counsel should convey:

1. they represent the company alone and not the individual;
2. they are conducting an investigation for the purpose of providing legal advice to the company;
3. their communication is protected by attorney-client privilege which belongs only to the company;
4. the company may choose to waive the privilege; and
5. their communication is confidential and must be kept confidential.

Besides preserving privilege, the warnings also contain specific information required by the rules of professionalism. Oftentimes, after Upjohn warnings, employees ask attorneys legitimate questions about how the statement could implicate them and whether they need to hire an attorney. Model Rule of Professional Conduct 4.3 details proper attorney conduct when dealing with unrepresented parties.[8] Per the rule, attorneys need to make reasonable efforts for the employee to understand the attorney's role and their representation solely of the client. At the same time, attorneys cannot provide legal advice to the employee and cannot advise employees whether to obtain counsel. Attorneys can, however, remind witnesses that they can consult their own legal counsel. Ethical issues can become more complicated when dealing with company directors. Model Rule of Professional Conduct 1.13(f) specifically states that, when the lawyer knows or reasonably should know that the organizations' interests are adverse to those of the person with whom the lawyer is dealing, the lawyer needs to explain the identity of the client.[9] Interviewing employees and directors can become understandably tricky situations. While the client may need to obtain information from employees quickly, they also need to take the time to consider the ethical and legal implications.

Unfortunately, protecting the privilege of statements

5 Upjohn Co. v. United States, 449 U.S. 383 (1981).

6 Id. at 391.

7 Id. at 390-91.

8 MRPC Rule 4.3: Dealing with Unrepresented Person: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

9 "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

does not end with an Upjohn warning. Prior to taking statements, attorneys should anticipate who could potentially receive the statements and how to create any additional privilege protections. Recordings of witness statements are generally not protected under attorney work product. However, an attorney's mental impressions and notes prepared in anticipation of litigation are protected.[10] When taking notes, attorneys should be sure to mark the documents as "Attorney Work Product" and weave the attorney's mental impressions in tandem with witness statements. Solely including witness quotes and statements without attorney notes or impressions runs the risk of a judge later compelling disclosure.[11] Indicating that the notes were prepared in anticipation of litigation or providing legal advice also provides protections against future attempts to compel the notes. Lastly, when recording witness statements, attorneys must abide by the local state rules governing consent for recordings. When witness consent is required, obtaining the witness's voiced consent at the beginning of the recording mitigates potential future allegations of impropriety.

Preparing for Later Inspections and Interviews

Agencies, such as OSHA, may request to inspect the incident site. Consider whether you will use the company liaison or a different individual as a guide. Prepare the individual in the same manner as the company liaison. Predesignate a route and scope for the visit. Walk the route ahead of time to eliminate violations and identify any residual safety considerations. During the inspection, take pictures of everything the investigator is photographing as investigating agencies may not be required to provide the photographs they took. Offering to arrange agency interviews of employees provides an opportunity to prepare interviewees. When preparing employees and managers for interviews, be sure to include the Upjohn warning. Preparation of non-managerial employees should be minimal. Implore the need to tell the truth and cooperate with investigations. When an agency does not allow counsel presence during interviews of non-managerial employees, request to speak to employees after the interviews in order to learn the agency's questions.

Conclusion

In short, preparation is everything. Even the safest companies may find themselves in the wake of governmental intervention after an industrial incident. Devising a plan and contemplating strategies to respond to the incident are integral to responding to the inevitable agency investigations.

10 Fed. R. Civ. P. 26(b)(3)(B) states "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

11 See United States v. Nobles, 422 U.S. 225 (1975).

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Bob currently serves on the firm's Management Committee, and on the Diversity & Inclusion and Wellness Committees. He defends companies in products liability, catastrophic personal injury and wrongful death claims. Throughout his career, Bob has defended national and international clients in numerous automotive, trucking, consumer products and power tool products liability cases throughout Florida and in several other states. He also has represented retailers and home builders in premises liability matters. He prides himself on being responsive to clients and on bringing cases to a successful conclusion through settlement or trial, whichever is best for the client.

Practice Focus

- Automotive
- Products Liability
- Consumer Products Liability Litigation
- Industrial & Commercial Product Liability
- Drug & Medical Device
- Personal Injury
- Automotive Liability Litigation
- Litigation
- ADA Accessibility
- Corporate Compliance and Investigations

Experience

- Regional counsel for automobile manufacturers, heavy truck manufacturers and power tool/consumer products companies in products liability, catastrophic personal injury and wrongful death cases

Honors

- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Chambers USA: America's Leading Lawyer, Litigation: Product Liability (2022-2023)
- Florida Super Lawyers (2013-2023)
- Florida Trend's Legal Elite (2011-2017, 2022)
- Florida Trend's Legal Elite - Up and Comers (2007-2008)
- Super Lawyers Business Edition (2013)
- The Best Lawyers in America® (2018-2024)
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Education

- University of Florida, B.A., 1991: Phi Beta Kappa
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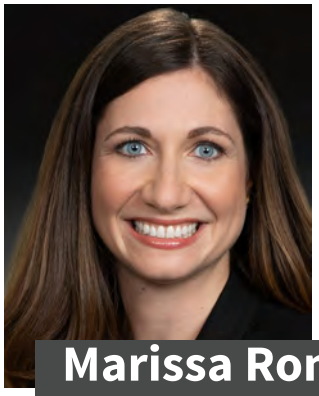

Breakout: Enforcement Lite - Government Influence Through Private Class Action Litigation

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Enforcement Lite: Government Influence Through Private Class Action Litigation
By Marissa S. Ronk and Christina L. Gualtieri

Whether the claims involve climate change initiatives, labor and employment, data privacy, or consumer fraud, class action filings have been rising for years. In the last ten years, corporate legal spending on defending class actions has increased by approximately $1.6 billion.[1] Labor and employment matters and consumer fraud claims now make up about 50% of overall corporate class action spending budgets.[2] Government agencies and administrations have also been issuing new rules and guidance on these subjects, which may explain some these trends. This paper provides a broad overview of government rules and guidance that have encouraged private class action litigation as a method for achieving government goals, as well as tips for corporate clients on how to protect themselves.

Recognizing the Role Of Private Class Actions As A Mechanism For Government Influence
The use of private lawsuits to achieve governmental objectives is inherent in U.S. regulatory design.[3] Specifically, for most industries, the U.S. primarily uses an "ex post" approach to regulation—i.e., inflicting consequences on those who violate the law, as opposed to requiring entities to comply with certain regulations before entering the market.[4] Relatedly, even in regulated industries, compliance with regulation is not always enough for a company to preempt or preclude private litigation.

For governmental agencies with limited resources to pursue every entity that violates substantive law, private lawsuits supplement those limitations through individuals with incentives to right a perceived wrong.[5] However, sometimes, a citizen's loss is so minimal that their personal incentive to pursue legal action is not as strong as the government's interest in enforcing its laws and remedying wrongful conduct affecting the public as whole.[6] Enter: the class action.

Private class actions allow individuals with the same or similar claims to band together to enforce governmental laws and regulations. Because the individual damages claimed may be relatively minor, using the class action format provides greater access to the courts for claimants and greater deterrence to defendants where the collective damages are steep. In addition, class action cases involving hot topics—e.g., environmental issues, employment classification, and consumer privacy—often get significant media attention. This, in turn, may provide a mechanism for deterrence that goes beyond immediate money damages.

By issuing guidance and initiating rulemakings, governmental agencies encourage private citizens to file class actions to implement these initiatives. And, in some cases, it only takes the mention of a risk or initiative to encourage these actions.

Practical Examples Of Governmental Influence On Initiating Class Actions:

Public Health
In the public health context, it did not even take an official governmental guidance or regulation before a flood of class action lawsuits were filed with regard to the alleged safety of gas stoves.

In January of 2023, Richard Trumka Jr., whom President Biden appointed as commissioner for the Consumer Product Safety Commission, told Bloomberg News that gas stoves were a "hidden hazard" causing harmful indoor air pollution.[7] His comments sparked a political

1 See 2023 Carlton Fields Class Action Survey, at 5.

2 See id. at 7.

3 J. Maria Glover, The Structural Role of Private Enforcement Mechanisms In Public Law, 53 Wm. & Mary L. Rev. 1137, 1145-46 (2011-2012).

4 Id. at 1145-47 (also identifying exceptions for food, drug, and environmental regulations)

5 Id. at 1153-55; see also Owen M Fiss, The Political Theory of the Class Action, 53 Wash. & Lee L. Rev. 21, 1 (1996).

6 Fiss, supra note 5, at 3.

7 Ari Natter, US Safety Agency to Consider Ban on Gas Stoves Amid Health Fears, Bloomberg (Jan. 9, 2012, 5:00 a.m. MST), https://www.bloomberg.com/news/articles/2023-01-09/us-

frenzy by suggesting there could be a ban on gas stoves.[8] Chairman Alexander Hoehn-Saric responded to the firestorm by releasing a statement indicating that the Commission is not planning to ban gas stoves.[9] But, the Chairman's statement reiterated that gas stoves present "indoor air quality hazards" and that the commission would invite public comments to support gas stove regulations.[10]

Thereafter, consumers filed proposed class actions in California, Wisconsin, and Illinois alleging that numerous appliance manufacturers, including Sub-Zero, Wolf Appliance, LG, and Samsung, failed to disclose the risks associated with using gas stove products.[11] These class action lawsuits generally allege that the manufacturers failed to inform the consumers of the risks associated with gas stoves, and that they would not have purchased the gas stove ranges had they known about the possible health risks. While the Consumer Product Safety Commission goes through the formal process of developing regulations on gas stoves—which could span years—these private class action lawsuits pressure manufacturers to address consumers' concerns, furthering the Commission's ultimate goal of regulating gas stoves.

Consumer Fraud

In 1992, the Federal Trade Commission ("FTC") put out Guides for the Use of Environmental Marketing Claims, also known as "Green Guides."[12] The Green Guides were revised in 1996, 1998, and 2012, and "are designed to help marketers avoid making environmental claims that mislead consumers."[13] The Green Guides are not a substantive law and do not provide a private cause of action; they simply represent "the Federal Trade Commission's current views about environmental claims." [14]

Still, the Green Guides are consistently cited in private class action lawsuits challenging manufacturers' allegedly false environmentally-friendly product claims, also called "greenwashing.[15] For example, in 2018, plaintiffs filed a class action lawsuit in California against Keurig Green Mountain Inc. for marketing its K-cups as "recyclable" when, in some locations, they are not actually recyclable.[16] Keurig ultimately settled the lawsuit for $10 million.[17] Similarly, plaintiffs recently named Nike USA, Inc. in a class action lawsuit in the Eastern District of Missouri.[18] The lawsuit claims that Nike markets its products as "sustainable" and made with "recycled fibers," when allegedly they are not. Although these cases are filed under state consumer protection laws, as well as common law claims such as fraud, misrepresentation, and unjust enrichment, the "greenwashing" claims are undoubtedly fueled by the FTC's Green Guides. And, while the FTC does initiate its own actions against companies for deceptive advertising, these private class actions serve to supplement the FTC's efforts.

Antitrust

In the antitrust context, private class actions have spurred the development of governmental guidance and regulations on no-poach agreements. In 2011, plaintiffs filed a class action lawsuit against major Silicon Valley companies, including Apple and Google, for violating antitrust laws via the use of no-poach agreements.[19] Specifically, the plaintiffs claimed that the companies jointly agreed not to poach each other's employees, thereby limiting job mobility and avoiding the need for salary increases to retain the employees.[20]

In October 2016, the FTC and Department of Justice ("DOJ") jointly released Antitrust Guidance for Human Resources Professionals (the "Antitrust Guidance"), with the stated goal of notifying human resources professionals to potential antitrust violations related to compensation, recruitment, and hiring practices.[21] The Antitrust Guidance advised that no-poach agreements that are not ancillary to legitimate collaboration among employers are per se illegal under antitrust laws.[22]

safety-agency-to-consider-ban-on-gas-stoves-amid-health-fears?in_source=embedded-checkout-banner.

8 Rob Wile, Ban new gas stoves, a federal safety commissioner proposes; CPSC says no such official plan yet, NBC News (Jan. 10, 2023, 8:58 a.m. MST), https://www.nbcnews.com/business/consumer/gas-stove-ban-proposal-when-and-why-rcna65078; Aleks Phillips, Is Joe Biden Banning Gas Stoves? What We Know, What We Don't, Newsweek (Jan. 11, 2023, 9:05 a.m. MST), https://www.newsweek.com/joe-biden-ban-gas-stoves-product-safety-trumka-jr-1773015.

9 Statement of Chair Alexander Hoehn-Saric Regarding Gas Stoves (Jan. 11, 2023), available at https://www.cpsc.gov/About-CPSC/Chairman/Alexander-Hoehn-Saric/Statement/Statement-of-Chair-Alexander-Hoehn-Saric-Regarding-Gas-Stoves#:~:text=Research%20indicates%20that%20emissions%20from,no%20proceeding%20to%20do%20so.

10 Id.

11 Abraham Jewett, Samsung, LG, Sub-Zero, Wolf face class actions over gas stove pollutants, Top Class Actions (May 22, 2023), https://topclassactions.com/lawsuit-settlements/consumer-products/appliances/samsung-lg-sub-zero-wolf-face-class-actions-over-gas-stove-pollutants/.

12 Federal Trade Commission, Green Guides, available at https://www.ftc.gov/news-events/topics/truth-advertising/green-guides#:~:text=The%20Federal%20Trade%20Commission's%20Green,environmental%20claims%20that%20mislead%20consumers.

13 Id.

14 16 C.F.R. § 260.1.

15 Factbox: What are the U.S. Green Guides and can they stamp out 'greenwashing'?, Reuters (April 27, 2023, 11:10 a.m. MST), https://www.reuters.com/business/sustainable-business/what-are-us-green-guides-can-they-stamp-out-greenwashing-2023-04-27/.

16 See Smith v. Keurig Green Mountain, Inc., Case No. 4:18-cv-06690 (N.D. Cal. 2018).

17 Natalie Hanson, Keurig settles recyclable pod class action for $10 million, Courthouse News (Feb. 27, 2023), https://www.courthousenews.com/keurig-settles-recyclable-pod-class-action-for-10-million/#:~:text=Keurig%20must%20print%20disclaimers%20anywhere,of%20a%20%2410%20million%20settlement.&text=OAKLAND%2C%20Calif.,(CN)%20%E2%80%94%20Keurig%20Dr.

18 See Ellis v. Nike USA, Inc., et al., Case No. 4:23-cv-00632 (E.D. Mo. 2023).

19 Dan Levine, U.S. judge approves $415 mln settlement in tech worker lawsuit, Reuters (Sept. 2, 2015, 9:35 p.m. MST), https://www.reuters.com/article/apple-google-ruling/u-s-judge-approves-415-min-settlement-in-tech-worker-lawsuit-idUSL1N11908520150903.

20 Id.

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

22 Id.

Notably, the Antitrust Guidance also stated that DOJ would pursue criminal penalties against companies utilizing these practices.

While DOJ has made efforts to pursue these penalties, private class actions have also risen as a supplement to those efforts. For example, the Seventh Circuit recently reinstated a proposed class action against McDonalds for using wage-limiting agreements.[23] And Jimmy Johns recently reached a confidential settlement agreement with a plaintiff who pursued a class action involving similar claims.[24] In addition, multiple aerospace engineering companies are currently involved in a class action for utilizing the same type of no-poach agreements.[25] Therefore, although DOJ is making efforts on the criminal side to enforce its position that no-poach agreements violate antitrust laws, private parties continue to supplement those efforts through the use of civil class actions.

Tips To Protect Clients From Private Enforcement Class Actions

While the causes of our increasingly litigious society can be blamed on multiple things—e.g., COVID, political climate, social media, etc.—the more important consideration is how corporate clients can protect themselves from this increased risk of private class actions to further government goals. One such mitigation method is the use of class action waivers and arbitration agreements. However, because such agreements may be unenforceable, other mitigation methods should be considered. These include, but are not limited to:

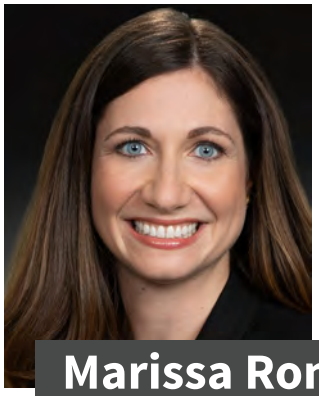
- Increase lobbying efforts and develop good relationships with local regulatory agencies;
- Document company efforts to comply with government regulations;
- Stay up to date with current state-of-the-art standards and technology guidelines; and
- Conduct comprehensive research on consumer preferences.

There is not a silver bullet defense against private civil class actions. By taking these steps, in-house counsel and outside counsel advising companies may better insulate the companies from the risks associated with increased civil class action activity as a means to supplement and advance federal and state regulatory efforts.

23 Annelise Gilbert, 7th Cir. Revives Ex-McDonald's Workers' No-Poach Antitrust Suit, Bloomberg (Aug. 25, 2023, 2:31 p.m. MST), https://news.bloomberglaw.com/daily-labor-report/7th-cir-revives-ex-mcdonalds-workers-no-poach-antitrust-suit.

24 Mike Leonard, Jimmy John's No-Poach Antitrust Case Ends With Confidential Deal, Bloomberg (Nov. 16, 2021, 6:27 a.m. MST), https://news.bloomberglaw.com/antitrust/jimmy-johns-no-poach-antitrust-case-ends-with-confidential-deal.

25 Mike Scarcella, Aerospace companies lose early bid to toss engineers' antitrust claims, Reuters (Jan. 23, 2023, 10:59 a.m. MST), https://www.reuters.com/legal/litigation/aerospace-companies-lose-early-bid-toss-engineers-antitrust-claims-2023-01-23/.



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Marissa Ronk represents sophisticated clients in complex commercial litigation and class and mass actions. She is a strategic leader, setting the direction and development of major cases to establish priorities, challenge and frustrate opponents, and create opportunities. Colorado Super Lawyers lists Marissa for Business Litigation, and Benchmark Litigation has named her to its 40 & Under Hot List.

A resourceful, proactive, and savvy leader, Marissa builds case strategies that align with clients' business goals and values. Rather than react to opponents' moves, she designs litigation plans that exploit pain points and increase leverage for her clients, whether as a plaintiff or defendant. For example, Marissa often develops counterclaims and pursues aggressive discovery to take an upper hand.

In addition to her practice, Marissa serves as a mentor in the Leadership Council on Legal Diversity and a co-chair of WTO's associate review committee. Prior to joining WTO in 2015, she worked in the litigation department of Winston & Strawn in Chicago.

Practice Focus
- Commercial Litigation
- Class Actions
- Product Liability
- Appellate

Industries
- Consumer Products & Services
- Oil & Gas
- Automotive
- Cannabis
- Healthcare

Memberships, Activities and Honors
- Colorado Super Lawyers - Super Lawyers, Business Litigation, 2023; Rising Stars, Business Litigation - 2021; Rising Stars, Personal Injury - Products Defense, 2018-2020
- The Best Lawyers in America - Ones to Watch - Commercial Litigation, 2021, 2022, 2024; Ones to Watch - Mass Tort Litigation / Class Actions - Defendants, 2021-2023; Ones to Watch - Product Liability Litigation - Defendants, 2021, 2022, 2024; Ones to Watch - Litigation - Labor and Employment, 2024
- Benchmark Litigation - Future Star, 2021-2023; 40 & Under Hot List, 2023
- Leadership Council on Legal Diversity - Mentor, 2022 - present; Fellow, 2022
- Colorado General Counsel Mentoring Program, 2018-2020

Government Service
- Judicial Clerk to The Honorable William C. Griesbach, U.S. District Court for the Eastern District of Wisconsin
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Breakout: Inside Job - Tackling Trade Secret Misappropriation by Employees

Mark Clark

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Inside Job - Tackling Trade Secret Misappropriation by Employees
By Mark L. Clark

Trade Secret Issues in Employment:
It has happened too many times – a newly hired employee brings with them electronic files from their prior employment. From the employee's perspective, they see the documents as the product of their hard work and they do not want to recreate all that work in their new employment. Various documents including spreadsheets of sales volumes, contact lists, industry research, management structures, quarterly forecasts, data from applications such as SalesForce and management flowsheets get loaded on to their computers at their new place employment as soon as they arrive.

In the meantime, the prior employer has the former employee's old computer forensically examined. Despite the employee's efforts to hide his tracks, it is discovered that on the day before he turned in his resignation, the former employee connected a thumb drive and downloaded several gigabytes of data, or he performed a backup of his hard drive to a personal cloud computing system.
,
The prior employer sues the new employer and the employee claiming misappropriation of trade secrets, breach of the prior employment contract, tortious interference with the employee's contractual obligations, fraud and conversion. A t,emporary restraining order and injunction are requested and the new employer has only a period of hours to show up at the court house and defend against the TRO. Soon a TRO is put in place, hundreds or thousands of documents have to be produced within 14 days and, in an extreme case in federal court, the U.S. Marshall might show up at the new employer's office to seize the trade secrets.

This article examines how to avoid this disaster, but also what to do if the disaster strikes.

Primer on Trade Secret Laws
It is important to have a basic understanding of trade secret laws so that risks can be identified and mitigated:

Every state except New York has adopted the Uniform Trade Secrets Act (UTSA). We will analyze the UTSA under Texas law as we are Texas counsel, but the same principles generally apply across each of the 49 states that have adopted UTSA.

In addition to the UTSA, Congress passed the Defend Trade Secrets Act in 2016, which creates a right of action when the trade secrets effect interstate commerce.

The Uniform Trade Secrets Act:
To succeed on a claim for misappropriation of trade secrets, Plaintiff will be required to show that:
(1) a trade secret existed;
(2) the trade secret was acquired through a breach of a confidential relationship or discovered through improper means;
(3) use of the trade secret without authorization by the owner; and
(4) damages resulting from use of the trade secret. See Tex. Civ. Prac. & Rem. Code § 134A.002; Universal Plant Services, Inc. v. Dresser-Rand Group, Inc., 571 S.W.3d 346, 360 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

Of paramount importance to any claim for theft of Trade Secrets is that the information at issue is actually a Trade Secret.

Pursuant to the Texas Uniform Trade Secrets Act (TUTSA), a trade secret is defined as:

> "Trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized

> physically, electronically, graphically, photographically, or in writing if:
>
> (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.
> Tex. Civ. Prac. & Rem. Code § 134A.002(6).

A trade secret may consist of any formula, pattern, device, or compilation of information that is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it. T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc., 956 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd).

However, information that is readily ascertainable does not qualify as a trade secret, and professional contacts made during employment are an employee's general experience that he or she is free to use following termination. A.M. Castle & Co., 123 F. Supp. 3d 909, 915 (S.D. Tex. 2015); Phillip H. Hunke, D.D.S., M.S.D., Inc. v. Wilcox, 815 S.W.2d 855, 858 (Tex. App.—Corpus Christi 1991, writ denied).

The question of whether an employer has taken steps to maintain the secrecy of the information is a critical component of defining trade secrets. Relevant questions to ask include: whether the information was ever disclosed to a third party who was not subject to a confidentiality agreement, was it ever disclosed on a public website or in marketing materials, or was the information disclosed in any public filings?

Also, information concerning clients and potential clients may or may not be protected trade secrets depending on the information contained in such lists. Typically names of companies, employee names, and phone numbers are generally considered public information and not trade secrets. However, compilations that might include industry research that focuses on select companies for product sales could be considered a trade secret.

If the information qualifies as a trade secret, then the next step in a successful claim for misappropriation of trade secrets will require a showing that the materials were acquired through improper means. "Improper means" is defined to include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, to limit use, or to prohibit discovery of a trade secret, or espionage through electronic or other means. Tex. Civ. Prac. & Rem. Code §134A.002(2). In most situations, Plaintiff will allege that the new employer encouraged or induced the employee to bring the information with them to his/her new employment. That the hiring of the employee was meant to give the new employer an economic advantage over the prior employer and to take advantage of the trade secrets of the prior employer to the advantage of the new employer.

Finally, the Plaintiff will need to demonstrate that the new employer actually used the trade secret. Frequently, in these situations data compilations and spreadsheets will typically have been used by the employee that brought the data soon after arriving at his/her new employment. The purpose of uploading the data to the new work computer is, after all, for the purpose of using the information in the employee's new job so that she does not have to recreate the work she performed at her prior place of employment. However, in some instances the data may have resided only on the employee's hard drive and, if discovered soon enough, there might not yet have been occasion to use the information. Savvy Plaintiff's attorneys will sometimes wait months before filing suit to give the employee an opportunity to use the information in his/her new employment.

The Federal Defend Trade Secrets Act

In 2016 Congress passed the Federal Defend Trade Secrets Act (DTSA). Under the DTSA, "An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C.A. § 1836 (West)

The DTSA closely tracts the UTSA, using the same definitions that appear in the UTSA for the terms Trade Secret, Misappropriation, and Improper Means. The DTSA permits Federal District Court to issue injunctions, assess damages and, in extraordinary circumstances, order the U.S. Marshall's office to seize the trade secrets from the Defendant.

Remedies: Injunctions, Seizures and Damages

Both the UTSA and the DTSA grant courts the power to use injunctive relief to protect the Plaintiff from the harm that could occur if the trade secrets are used or harmed. This usually takes the form of preserving the data, requiring copies of all data that was taken by the employee to be produced, and requiring the Defendant

to work with a third party forensic service to electronically capture the data and verify that it is secured.

The injunctive relief allows the Plaintiff to catch the Defendant off guard. Frequently, the Defendant has no knowledge that the new employee is in possession of the prior employer's trade secrets. While some courts may give a one day notice of a TRO hearing, some courts will grant the TRO ex parte, or may give the Defendant only a few hours of notice.

If granted, the TRO will only be effective for 14 days (which may be extended by an additional 14 days upon a showing of good cause.) Typically within 14 days, the court will hold an evidentiary hearing to decide whether to grant a preliminary (or temporary) injunction, which will remain in place until a trial can be held to determine whether the injunction should become permanent.

The Plaintiff has to make a showing that "immediate and irreparable injury, loss or damage will result to the movant" and that there is no other adequate remedy at law. Fed. Rul Civ. Pro. 65.

In preparation for the preliminary injunction hearing, the court may order that discovery be produced and that depositions be taken. This places the new Defendant in a precarious position of having to defend claims that they only just learned of in a matter days.

Under the DTSA, the court can go a step further and order the U.S. Marshall's office to seize the data. However, such seizure may only be ordered where irreparable imminent harm is shown and that the Defendant "would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person." 18 U.S.C.A. § 1836 (2)(A)(VII).

Finally, under the UTSA and the DTSA, a court may award damages. The calculation of damages in a trade secrets case is typically not subject to precise measurement and the courts grant extremely broad deference to the Plaintiff's chosen economic model.

The Texas Supreme Court has summarized such damages as follows:

> A "flexible and imaginative" approach is applied to the calculation of damages in misappropriation-of-trade-secrets cases. Univ. Computing Co. v. Lykes–Youngstown Corp., 504 F.2d 518, 538 (5th Cir. 1974). Damages in misappropriation cases can therefore take several forms, including the value of the plaintiff's lost profits, the defendant's actual profits from the use of the secret, the value a reasonably prudent investor would have paid for the trade secret, the development costs the defendant avoided by the misappropriation, and a reasonable royalty. Bohnsack v. Varco, L.P., 668 F.3d 262, 280 (5th Cir. 2012). "[E]ach case is controlled by its own peculiar facts and circumstances." Univ. Computing, 504 F.2d at 538 (quoting Enter. Mfg. Co. v. Shakespeare Co., 141 F.2d 916, 920 (6th Cir. 1944)). Loss of value to the plaintiff is usually measured by lost profits. See, e.g., Bohnsack, 668 F.3d at 280; Jackson v. Fontaine's Clinics, Inc., 499 S.W.2d 87, 89–90 (Tex. 1973); Elcor Chem. Corp. v. Agri–Sul, Inc., 494 S.W.2d 204, 214 (Tex.App.–Dallas 1973, writ ref'd n.r.e.). To recover lost profits, a party must introduce "objective facts, figures, or data from which the amount of lost profits can be ascertained." Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 (Tex. 1992). Reasonable certainty is required to prove lost profits. E.g., Miga v. Jensen, 96 S.W.3d 207, 213 (Tex. 2002). Value to the defendant may be measured by the defendant's actual profits resulting from the use or disclosure of the trade secret (unjust enrichment), the value a reasonably prudent investor would have paid for the trade secret, or development costs that were saved. Univ. Computing, 504 F.2d at 536, 538–39; Precision Plating & Metal Finishing Inc. v. Martin Marietta Corp., 435 F.2d 1262, 1263–64 (5th Cir. 1970); Elcor Chem. Corp., 494 S.W.2d at 214.; Sw. Energy Prod. Co. v. Berry-Helfand, 491 S.W.3d 699, 710–11 (Tex. 2016)

Generally speaking the above analysis gives a Plaintiff the opportunity to be very creative, with extreme leeway, in how it calculates damages.

The Interplay Between Trade Secrets and Confidential Information

Because the term Trade Secret is narrowly defined, typically Plaintiffs will also make alternative allegations that the information taken by the employee is "Confidential Information" as that term is defined in the employee's employment contract with Plaintiff. The Plaintiff will typically allege that the new employer tortiously interfered with the contract by encouraging the employee to disclose the Confidential Information and to use the information in their new employment. The plaintiff will also most likely add a conversation claim for the wrongful acquisition of the Confidential Information by the new employer.

Such allegations provide a new avenue to the Plaintiff to get around the stringent requirement of the UTSA and DTSA and instead seek damages for the typically much broader definition of confidential information.

Insurance Coverage

When a trade secrets case occurs and several attorneys begin pressing hard for discovery, conducting

depositions and preparing for a trial that is only days away from occurring, certain issues can get lost in the confusion. But it should be in the forefront of everyone's mind to ask whether there is any insurance coverage that could potentially apply to the claims. If a company is insured under a Directors & Officers ("D&O") policy then such policies may expressly afford a defense for misappropriation of trade secrets. However, most D&O policies that afford a defense for misappropriation of trade secrets, exclude indemnity for damages caused by misappropriation. Nevertheless, the high cost of defending trade secrets cases will often lead the carrier to settle the claim if such a settlement claim can be had within the reasonably foreseeable cost of defending the claim.

Outside of D&O policies, however, it is rare to find coverage for trade secret claims. At least one court found that under a General Liability ("GL") Policy's "advertising injury" coverage, where trade secrets of a competitor were inadvertently used in designing and distributing advertising for the Defendant, the insurer owed a defense under the GL policy. Sentex Sys., Inc. v. Hartford Acc. & Indem. Co., 93 F.3d 578, 580 (9th Cir. 1996). However, such a favorable ruling under a GL policy is rare. Most of the cases examining coverage under a GL policy for trade secrets have concluded that there is no coverage.

Where tortious interference is alleged, there may be an opportunity for insurance coverage under a GL policy. The critical question may center on how the court interprets the tortious interference claim. Tortious interference with a contract is frequently excluded under the contractual exclusion clause of a GL policy. The courts find that tortious interference with a contract is so intertwined with breach of the underlying contract that such allegations typically fall within the exclusion for damages arising from breach of contract. Liberty Ins. Corp. v. Tinplate Purchasing Corp., 743 F. Supp. 2d 406 (D.N.J. 2010) (tortious interference with contract is excluded from insurance coverage because breach of the relevant contract is excluded from coverage). However, if the allegations are related to tortious interference with the employment relationship or business relationships of Plaintiff then it opens the possibility of a duty to defend the insured for such claims. United Wats, Inc. v. Cincinnati Ins. Co., 971 F. Supp. 1375, 1385 (D. Kan. 1997).

Practical Advice For Avoiding Such Cases

Invariably when these types of cases occur, it is because employees and employers did not pay attention to obligations stated in employment contracts combined with poor exit communication with employees, and ineffective training and onboarding of new employees.

If an employer requires an employee to sign an employment contract, it is critical that the employment contract set out in clear terms the information that is confidential, how that information may be used, where that information may be stored (on employer owned platforms and devices only) and the employer needs to have a means of monitoring and checking for the unauthorized transfer of the information. While some employees may resign on a moment's notice, where feasible, the Employer should forensically examine the employee's computer to check for any unauthorized transfer of data before the employee leaves. The exit interview should confirm that the employee has no data.

Likewise, when onboarding new employees, an agreement should be signed by every employee that they do not possess nor will they bring onto the premises, upload or use in anyway the confidential data of any other employer or any third party in the course of their employment with employer. And this document should not just be a document that is signed, amongst a large stack of documents, but there should be a conversation with the employee explaining this rule and clear consequences of its violation, which includes immediate termination of employment.

Conclusion

The problems of trade secrets being brought into a business by a new employee are a prime example of one bad actor causing significant damage to both his prior employer and his new employer. Injunctions, U.S. Marshalls potentially showing up on premises and seizing computers, along with the hundreds of thousand or perhaps millions of dollars in litigation costs and damages, invariably wreak havoc on a corporate culture.

A full understanding of the legal concepts related to trade secret litigation, a review of the company's employment contracts and new employee documents, together with an improvement to the exit interview process and onboarding process for all employees will help defend against this all too frequent occurrence.

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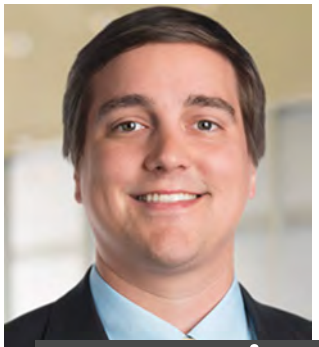

An Uphill Battle: Products Liability Litigation After a CPSC Recall

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An Uphill Battle: Products Liability Litigation After a Consumer Product Safety Commission (CPSC) Recall
By Raymond Lewis

When evidence of a product recall is admitted, it can cause a drastic change in the jury's perception of the product and the manufacturer. The admission of recall evidence at trial undermines the objectivity of a trial and is an uphill battle for the defense. The modern-day dynamics surrounding recalls are dangerous and have exacerbated the problem. Americans are educated—or mis-educated—by social media, television, websites, magazines, and newspapers. Product recalls get attention and make headlines, especially when injuries or death are linked to the product. Most prospective jurors believe they are well acquainted with recall situations and think they know what a recall means about the product and, worse, about the manufacturer.

Recall evidence often becomes the focal point of the trial and makes an immediate and lasting impression. For plaintiffs, introduction of recall evidence at trial is a critical strategic advantage; it tries to tell the highly prejudicial story that a knowing or negligent manufacturer released a dangerous product into the stream of commerce where consumers faced all the risks. Whatever the case, recall evidence is inherently inflammatory, and tends to mesmerize jurors.

No silver bullet exists when it comes to fighting product-recall evidence. This paper identifies some of the evidentiary issues surrounding the admissibility of evidence related to recall actions by the Consumer Product Safety Commission ("CPSC") at trial and discusses practical solutions and strategies for how in-house counsel and defense counsel might rebut and fight the admissibility and effect of recall evidence at trial.

1. The Consumer Product Safety Commission
a. History and Jurisdiction.
The Consumer Product Safety Commission ("CPSC") is an independent federal agency created by the Consumer Product Safety Act in 1972. The CPSC defines its mission as "protecting YOU, the consumer, against unreasonable risks of injuries and deaths associated with consumer products."[1] The CPSC has jurisdiction over roughly 15,000 types of consumer products used in and around homes, schools, and recreation.[2] The scope of the CPSC's jurisdiction is tied to the definition of "consumer product," which is broad.[3] A "consumer product" is defined, in relevant part, as:

1. [A]ny article, or component part thereof,
2. produced or distributed
   a. for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or
   b. for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.[4]

To meet this definition, the CPSA further requires that a product must be "customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer."[5]

The objectives of the CPSA are stated in 15 U.S.C. §

1 https://www.cpsc.gov/s3fs-public/About-CPSC-Poster.pdf?VersionId=csm2ROxwCNxZ2euT_o6z3BOIwiCGPT_H

2 The CPSC administers a number of federal laws, including but not limited to the Consumer Product Safety Act (CPSA), the Flammable Fabrics Act, the Refrigerator Safety Act, the Federal Hazardous Substances Act, the Poison Prevention Packaging Act, the Labeling of Hazardous Art Materials Act, the Child Safety Protection Act, the Virginia Graeme Baker Pool and Spa Safety Act, the Children's Gasoline Burn Prevention Act, the Drywall Safety Act, the Child Nicotine Poisoning Prevention Act, the Portable Fuel Container Safety Act (15 U.S.C. § 2056d), the Nicholas and Zachary Burt Memorial Carbon Monoxide Poisoning Prevention Act, the Safe Sleep for Babies Act, Reese's Law (Pub. L. No. 117-171), and the imitation firearms provisions of Pub. L. Nos. 100-615 and 117-167.). See The Consumer Product Safety Act: A Legal Analysis (Apr. 2018) at 1, n.1.

3 Some types of products that are specifically regulated by other federal agencies are explicitly carved out of the definition. Different federal agencies have regulatory control and authority over other kinds of products, such as automobiles (Department of Transportation); planes (Federal Aviation Administration); foods, drugs, cosmetics, and medical devices (Food and Drug Administration); and pesticides and fungicides (Environmental Protection Agency).

4 15 U.S.C. § 2052(a)(5).

5 Id. § 2052(a)(5)(A).

2051(b) as:

> 1. [T]o protect the public against unreasonable risks of injury associated with consumer products;
> 2. [T]o assist consumers in evaluating the comparative safety of consumer products;
> 3. [T]o develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
> 4. [T]o promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

The CPSC meets these objectives through monitoring, research, investigations, safety standard-setting (mandatory and voluntary), and enforcement powers.

b. Consumer Monitoring

One of the primary means by which the CPSC addresses its mission of protecting consumers is by monitoring and evaluating deaths, injuries, illnesses, and other harms associated with consumer products.[6] The CPSC maintains a database—called the National Electronic Injury Surveillance System (NEISS)—of injury reports collected from dozens of emergency rooms across the country.[7] These reports provide the CPSC with statistical data related to confirmed and possible product-related injuries.[8] The CPSC calls the NEISS "the foundation for many CPSC activities," because it provides important data that informs the CPSC about what it should investigate and when enforcement and remedial actions may be appropriate.[9]

In addition, the CPSC contracts with all 50 states and the District of Columbia to receive information on accidental deaths likely connected to consumer products.[10] The CPSC also purchases and reviews thousands of "death certificates that have a high probability of consumer product involvement."[11] Annually, the CSPC prepares a report of this consumer product injury-related information for Congress.[12]

c. Collaboration with Voluntary Standards Organizations.

Another way that the CPSC works to prevent injuries and deaths is to collaborate with voluntary standards organizations for consumer products and make sure those standards are sufficient and effective. The CPSC believes that voluntary safety standards reduce or eliminate injuries or deaths associated with products. The CPSC has limited rulemaking powers to establish mandatory safety standards and tends to defer to the voluntary standards.

Most voluntary standards are developed by organizations or interest groups. The standards that these groups develop are referred to as "voluntary" standards, because they are being volunteered by a non-governmental group as an alternative to governmental regulation.[13] The voluntary standards are handled by various standards development organizations (SDOs), most of which are accredited by the American National Standards Institute (ANSI).[14] The safety standards are a set of product requirements intended for manufacturers to use to help reduce or prevent injuries. While most of the voluntary standards are developed by the American Society for Testing and Materials (ASTM) International, the CPSC also works with many other SDOs, such as:

- NIST - National Institute of Standards and Technology
- ICC - International Code Council
- ISO - International Organization for Standardization
- AHRI - Air Conditioning, Heating and Refrigeration Institute
- ASHRAE - American Society of Heating, Refrigerating and Air-Conditioning Engineers
- BIFMA - Business and Institutional Furniture Manufacturing Associations
- NFPA - National Fire Protection Association

The CPSC has no legal authority to enforce voluntary standards.[15] However, the failure to comply with voluntary standards is a factor in the CPSC's decision to use its other enforcement powers.

d. A CPSE "Recall" (a.k.a. corrective action plan)

The CPSC has a number of enforcement powers from injunctive relief to civil penalties to requesting that the Department of Justice pursue criminal penalties.16 But the most important enforcement power held by the CPSC is its authority to order companies to undertake various "corrective actions." The CPSC's power to implement corrective actions is both involuntary and voluntary.

Involuntary corrective actions can be imposed by the CPSC after an administrative proceeding. If, after administrative hearings, the CPSC concludes that a

6 The Consumer Product Safety Act: A Legal Analysis (Apr. 2018) at 7.

7 Id.

8 Id.

9 Id.

10 Id. at 8.

11 Id.

12 Id.

13 https://www.cpsc.gov/About-CPSC/Consumer-Ombudsman/Voluntary-Standards-Development-FAQ-for-Consumers#:~:text=Many%20voluntary%20safety%20standards%20are,an%20alternative%20to%20governmental%20regulation.

14 Consumer Prod. Safety Comm'n, 2021 Annual Voluntary Standards Tracking Activities Report, 1 (2021).

15 The Consumer Product Safety Act: A Legal Analysis (Apr. 2018) at 13.

16 15 U.S.C. §§ 2064, 2066, 2068-73.

consumer product constitutes a "Substantial Product Hazard" and public disclosure of the hazard is necessary to protect the public, the CPSC may order relevant manufacturers, distributors, or sellers to address the hazard through a corrective action.[17] This administrative process, which generally requires a full administrative hearing, can be time consuming, and the CPSC's decision can be challenged in federal court by any adversely affected party.[18] Given the length of this process, the CPSC infrequently initiates involuntary corrective actions through the administrative process.[19]

The voluntary, or negotiated corrective action, is the CPSC's preferred method of implementing corrective actions. The majority of corrective actions occur through negotiations and with the cooperation of the particular company. For negotiated corrective actions, the CPSC identifies through its research and reporting whether the product poses a "Substantial Product Hazard." A Substantial Product Hazard means that the product does not conform to mandatory or voluntary safety standards or rules or other CPSC-issued rules or product bans.[20] A product may also pose a Substantial Product Hazard when a defect in the product "creates a substantial risk of injury to the public."[21] Section 15(a)(2) of the Consumer Product Safety Act [15 U.S.C. § 2064(a)(2)] lists criteria for determining when a product creates a substantial product hazard, and the CPSC's Recall Handbook provides the following guidance about that criteria:

- Pattern of defect. The defect may stem from the design, composition, content, construction, finish, or packaging of a product, or from warnings and/or instructions accompanying the product. The conditions under which the defect manifests itself must also be considered in determining whether the pattern creates a substantial product hazard.
- Number of defective products distributed in commerce. A single defective product could be the basis for a substantial product hazard determination if an injury is likely or could be serious. By contrast, defective products posing no risk of serious injury and having little chance of causing even minor injury ordinarily would not be considered to present a substantial product hazard. The number of products remaining with consumers is also a relevant consideration.
- Severity of risk. A risk is considered severe if the injury that might occur is serious, and/or if the injury is likely to occur.
- Likelihood of injury. The likelihood is determined by considering the number of injuries that have occurred, or that could occur, the intended or reasonably foreseeable use or misuse of the product, and the population group (such as children, the elderly, or the disabled) exposed to the product.[22]

Once the CPSC makes a Substantial Product Hazard determination, it assigns that hazard as either Class A, B, or C.[23] Class A hazards exist when a risk of death or grievous injury or illness is likely or very likely.[24] Class B hazards exist when a risk of death or grievous injury or illness is not likely to occur, but is possible or when moderate injury or sickness is very likely.[25] Class C hazards exist when a risk of serious injury or illness is not likely, but is possible, or when moderate injury or illness is not necessarily likely, but is possible.[26] Once the hazard has been classified, the CPSC then works with the company to negotiate and prepare a corrective action. Interestingly, while the regulations and CPSC-published guidance call these plans corrective actions, the CPSC requires that any corrective action plan be referred to as a "recall" because the public and media more readily recognize and respond to that description.[27]

The CPSC handbook uses the term "recall" to describe any corrective action that involves repair, replacement, refund, or notice/warning program for a product. A company involved in a recall must develop a plan that extends to the entire distribution chain and to consumers who potentially have the product.[28] The CPSC requires that the company designs its plan and communications in order to reach consumers and motivate people to respond to the recall.

The information that should be included in a recall is set forth at 16 C.F.R. § 1115.20(a). The plan must fulfill the ultimate objectives of a recall, which are:

1. to locate all defective products as quickly as possible;
2. to remove defective products from the distribution chain and from the possession of consumers; and
3. to communicate accurate and understandable information in a timely manner to the public about the product defect, the hazard, and the corrective action. Companies should design all informational material to motivate retailers and media to get the word out and

17 15 U.S.C. § 2064(c)-(d), (f); 16 C.F.R. §§ 1025.1-72 (2017).

18 15 U.S.C. § 2073.

19 The Consumer Product Safety Act: A Legal Analysis (Apr. 2018) at 17.

20 15 U.S.C. § 2064(b); 16 C.F.R. § 1115.4. See also Consumer Prod. Safety Comm'n, Recall Handbook 12 (2012).

21 Id.

22 Consumer Prod. Safety Comm'n, Recall Handbook at 12.

23 Id. at 14-15.

24 Id.

25 Id.

26 Id.

27 Id. at 5.

28 Id. at 17-18.

consumers to act on the recall.[29]

The CPSC guidance offers a Recall Checklist that includes the following guidance for businesses recalling products:

- Initiating a Recall
  - Report to CPSC if you have a reporting obligation.
  - Stop production.
  - Identify affected UPC, date codes, and model numbers.
  - Isolate inventory.
  - Notify distribution chain to stop sale and isolate products.
  - Contact recipients of any in□transit shipments of products.
  - Determine remedy (full refund, repair, or replacement).
  - Test replacement or repair.
  - Redesign future production to eliminate hazard.
  - Enhance quality control measures.
  - Change model/serial numbers of redesigned product.
  - Add a permanent mark or new permanent - labeling to distinguish reworked products from defective products.
  - Relabel packaging of reworked products to - distinguish from defective products.
  - Draft a reverse logistics plan.
  - Determine how returns will be processed at all levels of distribution.
- Recall-Notice Documents and Related Items
  - Toll free number.
  - Joint Press Release.
  - Social Media Plan (Twitter, Facebook, Instagram, etc.).
  - Link to recall information on Firm's home page, recall information posted in Firm's website.
  - Retail Notification/Poster.
  - Recall Hotline Questions and Answers, Customer Service Script, and/or FAQ.
  - Individual letters to distribution chain (retailers, consumers, distributors).
  - Envelopes marked with "Important Safety Message" or "Safety Recall" (in red ink) for recall notice mailing.
  - Contact information for all retailers, distributors, and consumers.
- After the Public Announcement
  - CPSC will monitor the recall by reviewing monthly reports, incoming complaints regarding the recall and products, and contacting retailers and/or consumers.
  - Report monthly on recall participation as required.
  - Keep recall notice information posted on the firm's website indefinitely.
  - Maintain prominent link to recall information on homepage.
  - Keep retail notifications/posters up in retail locations for 120 days or longer.
  - Consult frequently with Compliance staff working with you on the recall to avoid problems.[30]

e. Examples of Recalls.

The CPSC provides a searchable data base for product recalls and summarizes high-profile recalls on its website, https://www.cpsc.gov/Recalls. In August 2023 alone, the following were products subject to CPSC recalls: Costco Ubio Labs Power Banks (fire hazard); Polaris RZP XP Recreational Off-Road Vehicles (fire and injury hazards); Restwell Crib Mattresses (suffocation hazard); Red Apple Fireworks (explosion hazard); Gree Dehumidifiers (fire and burn hazards); Polaris Snowmobiles (injury hazard); TOMY Flair Highchairs (fall hazard); Prime-Line Glass Doorknobs (laceration hazard); Apollo Phantom Electric Scooters (fall and injury hazard); and Electrolux Frigidaire Gas Cooktops (gas leak and fire hazard).

2. Strategies for Defending Against Recall Evidence.

The first decision that the company needs to make is whether it will embrace or fight the recall evidence. In some situations, embracing the recall process and evidence may be a good strategy. Embracing and admitting the recall evidence can show the jury the company is taking responsibility and accountability for its product. If punitive damages are involved, companies can use the recall evidence to show its efforts to improve the product and protect the public.

Because recall evidence tends to create an inference of wrongdoing on the part of the company, the more common strategy is to explore all options available to keep the recall evidence away from the jury. In these cases, various evidentiary strategies and objections can be tried to keep the evidence out. Jurors will ask, "Can this happen to me or my loved ones?" The defense needs the answer to be, "No." Jurors that believe the plaintiff made a mistake or disregarded a warning, are more likely to ignore the recall evidence and decide the accident was plaintiff's or some third-party's fault.

Early recognition that recall evidence may be offered gives the defense the opportunity to address inadmissibility in

29 Id. at 18.

30 https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/Recall-Checklist

discovery, briefs, motions, and hearings in advance of trial. The typical questions relative to the admissibility of recall evidence are: Can the recall evidence be used to show the existence of a defect?; Can the recall evidence be used to show knowledge of the defect?; Can the recall evidence be used to show that a change in the product was feasible?; Can the recall evidence be used to show that adequate warnings were not given?; Can the recall evidence be used to show misuses or abuse of the product?; Can the recall evidence be used to show the specific product caused the injury alleged to have been caused by the defect?; and Can the recall evidence be used to establish compliance with a federal statute or a federal standard? The answers to these questions guide the defense strategies.

The following is an overview of the general arguments that can be asserted to attack the admission of recall evidence:

- The recall does not involve the same product, model, or alleged defect;
- The injury alleged was not caused by the aspect of the product that was the subject of the recall;
- The recall is a subsequent remedial measure;
- The recall evidence is more prejudicial than probative;
- The recall is not an admission because it was involuntary, mandated, and regulated by federal law;
- The recall evidence is hearsay; and
- The recall evidence is not relevant, and unrelated to the accident.

Unfortunately, there are no bright-line rules or consistency among the federal and state courts on the admission of recall evidence. The case law is disjointed, and the decisions tend to rest on the particular facts of the recall, aspects of the product, or the severity of the injuries.

Relevancy is the first line of defense. Defendants have had some success in arguing that recall evidence is not relevant when it is not related to the same product or the identical component part that caused the alleged injury in the lawsuit.[31] A relevancy objection is also appropriate when the recall evidence relates to the same product but a different defect. When the defect that caused the injury is the same as the one at issue in the recall, courts often hold that the evidence of the recall is admissible.[32]

Another relevancy objection would be that the recall evidence relates to a defect that was not the proximate cause of the accident. When the recall evidence shows a defect existed that triggered the recall, the plaintiff should also be required to establish that the defect was the proximate cause of the injury. If plaintiff cannot prove proximate causation, then the recall evidence should be excluded on relevancy grounds.

The recall evidence may also be hearsay. A hearsay objection could exclude evidence of a recall against a product distributor, as opposed to a manufacturer. A distributor can argue that the recall letters are out-of-court, written statements by the product manufacturers, and are thus, inadmissible hearsay against it.[33] When recall evidence is offered against the manufacturer, a hearsay objection has its limits. Frist, plaintiff may argue that the recall evidence is a business record, an exception to hearsay. Second, the recall evidence prepared by the manufacturer might be an admission or statement by a party-opponent, another exception to hearsay.[34] Lastly, plaintiff may argue that the recall evidence is a "statements against interest" by the manufacturer that the product was defective.

Some courts have held that recall evidence should not be admitted to show that the defect existed when it left the manufacturer's control.[35] However, other cases have held that CPSC reports are admissible to show a manufacturer's knowledge about whether the product was unreasonably dangerous.[36] In Dixon v. Home Depot U.S.A., No. 13-2776, 2015 WL 3756199 (W.D. La. 6/16/15), the plaintiff was injured while operating a table saw in January 2011. In 1976, the CPSC issued a report that addressed the troubling number of injuries related to table saws. In 2010, the CPSC enacted mandatory revisions to ensure the product operated safely. The table saw, which injured the plaintiff, did not comply with the new standards. The court found genuine factual issues existed as to whether the table saw's blade guard was defective. The defendant anticipated that a report from the CPSC would be introduced into evidence and subsequently filed a motion to exclude, objecting to the document's relevance and, if admitted, its unfair prejudicial value.

The success of the defendant's motion to exclude rested on whether the plaintiff could show that the blade guard in the CPSC report were "substantially similar" to the specific blade guard that created the injury. Evidence of similar incidents is relevant when its proponent

31 See e.g. Jordan v. General Motors Corp., 624 F. Supp. 72, 77 (E.D. La. 1985); Nay v. General Motors Corp., 850 P.2d 1260 (Utah 1993); Glynn Plymouth, Inc. v. Davis, 120 Ga.App. 475, 170 S.E.2d 848 (1969).

32 See e.g., Hessen for Use and Benefit of Allstate Ins. Co. v. Jaguar Cars Inc., 915 F.2d 641, 649 (11th Cir. 1990)

33 Higgins v. Gen. Motors Corp., 465 S.W.2d 898 (Ark. 1971).

34 Arguably, only a voluntary recall would qualify as an admission. Involuntary recalls have been held to not constitute an admission.

35 Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984); Barry v. Manglass, 55 App. Div.2d 1, 389 N.Y.S.2d 870 (1976), Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); Harley-Davidson Motor Co. v. Carpenter, 350 So.2d 360 (Fla. App. 1977).

36 Manieri v. Volkswagenwerk A.G., 151 N.J. Super. 422 (App. Div. 1977); Farmer v. Paccar, 562 F.2d 518 (8th Cir. 1977).

demonstrates that the other incidents occurred under substantially similar circumstances.[37] Further, the Fifth Circuit has recognized that the substantial-similarity requirement is relaxed when used to show notice of a defective condition.[38]

The Dixon Court found the CPSC report admissible. The court determined that the CPSC report was relevant to the issue of the defendant's knowledge that the table saws' blade guard was unreasonably dangerous.[39] Further, the type of injury in Dixon was exactly the type of injury the CPSC intended to address in its mandatory revisions. Finally, the court conducted the balancing test of whether the reports probative value was substantially outweighed by its potential for unfair prejudice and determined the report was admissible for the limited purpose of showing the defendant had notice the table saws were potentially dangerous.

Perhaps the strongest objection is that any recall evidence should be excluded under the Subsequent-Remedial-Measure rule. This rule excludes post-accident remedial actions, like a recall, based on the policy argument that exclusion encourages risk reduction efforts and product improvements. The rule is found at Federal Rule of Evidence 407, and states:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

As stated in Rule 407, a remedial measure is an action that, had it been taken earlier, would have made the injury less likely to occur. Product recalls fall within this definition because had the recall been initiated sooner, then the injury allegedly caused by the product would have been less likely to occur.

Pursuant to Rule 407, many courts have held that evidence of a recall that occurred after the accident or injury-causing event constitutes subsequent remedial measures and is not admissible to prove negligence or culpable conduct in connection with that event. Any post-accident measure that, if taken previously, would have made the injury or harm less likely to occur should be inadmissible to prove: (1) negligence or culpable conduct, (2) existence of a defect in the product, (3) existence of a defect in a product's design, or (4) need for a warning. Fed. R. Evid. 407.

For example, in Rutledge v. Harley-Davidson Motor Co., the plaintiff was injured when her motorcycle ran off the road. 364 F. App'x. 103 (5th Cir. 2010). One year after the accident, Harley-Davidson sent two recall notices about the voltage regulator that could affect the driver's ability to steer in certain circumstances. The plaintiff argued that Harley-Davidson admitted through the recall notice that the motorcycles had a pre-existing condition that caused the motorcycle to be dangerous. The plaintiff offered the notice as evidence to show Harley-Davidson's ownership or control of the design, an exception to Rule 407. Id at 106.

The court rejected this argument on multiple grounds. First, the recall notices were voluntarily issued in January and March 2007, after the December 2006 accident. The rule barring admission of evidence of subsequent remedial measures precludes admission of manufacturers' recall notices that were issued after the accident as proof of the existence of a defect causing the accident. Second, the court noted that the only evidence the plaintiff offered to establish the existence of a defect were the recall notices. Product-recall evidence cannot be used to bridge the gap between general causation and specific causation in the product litigation. Therefore, this evidence fell squarely within the rule of subsequent remedial measures, barring recall notices as evidence offered to prove a defect in a product or its design. Id.

However, the scope of Rule 407 may be narrower than expected and it may allow recall evidence to admitted for other purposes, such as impeachment, proving ownership, control, or the feasibility of precautionary measures. Defense attorneys should be prepared to fight plaintiffs on the following arguments that may circumvent exclusion of recall evidence under Rule 407.

First, Rule 407 requires that the remedial measure must be one that makes the injury less likely to have occurred. Thus, the fight becomes what aspects of the recall fit into the category or a measure that makes the injury less likely. While some courts have excluded published settlements, recall letters, and press releases, others have allowed supporting documentation, i.e., post-accident studies, tests, and reports, to be admitted into evidence even if they lead to or relate to a subsequent recall. The basis for this admission is that the studies, tests, and reports, in-and-of themselves, would not have made the injury less likely to occur, and thus, the policy behind Rule 407 no

37 See also Rodriguez v. Crown Equipment Corp., 923 F.2d 416, 418 (5th Cir.1991).

38 Edwards v. Permobil, Inc., 11–1900, 2013 WL 4508063, at *1 (E.D. La. 8/22/13).

39 Dixon, No. 13-2776, WL 3756199 at *2.

longer exists.

Second, plaintiffs will argue that Rule 407 does not apply when the recall is involuntary. Because subsequent remedial measures must be voluntary actions, a forced or mandatory recall is outside the scope of Rule 407. This possible exception to exclusion under Rule 407 presents a difficult Hobson's Choice for the company. If the company fights the recall, then all that evidence most likely is admissible in future litigation. But, if the company proceeds and cooperates with the recall, it is essentially acquiescing to a problem with its product but has a chance of having that evidence excluded. Proving that a recall is involuntarily requires more than a mere showing that a federal agency is involved. However, there is no consensus in the case law about what level of government involvement is needed to label a recall involuntary.

Third, Rule 407 likely allows recall evidence to be admitted to show control or ownership of the defective product. While it is admittedly rare that a defendant would deny control or ownership of the product after recalling that product, it has occurred, and the plaintiff can introduce evidence of the recall to prove control and ownership. Depending upon the product-identification-related facts of each case, defendants are likely better served to admit ownership and control to avoid introduction of the recall evidence.

Fourth, when defendants take the position that an alternative design is not feasible, exclusion of recall evidence under Rule 407 is less likely. When the defense challenges feasibility or possibility of an alternative design, the costs associated with that design, and the ultimate utility of that design, it likely opens the door for allowing recall evidence to be admitted. For example, while not a product recall case, in Anderson v. Malloy, 700 F.2d 1208 (8th Cir. 1983), the Eighth Circuit reversed the trial court's exclusion of recall evidence as a subsequent remedial measure when the defendant argued that the alternative design was not feasible. The plaintiff had been assaulted in her hotel room. The defense denied that the hotel room could have been made safer and that adding a door chain and peep holes to the door was not a feasible alternative design. The Eighth Circuit held that such testimony "opened the door" to plaintiff's evidence that defendant installed door chains and peep holes shortly after the assault.

Lastly, recall evidence may be admissible for the purpose of impeachment when that evidence will contradict a witness's earlier testimony about the product.[40] Using recall evidence as impeachment must still be balanced and should only be allowed when the recall evidence will directly and significantly contradict a witness's earlier testimony. Calling the product the best, safest, high quality, top of the line, or other embellishments may be impeached through product recall evidence.

40 See e.g., Petree v. Victor Fluid Power, Inc., 831 F.2d 1191 (3d Cir. 1987) (allowing recall evidence when defense expert claimed that risk of danger had been engineered out of the product and a warning would serve no purpose); Flaminio v. Honda Motor Co., 733 F.2d 463, 468 (7th Cir. 1984) (evidence of a subsequent design change does not impeaches a defendant's testimony that it never would have made the design changes); Wood v. Mobark Indus., 70 F.3d 1201, 1208 (11th Cir. 1995) (design change evidence allowed to impeach testimony by the corporate defendant that the wood chipper chute was the safest length possible).

AN UPHILL BATTLE

PRODUCTS LIABILITY LITIGATION AFTER A CONSUMER PRODUCT SAFETY COMMISSION (CPSC) RECALL

DeutschKerrigan

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New Orleans, LA
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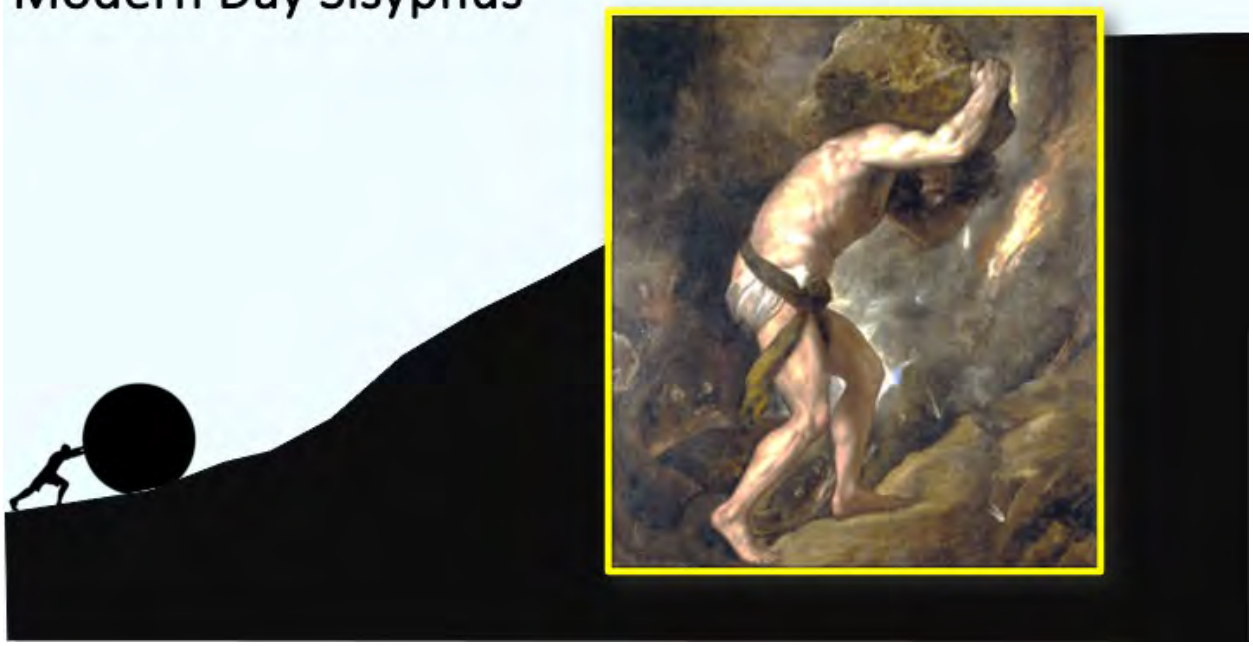
Modern Day Sisyphus



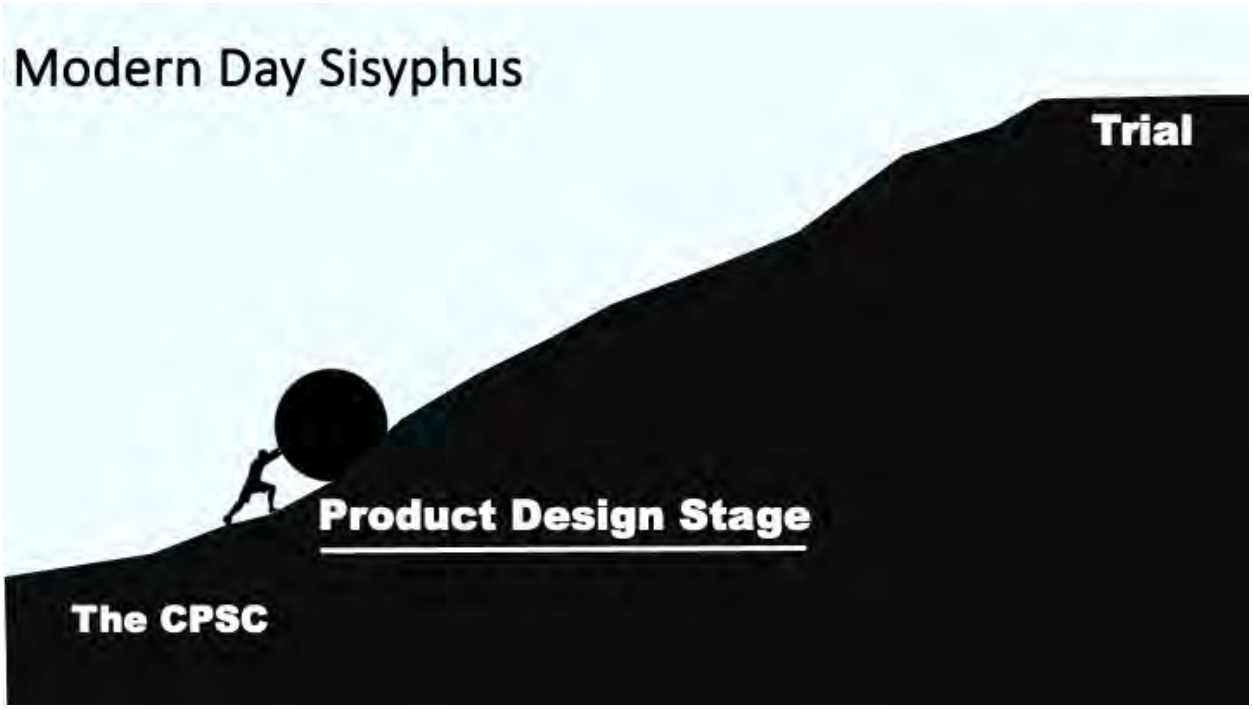
- Created by Consumer Product Safety Act in 1972
- Jurisdiction over any "consumer product"
  - 15 U.S.C. § 2052(a)(5).
- Mission: "protecting YOU, the consumer, against unreasonable risks of injuries and deaths associated with consumer products."
- Methods:
  - Consumer Monitoring
  - Mandatory Reporting
  - National Electronic Injury Surveillance System (NEISS) Database

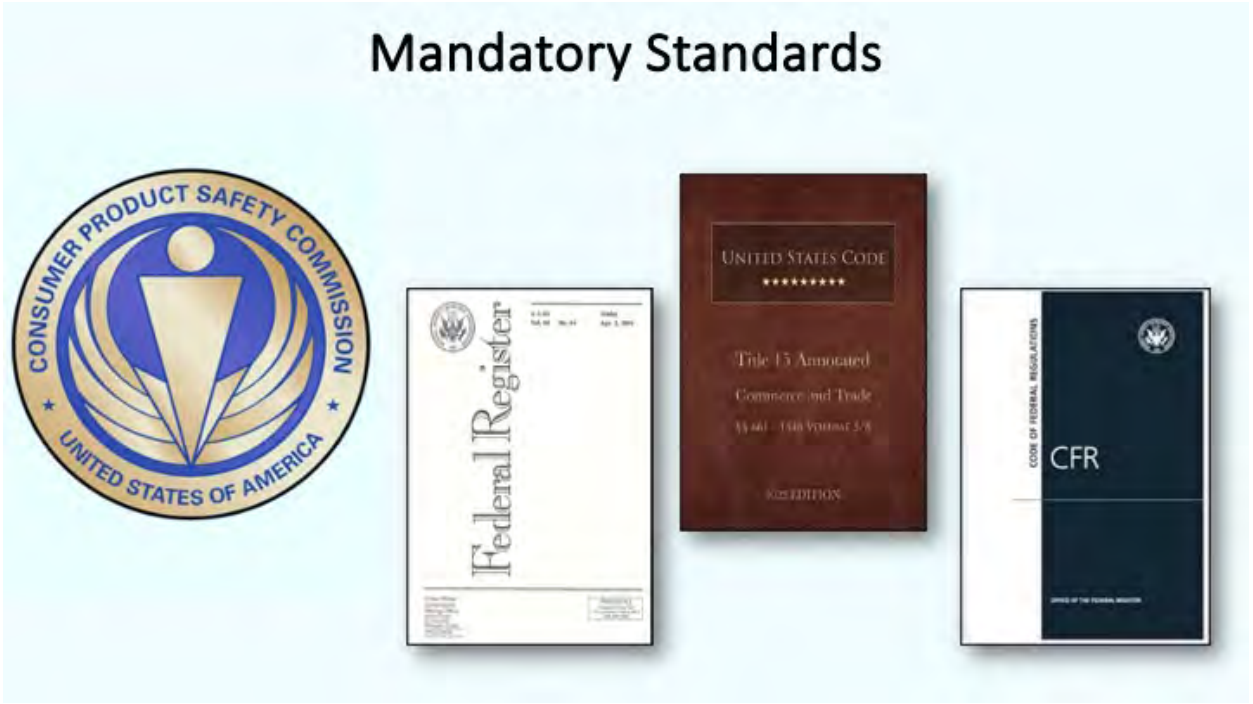
"Substantial Product Hazard"

- 15 U.S.C. § 2064
- "Substantial Product Hazard"
  - "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a **substantial risk of injury to the public**."
  - Product does not conform to mandatory or voluntary safety standards or rules or other CPSC-issued rules or product bans

"Substantial Product Hazard"

- 16 C.F.R. § 1115.4.
- A product may contain a design defect even if it is manufactured exactly in accordance with its design and specifications if the design presents a risk of injury to the public.
- A consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury.


Modern Day Sisyphus
Trial
Product Design Stage
The CPSC


Mandatory Standards
CONSUMER PRODUCT SAFETY COMMISSION
UNITED STATES OF AMERICA
Federal Register
UNITED STATES CODE
Title 15 Annotated
Commerce and Trade
CFR
CODE OF FEDERAL REGULATIONS

Voluntary Standards

- "Voluntary" Standards
- Collaborates with Standards Development Organizations (SDOs)
- Adherence to and Compliance with Voluntary Standards is Critical Factor in Enforcement

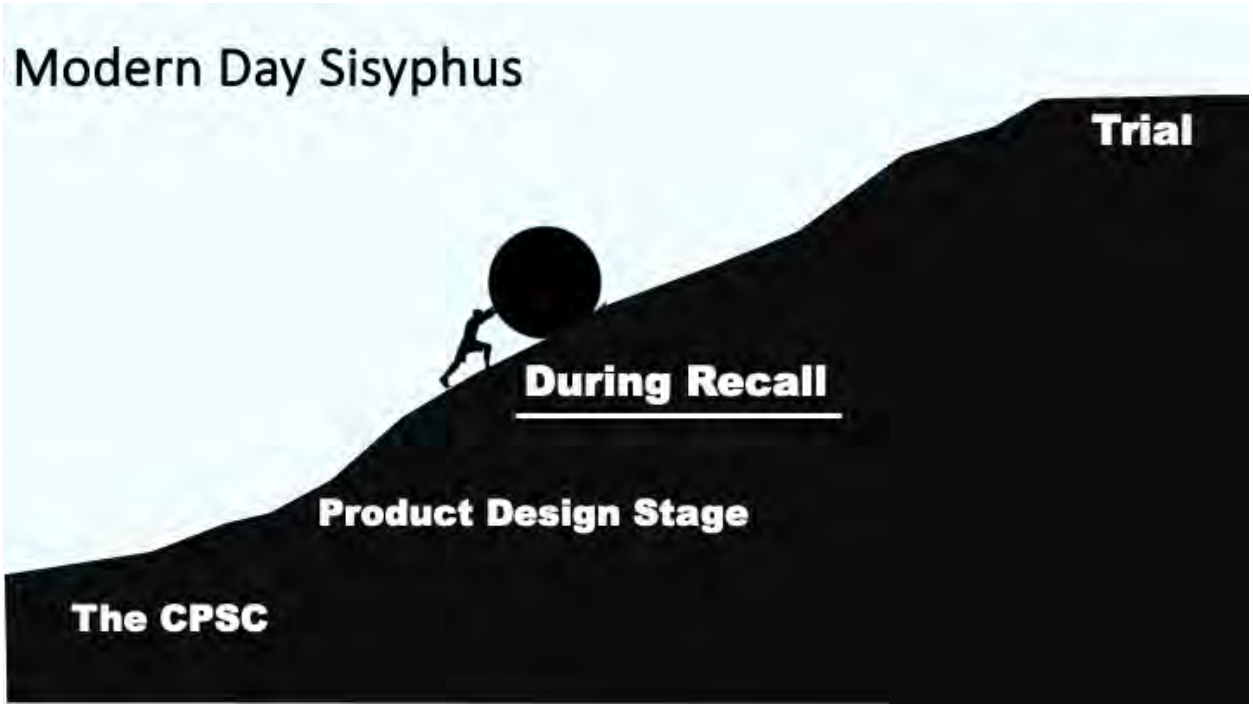
Standards Development Organizations (SDOs)

Standards Development Organizations (SDOs)

- 80+ Volumes
- 12,800+ Standards
- Metals, Paints, Plastics, Textiles, Petroleum, Construction, Energy, Medical Services, Devices And Electronics
- ASTM F963-17 – Child Toys
- ASTM F381-16 & F2970-22 – Trampolines and Trampoline Parks

Standards Development Organizations (SDOs)

- Nongovernmental organizations from 160 countries
- 24,676+ Standards
- Manufactured Products, Automotive, Aerospace, Medical Devices, Technology, Food Safety, Agriculture



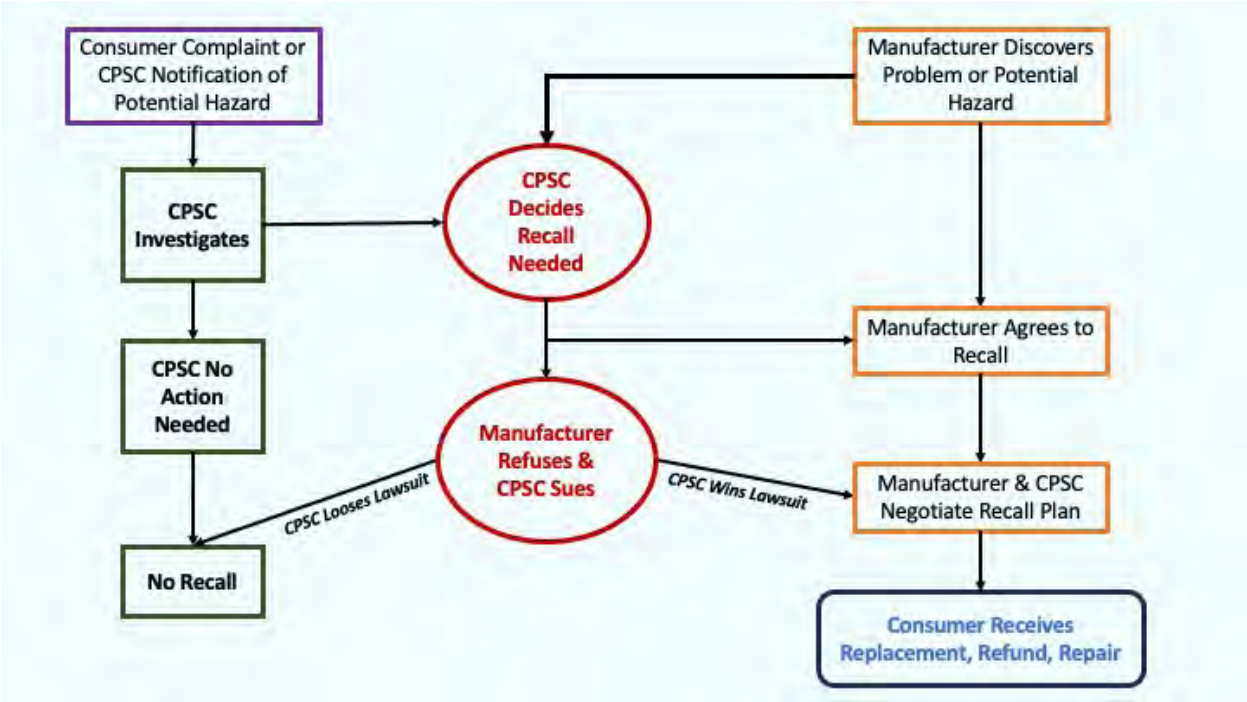
Hobson's Choice

***Involuntary* Recall**

vs.

***Voluntary* Corrective Action Plan**

"Recall"



Involuntary Recall


UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

THYSSENKRUPP ACCESS CORP.

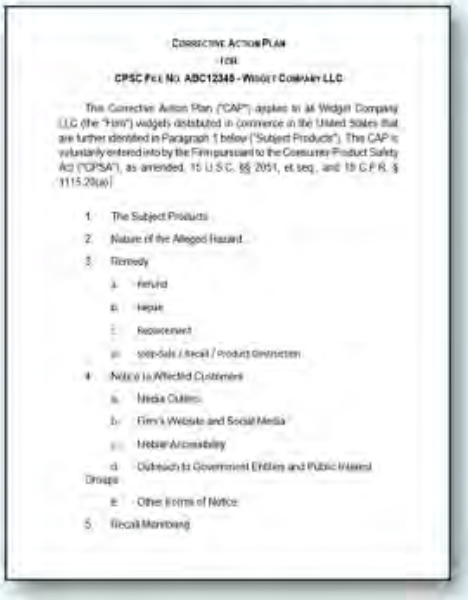
CPSC DOCKET NO. 21-1

Respondent.

COMPLAINT

- Harsher
- Allegations More Public
- Civil Penalties in Play…
  - Each Violation - $8,000 - $100,000
  - Multiple Violations - $1.8 M - $15 M
- Most Likely Admissible in future litigation

Corrective Action Plan



CORRECTIVE ACTION PLAN
FOR
CPSC FILE NO. ABC12345 - WIDGET COMPANY LLC

This Corrective Action Plan ("CAP") applies to all Widget Company LLC (the "Firm") widgets distributed in commerce in the United States that are further identified in Paragraph 1 below ("Subject Products"). This CAP is voluntarily entered into by the Firm pursuant to the Consumer Product Safety Act ("CPSA"), as amended, 15 U.S.C. §§ 2051, et seq., and 16 C.F.R. § 1115.20(a)

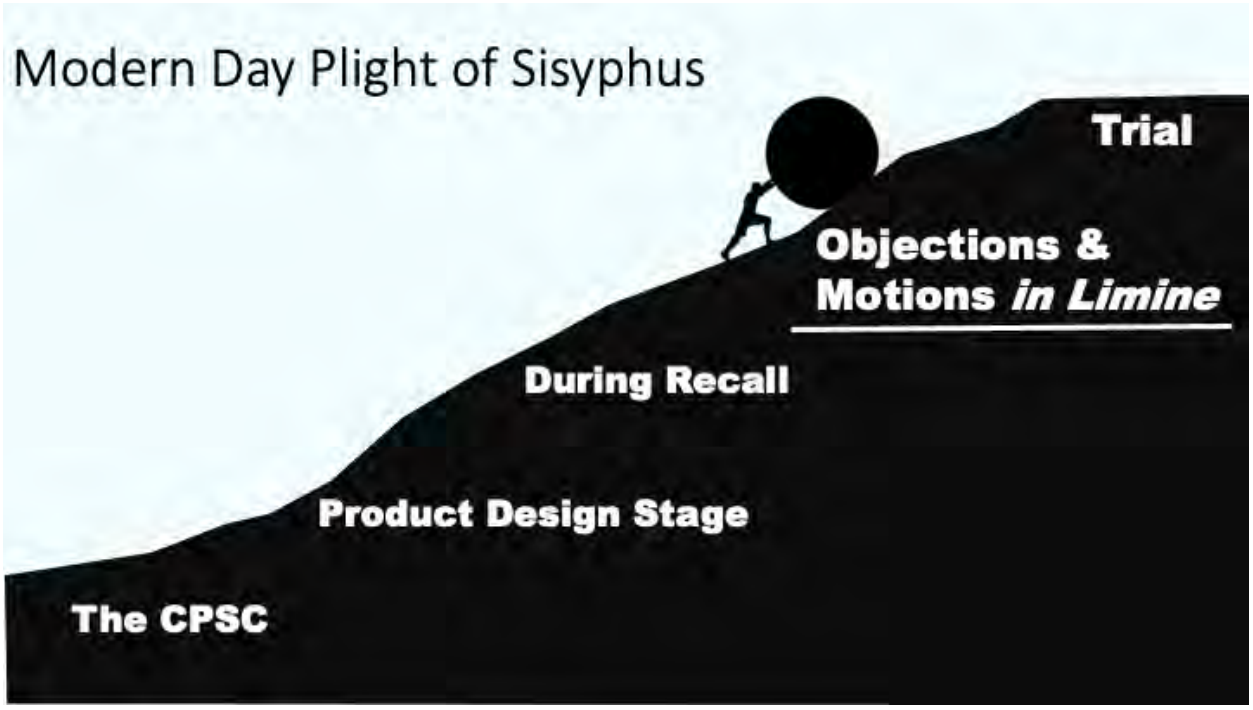
1. The Subject Products
2. Nature of the Alleged Hazard
3. Remedy
   a. Refund
   b. Repair
   c. Replacement
   d. Stop-Sale / Recall / Product Destruction
4. Notice to Affected Customers
   a. Media Outlets
   b. Firm's Website and Social Media
   c. Retailer Accessibility
   d. Outreach to Government Entities and Public Interest Groups
   e. Other Forms of Notice
5. Recall Monitoring

- Negotiated
- More Control over…
  - The Process
  - The Language
  - What is Required
  - How Recall is Accomplished
  - What is Made Public
- Admissibility Not as Clear Cut

Control the "Recall" Documentation

PRODUCT SAFETY PLANNING, REPORTING, and RECALL HANDBOOK

- Section 15 Reports:
  - Noncompliance with Voluntary Standards
  - Noncompliance with Mandatory Standards
  - Defect
  - Unreasonable risk of serious injury or death
- Section 37 Reports – civil actions
- Investigation / Correspondence with CPSC
- Press Releases
- Recall (a.k.a, Corrective Action Plan)


Modern Day Plight of Sisyphus
Trial
Objections &
Motions *in Limine*
During Recall
Product Design Stage
The CPSC


Objectives
What Outcomes do We Want?
Strategy
How do we get there?
Methods
What has to be done?

Objectives

What Outcomes do We Want?

Objectives

What Outcomes do We Want?

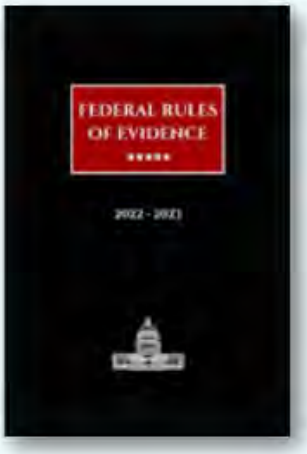
Strategy

How do we get there?

Methods

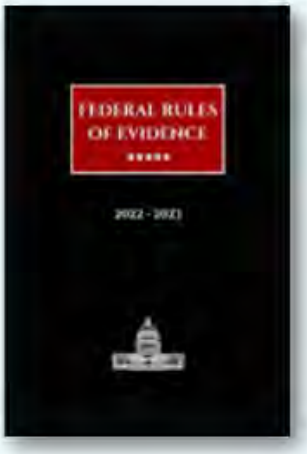
What has to be done?

Relevancy



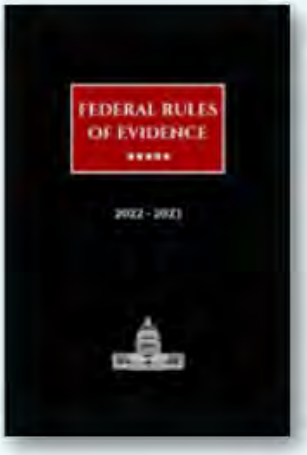
- FRE Rule 401-403
- Not the Same Product as the Recall
- Not the same Defect as the Recall
- Not the Cause of the Injury
- More Prejudicial than Probative

Subsequent Remedial Measure



- FRE Rule 407
- Should be Inadmissible to Prove:
  - negligence or culpable conduct
  - existence of a defect in the product
  - existence of a defect in a product's design
  - need for a warning
- Not Applicable to Involuntary Recall
- "Other Purposes" Exception
  - Knowledge, Impeachment, Proving Ownership, Control, Feasibility of Precautionary Measures

Other Options



- Hearsay
- Not an Admission by a Party when Involuntary
- Admissions
- Stipulations

Objectives
What Outcomes do We Want?

Strategy
How do we get there?

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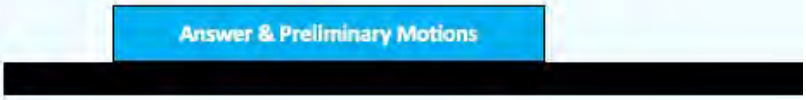
What has to be done?

Methods



Methods

Methods

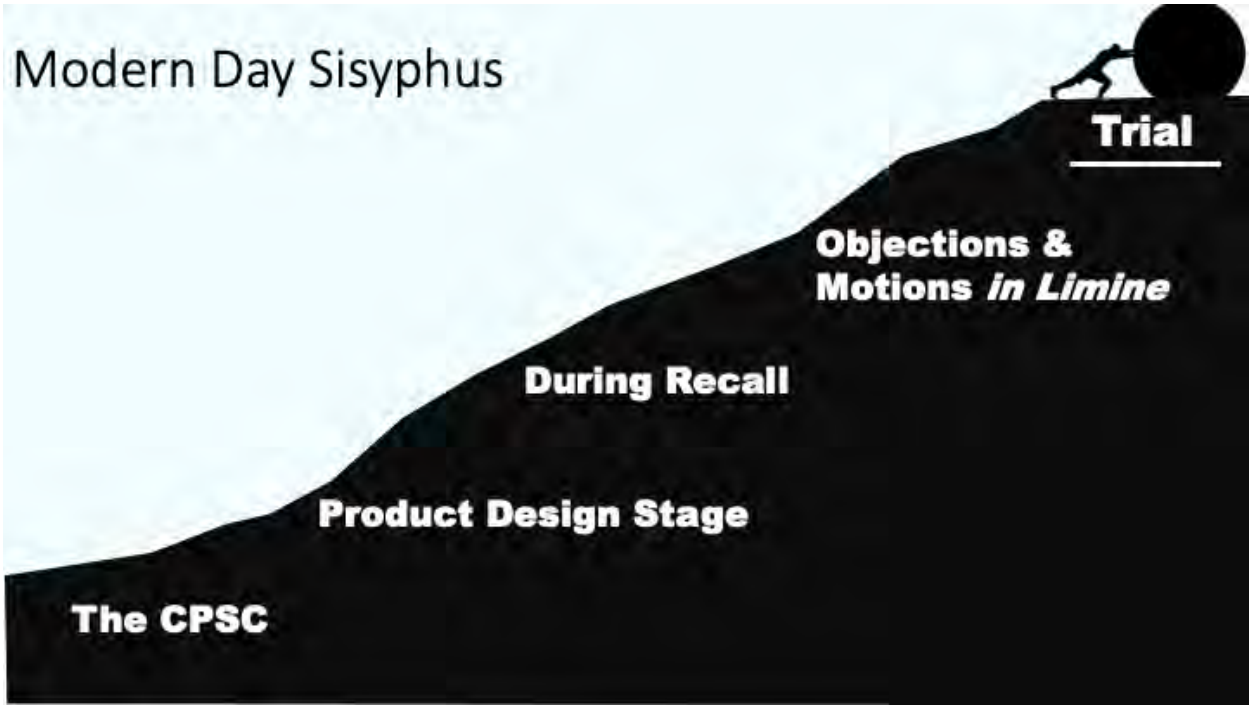
Methods

Methods

Methods

Methods

Methods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Trial
Objections &
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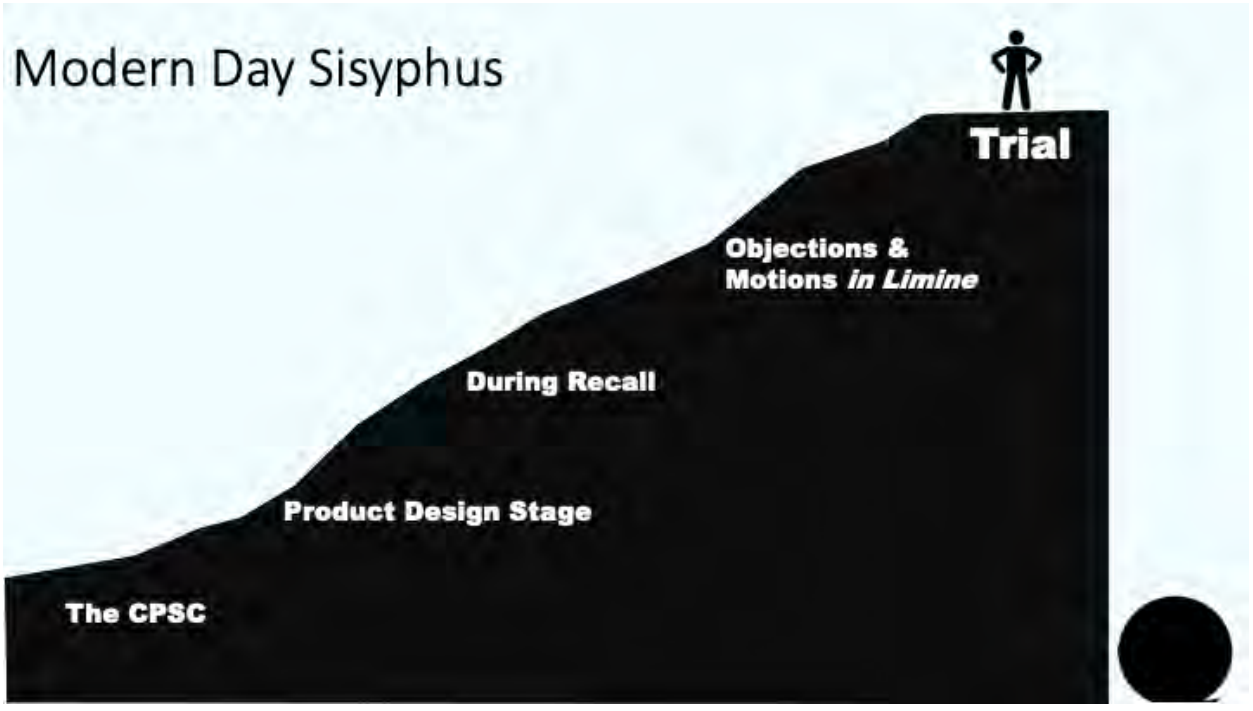
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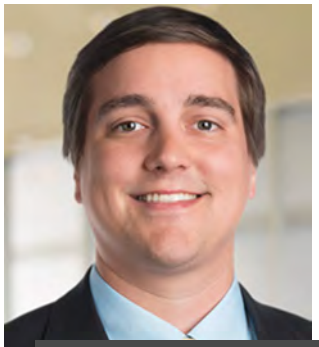

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Ray Lewis

Partner | Deutsch Kerrigan (New Orleans, LA)

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

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

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

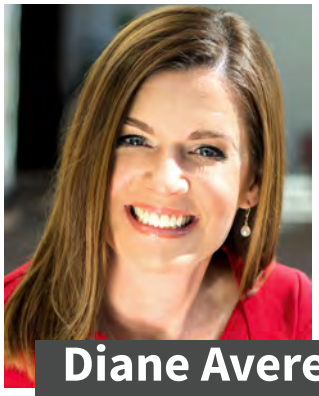
Practices
- Appellate Litigation
- Commercial Litigation
- Commercial Transportation
- Insurance Coverage
- Manufacturer’s Liability and Products Liability

Industries
- Transportation
- Insurance
- Manufacturing

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

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

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



Can We Chat(GPT)? Maximizing Use and Mitigating Risks of Generative AI Engines

Diane Averell
Porzio Bromberg & Newman (Morristown, NJ)

Maximizing Use and Mitigating Risks of Generative AI Engines
By Diane Fleming Averell

Generative Artificial Intelligence ("GAI") Tools have been making worldwide headlines since OpenAI launched ChatGPT in November 2022. GAI Tools enable users to tackle complex tasks at jaw-dropping speed by entering simple prompts into the advanced search engines. Users can input core keywords on a certain topic and command, within seconds, the GAI Tools to create almost any kind of content -- draft communications, write essays and blog posts, develop standard operating procedures, prepare HR policies, summarize voluminous data on any subject, generate code, write poetry, create recipes, plan travel itineraries, and translate languages. Relevant to the legal profession, GAI Tools can generate wills, contracts, settlement agreements, litigation budgets, action plans, pleadings, motions, briefs, memoranda of law, and summaries of jurisprudence, statutes, regulations, and proposed legislation.

At first blush, the technology promised to revolutionize every aspect of the legal profession and create new and limitless efficiencies that were never thought possible in our lifetime. But then the AI developers revealed critical information about GAI Tools that require practitioners to reconsider the relative benefits and risks offered by the tools. In March 2023, Open AI revealed that its GAI Tool "ChatGPT" does not delete the "specific prompts" from users' histories. This is because GAI Tools retain and learn from every prompt or command received from users, and will utilize this information in its future search results and responses to other users. Stated differently, whatever information users share with GAI Tools is now in the public domain. At that point, OpenAI warned users not to share sensitive information on the platform. But, no doubt, the uninitiated still do.

Over the last year, the headlines have been rife with stories regarding monumental deficiencies in content created by GAI Tools –e.g., its unauthorized use of IP; gross inaccuracies and fabrications identified in written work product; and its exploitation by bad actors to create malware, phishing communications, and social engineering. Against this backdrop, lawmakers and tech industry leaders are grappling with how to regulate GAI Tools. Organizations are struggling with the decision to ban or embrace their employees' use of the technology.

Due to the security and ethical risks attendant to the unrestricted use of GAI Tools, lawyers cannot simply "wait and see". It is critical for in-house legal departments and outside law firms, alike, to understand the extraordinary utility of GAI Tools, but also evaluate and guard against the ethical and legal pitfalls inherent in their unrestricted use. Armed with this information, in-house and outside lawyers are positioned to counsel their organizations on best practices for maximizing the benefits of GAI Tools while mitigating the risks. The following tips and considerations aim to assist you in understanding the basics of GAI Tools and build an action plan for their safe and effective use in your organizations.

Understand the Ethical and Data Privacy Implications of GAI Tools
Lawyers have an ethical obligation to have a general understanding regarding how GAI Tools work. ABA Model Rule of Professional Conduct 1.1 (Competence) mandates: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Staying up-to-date on technology is required to be deemed "'competent" – event if the lawyer has no interest in using the technology. Comment 8 to Rule 1.1 states, "[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…."

From a competence and risk mitigation standpoint, lawyers must understand the limits of GAI Tools. For example, GAI Tools have the tendency to "hallucinate," meaning that the technology confidently responds to user prompts or requests with fundamentally flawed,

outdated, inaccurate, or at worst, wholly fabricated content. Depending on the age, source, and viewpoint of the digitized sources from which the GAI Tools generate output, the content may be biased, inappropriate, or false. GAI Tools also may produce content based on the unauthorized use of IP or derived from inaccurate or sensitive information "learned" from the prompts entered by unknowing users. Any output from GAI Tools must be scrutinized and verified through valid, credentialed, trusted sources to ensure that all of these potential pitfalls are avoided.

Perhaps the most dangerous pitfall inherent in GAI Tools is the risk to the security and confidentiality of data. ABA Model Rule of Professional Conduct 1.6 (Duty to Maintain Confidentiality) mandates, in relevant part:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)…
>
> ***
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Sharing confidential or sensitive company or client information with GAI Tools pose many of the same legal and ethical risks that arise with sharing such information with any unauthorized third party. As an initial matter, any and all information that users provide to GAI Tools will be retained and used for future responses to other users. And consistent with the posted "Terms of Use" for GAI Tools, the AI developers view the information that users provide as "public" and typically have free reign to use it for their own commercial and product development purposes, including using the data to continuously train their current and future products. Users have no control whatsoever over the data shared with these platforms, which are no doubt under constant threat of cybersecurity attacks. For all these reasons, GAI Tools create substantial data privacy concerns for commercial enterprises.

Lawyers must be mindful of the impact of data privacy laws on the use of GAI Tools both in the United States and abroad. Most American states have enacted laws to protect "personal" and "private" information, with vastly differing definitions, scopes, and methods of protections afforded. Sharing certain client or employee data with GAI Tools could trigger a "data breach" under certain state laws, which must be reported either to the client or employee, a government agency specified in the relevant state laws, or both.[1]

Accordingly, lawyers must never share with GAI tools any information that is sensitive, confidential, privileged, or protected by law. This prohibition includes any data that contains personally identifiable information (PII), trade secrets, intellectual property, financial information, or other sensitive data of your clients, your organization and employees, or third parties.

Again -- even if you have no intention of using GAI Tools in your legal practice, chances are that other members of your team have, or are, using them to complete their work duties. Remember – your ethical obligations extend to all non-lawyers on your team. ABA Model Rule of Professional Conduct 5.3 (Responsibilities Regarding Nonlawyer Assistants) mandates:

With respect to a non-lawyer employed or retained by or associated with a lawyer:…

> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> >
> > (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take

1 For example, New Jersey defines personal information as an individual's first name or first initial linked with one or more of a person's: 1) Social Security Number; 2) Driver's license number or state identification card; 3) account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; or (4) user name, email address, or any other account holder identifying information, in combination with any password or security question and answer that would permit access to an online account. The statute further provides that "dissociated data", meaning any of the defined pieces of information on their own, can still constitute personal information if there is a means of linking the pieces of dissociated data. N.J.S.A § 56:8-161. GAI Tools retains all user inputs in the platforms' databases and could constitute a means of linking pieces of dissociated data for purposes of the statute. Therefore, using any of the defined information as an input, even on its own, could lead to a breach of security as defined by N.J.S.A § 56:8-161 through N.J.S.A § 56:8-163. This section defines a breach of security as unauthorized access to electronic files, media, or data containing personal information that compromises the security, confidentiality, or integrity of personal information when access to the personal information has not been secured by encryption or by any other method or technology that renders the personal information unreadable or unusable. N.J.S.A § 56:8-161. Section 56:8-163 requires that any known breach of security must be reported to the Division of State Police in the Department of Law and Public Safety for investigation before reporting the breach to the affected persons. N.J.S.A § 56:8-163.

reasonable remedial action.

Legal departments and outside law firms should take action to address GAI Tools with their employees and develop policies that explicitly address if and how GAI Tools may be engaged in fulfilling their work duties.

Develop An Acceptable Use Policy for GAI Tools

As a preliminary matter, your organization should consider empaneling a task force of qualified individuals to fully investigate the available GAI Tools, consider how they might be utilized within your organization, and determine whether the potential benefits of the technology outweigh the risks inherent in them. Should your organization decide to allow employees to engage GAI Tools in their work duties, then it is critical to identify the GAI Tools that they are authorized to use and then adopt an Acceptable Use Policy to govern such usage on an organization-wide basis.

The basic tenets of this policy should set explicit guardrails for the use of approved GAI Tools that aim protect data from unauthorized access, disclosure, modification, loss, or damage while using GAI Tools. Organizations should put teeth into the policy by making it clear that any violation may result in disciplinary action, up to and including termination of employment. Sample policy terms include the following:

- Employees may use approved GAI Tools for authorized and legitimate purposes that are consistent with our professional and ethical obligations.
- Employees may not utilize GAI Tools to engage in any unlawful or unethical activity.
- Employees must attend company-provided training on the appropriate, lawful, and ethical use of approved GAI Tools.
- Employees are prohibited from entering into GAI tools any information that is sensitive, confidential, privileged, or protected by law. This prohibition includes any data that contains personally identifiable information (PII), trade secrets, intellectual property, financial information, or other sensitive data of our clients, our organization and employees, or third parties. Personally identifiable information refers to information that can be used to identify, locate, or contact an individual, alone or when combined with other personal or identifying information.
- Employees must never use GAI Tools as a substitute for individual critical thinking or the production of any finalized substantive work product. Although it may be used as a tool of enhancement or to aid in the development of initial drafts, no finalized version of any such materials should be submitted to any supervisor, manager, client, court, government agency, etc., without a thorough verification and review.
- Employees are prohibited from entering into GAI Tools any data that is intended to result in offensive, discriminatory, or inappropriate content.
- In utilizing GAI Tools, employees must be mindful of avoiding any biases, discriminations or other prejudices that may be embedded or inherent in the program.
- Employees who become aware of an actual or potential violation of this policy, should promptly report such information.
- Any use of GAI Tools under this policy must comply with the relevant company policies and procedures, internal controls, and guidelines.

Once your organization has adopted an Acceptable Use Policy, creating and launching a mandatory training program for all employees is the next, essential step in maximizing the use of GAI Tools while mitigating the risks.

Mandate Employee Training for GAI Tools

Your organization should launch mandatory training program to ensure that your employees: (1) understand the guardrails set forth in the Acceptable Use Policy for the lawful and ethical use of GAI Tools, and (2) learn how to effectively and safely integrate GAI Tools into their daily workflows and projects that will improve efficiency while shielding data from inadvertent disclosure. This two-prong approach requires collaboration among your organization's lawyers and your organization's IT, Knowledge Management, and Project Management gurus to develop a training module that is tailored to the various job functions of your employees and the type of tasks and data they typically handle on a day-to-day basis. The overall goal is to provide hands-on skills training that will enable your employees to identify appropriate tasks for utilizing GAI Tools and then optimize the performance and efficiency of those tools – all within the parameters of the Acceptable Use Policy. At a minimum, the training module should:

- Educate employees regarding what GAI Tools are and how they work;
- Explain the risks inherent in GAI Tools (e.g., inaccuracy, bias, plagiarism; misuse/misinformation; and ethical and data privacy concerns);
- Provide a tutorial on best practices for safe and effective use of the GAI Tools approved by your organization and consistent with the Acceptable Use Policy; and
- Offer hands-on training for particular departments and/or job functions regarding implementation of GAI Tools in various workflows to automate repetitive or

tedious tasks, enhance work product, and improve efficiency and productivity.

Suffice it to say, the availability and functionality of GAI Tools is constantly and rapidly evolving. Lawmakers and AI developers continue to wrestle with ways to harness what's best about the technology while mitigating – and where possible eliminating—the potentially destructive impact of the known and unknown risks inherent in it. In the meantime, organizations are wise to monitor developments from both a technology and regulatory standpoint and update their Acceptable Use Policies and training programs as necessary.

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Can We Chat(GPT)? Maximizing Use and Mitigating Risks of Generative AI Engines

Diane Fleming Averell
Morristown, New Jersey

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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RPC 1.1: Competence

Comment 8 to Rule 1.1:

"[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...." (emphasis added).

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RPC 1.6: Duty to Maintain Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

***

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Acceptable Use Policy

- Employees may use approved Generative Artificial Intelligence (GAI) Tools for authorized and legitimate purposes that are consistent with our professional and ethical obligations.
- Employees may not utilize GAI Tools to engage in any unlawful or unethical activity.
- Employees must attend company-provided training on the appropriate, lawful, and ethical use of approved GAI Tools.

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Acceptable Use Policy

- Employees are prohibited from entering into GAI tools any information that is sensitive, confidential, privileged, or protected by law. This prohibition includes any data that contains personally identifiable information (PII), trade secrets, intellectual property, financial information, or other sensitive data of our clients, our organization and employees, or third parties.

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Acceptable Use Policy

- Employees must never use GAI Tools as a substitute for individual critical thinking or the production of any finalized substantive work product. Although it may be used as a tool of enhancement or to aid in the development of initial drafts, no finalized version of any such materials should be submitted to any supervisor, manager, client, court, government agency, etc., without a thorough verification and review.

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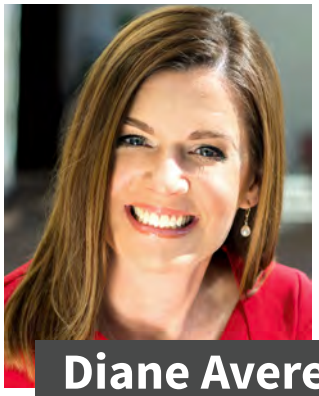
Mandatory Employee Training

- Educate employees regarding what GAI Tools are and how they work;
- Explain the risks inherent in GAI Tools (e.g., inaccuracy, bias, plagiarism; misuse/misinformation; and ethical and data privacy concerns);
- Provide a tutorial on best practices for safe and effective use of the GAI Tools approved by your organization and consistent with the Acceptable Use Policy; and
- Offer hands-on training for particular departments and/or job functions regarding implementation of GAI Tools in various workflows to automate repetitive or tedious tasks, enhance work product, and improve efficiency and productivity.



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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

Industries
- Chemical
- Manufacturing
- Medical Device

Recognitions
- Recognized in BTI Client Service All-Stars list 2022 & 2020.
- Included in The Best Lawyers in America®, Mass Tort Litigation / Class Actions - Defendants, Product Liability Litigation - Defendants, 2020-2024 list.
- Included in the New Jersey Super Lawyers, Personal Injury-Products: Defense, 2016 - 2023; New Jersey Super Lawyers "Rising Stars" List, 2009-2010, 2013 lists.
- 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

Let's Be Real: "Deep Fakes" in Trial Practice

Mark Adkins
Bowles Rice (Charleston, WV)

Let's Be Real: "Deep Fakes" in Trial Practice
By Mark Adkins

"Deepfakes" are hyper-realistic digital falsifications of images, video, and audio created with artificial intelligence that can alter an image, re-create someone's voice, or map one person's movements and speech onto footage of another person.[1] In the blink of an eye, artificially generated images and videos went from obviously photoshopped to a quality so indistinguishable from reality that millions of X, the platform formerly known as Twitter, users can be convinced that the Pope is the newest member of BTS, a South Korean boy band. As may be evident from the recent viral deepfake image of the supreme pontiff in a $4,000 designer white puffer coat, this technology is not reserved for the refined scholars and altruists of the world but is available to the entire populous including the least sophisticated among us.

If you have ever worried that artificial intelligence is simplifying the legal profession to the point where lawyers will soon become obsolete, fear not, because deepfake evidence will provide you with job security and make your life as a trial lawyer a lot more complicated.

Trial lawyers have long appreciated the persuasiveness and impact of video, audio, and photographic evidence on a jury, and now deepfakes have the potential to upend some of the most powerful defenses. Deepfakes and accusations of deepfakes have begun permeating courtrooms and depositions, and it is time for trial attorneys to take notice and precautions.

How are Deepfakes Made?
The idea that deepfakes are difficult to create and utilized by only those well-versed in computer science or technology could not be further from the truth. The technology used to create deepfakes mimics the neural networks of the human brain, so that the computer learns and processes information like a human. In machine learning, artificial "neural networks" connect to each other to take in, classify, and validate data. Once data is validated (i.e., the neural network confirms that an image of a human is indeed a human), the neural network can start to learn from new data sources and predict outcomes. This is how Facebook's facial recognition technology works—it uses layers of artificial neural networks to process tagged images of people and then uses that knowledge to predict the identity of untagged images.

Generative adversarial network (GAN) is a type of machine learning that uses two of these neural networks and essentially pits them against each other. One network tries to "fool" the other network by generating fake audio, visual, or video data, and the other network tries to predict whether the data is fake. As the process is repeated, the network generating the data improves and creates more realistic fake data, which is how deepfakes are manufactured. There are several types of GAN models, but what is important to know is that these models are available in open-source platforms to anyone with an internet connection. Indeed, the reality is that anyone which a smartphone or a computer and a little time can create a deepfake.

Evidentiary Issues
One of the most highly contested legal issues surrounding deepfake technology is whether to raise the bar on authenticating evidence.[2] In discussing potential pitfalls surrounding deepfake technology related to litigation, consider the risks in health care matters, specifically in cases where medical records are admitted into evidence.[3] Deepfake technology can alter MRI or CT images to embellish or disprove medical diagnoses.[4] In any case, photographs and video footage can be modified to fake an individual's presences in a case to create an alibi or

1 Elizabeth Caldera, Reject the Evidence of Your Eyes and Ears: Deepfakes and the Law of Virtual Replicants, 50 Seton HALL L. REV. 177 (2019) (quoting John Brandon, Terrifying High-Tech Porn: Creepy 'Deepfake' Videos Are on the Rise, Fox NEWS (Feb. 16, 2018).

2 Agnieszka McPeak, The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood, 23 Vand. J. Ent. & Tech. L. 433 (2021).

3 Rachael L. Anna, Deepfakes: What Are They, and Why Are They Dangerous?, 33 S.C. LAW. 34 (2021).

4 33 S.C. LAW. 34 (2021).

destroy a witness's credibility. Therefore, courts may see deepfakes being used as the catalyst for claims, creating contradictory evidence from both sides, or generating routine objections over whether evidence that would have been unquestionable several years ago is a AI-generated deepfake.[5]

Imagine this scenario: You are presenting your next piece of evidence when opposing counsel objects on the basis that it is a suspected deepfake. What do you do? One strategy is to counter the objection as vague and unsubstantiated and demand a specific basis for the objection. Another option is to rely more heavily on the means of authentication. The Federal Rules of Evidence provide the steps one should take when considering multi-media evidence.[6] To demonstrate that your evidence is what you say it is, Rule 901 of the FRE states that "the proponent must produce evidence sufficient to support a finding" of that goal.[7] If accusations of deepfakes are likely to be an issue at trial, then you should prepare multiple means of authentication to overcome this burden, such as introducing a witness with knowledge of the evidence, relying on the distinctive characteristics of the evidence, obtaining opinions from witnesses familiar with the voice or image of the person in the evidence, or proffer evidence that explains the process of how this data was recorded and preserved.

From a practical standpoint, trial lawyers can develop strategies and plans to address issues relating to deep fakes as they arise during the course of a trial or deposition. The first strategy should be education and prevention—understand and keep up with the technology that is available to those that seek to falsify evidence, and where such evidence is being used. Known issues should be addressed at the pretrial stage, and attorneys should be prepared with alternative means of authentication.

Forensic experts can also be used to either challenge suspicious evidence or assist in the defense of evidence that has been wrongly labeled a deepfake. In addition to experts, discovery vendors use artificial intelligence and have tools to analyze metadata to determine if a video or image has been manipulated or AI-generated. Also, clients and witnesses should be educated on the issues that deepfakes present, specifically those individuals that are charged with authenticating documents and records. If witnesses get caught flatfooted in a deposition or on the witness stand about whether any documents or files have been altered, an unprepared answer could lead to damaging testimony or even exclusion.

Conclusion

A number of states, including California, Virginia, Texas, Minnesota and more recently, Illinois, have enacted legislation to address threats posed by deepfake technology.[8] At the federal level, the DEEP FAKES Accountability Act was introduced to combat deepfake disinformation by imposing criminal and civil penalties.[9] Outside of the emerging deepfake laws, courts must serve as gatekeepers in vetting deepfake evidence in the fact-determining process. As the technology to create deepfakes becomes more prevalent, courts will ultimately manage challenges posed by the falsified, hyper-realistic media. Parties on both sides need to be aware of the evidentiary issues associated with deepfake technology and equip themselves with strategies and arguments to prevent the admission of this powerful "evidence."

5 Riana Pfefferkorn, "Deepfakes" in the Courtroom, 29 B.U. PUB. INT. L.J. 245 (2020).

6 Matthew Ferraro & Brent Gurney, The Other Side Says Your Evidence is a Deepfake. Now What? (Dec. 21, 2022).

7 Fed R. Evid. 901(a).

8 Isiah Poritz, States Are Rushing to Regulate Deepfakes as AI Goes Mainstream, BLOOMBERG, June 20, 2023, https://www.bloomberg.com/news/articles/2023-06-20/deepfake-porn-political-ads-push-states-to-curb-rampant-ai-use#xj4y7vzkg

9 H.R. 2395, 117th Cong. § 1 (2021-2022) (requiring deepfake creators to embed a digital watermark or include a clearly articulated disclosure of the audio or video's alteration).


LET'S BE REAL:
Deep Fakes in
Trial Practice
J. Mark Adkins, Esq.
Bowles Rice


WHAT IS A DEEP FAKE?
• A Deep Fake is an image or video that has been digitally manipulated to replace one person's likeness convincingly with that of another.
• Deep Fakes are the manipulation of facial appearance through deep generative methods.
• (Thanks, Wikipedia)
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LET'S BE REAL: DEEP FAKES 2 TRIAL NETWORK NAPA 2023

EXAMPLE: POPE FRANCIS IN A PUFFER JACKET

EXAMPLE: POPE FRANCIS IN A PUFFER JACKET

- This Deep Fake surfaced in the Spring of 2023
- This image instantly went viral
- This image was created by a 31-year-old construction worker who liked to play around with the artificial-intelligence image generator
  - *He got the idea while taking mushrooms*

LET'S BE REAL: DEEP FAKES 4 TRIAL NETWORK NAPA 2023

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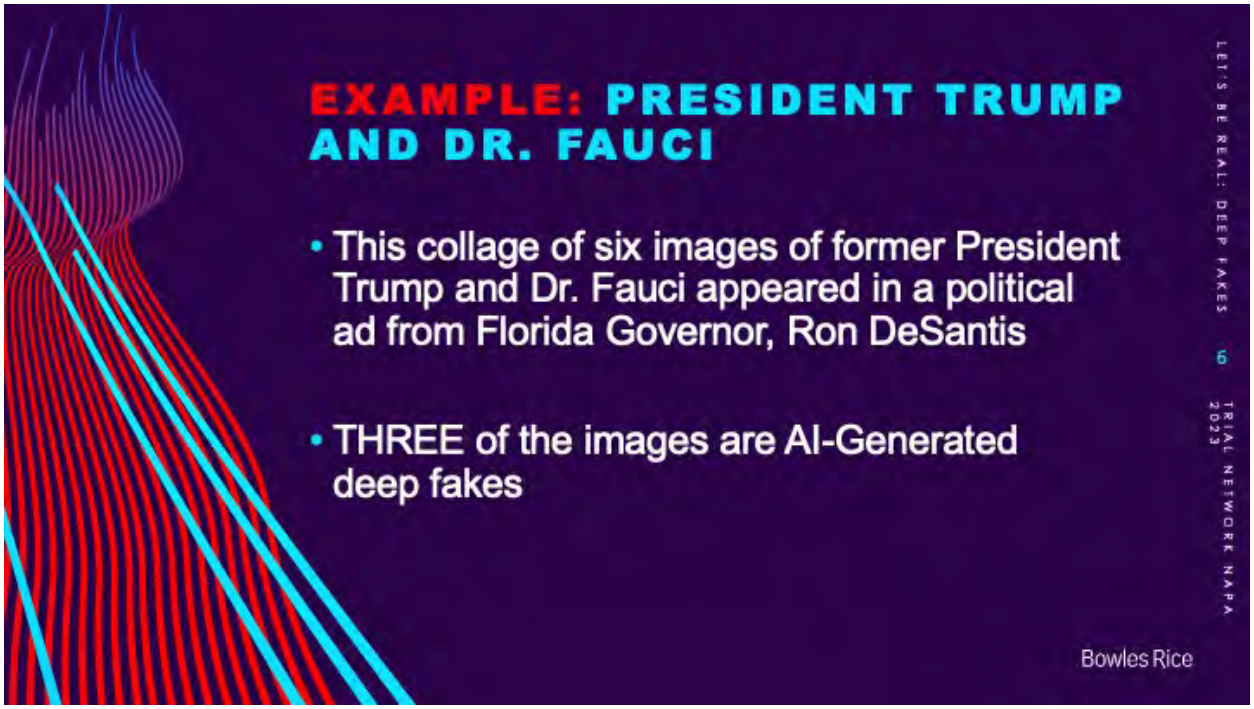
EXAMPLE: PRESIDENT TRUMP AND DR. FAUCI
Fake
REAL LIFE TRUMP
TELEVISION,
Fake
Fake


EXAMPLE: PRESIDENT TRUMP AND DR. FAUCI
• This collage of six images of former President Trump and Dr. Fauci appeared in a political ad from Florida Governor, Ron DeSantis
• THREE of the images are AI-Generated deep fakes
LET'S BE REAL: DEEP FAKES 6 TRIAL NETWORK NAPA 2023
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EXAMPLE: PRESIDENT TRUMP AND DR. FAUCI

- The DeSantis campaign did not apologize for using the fake images
  - *Citing other campaigns, such as the Trump campaign, for also using deep fakes*

EXAMPLE: MARK CLIMBING EVEREST

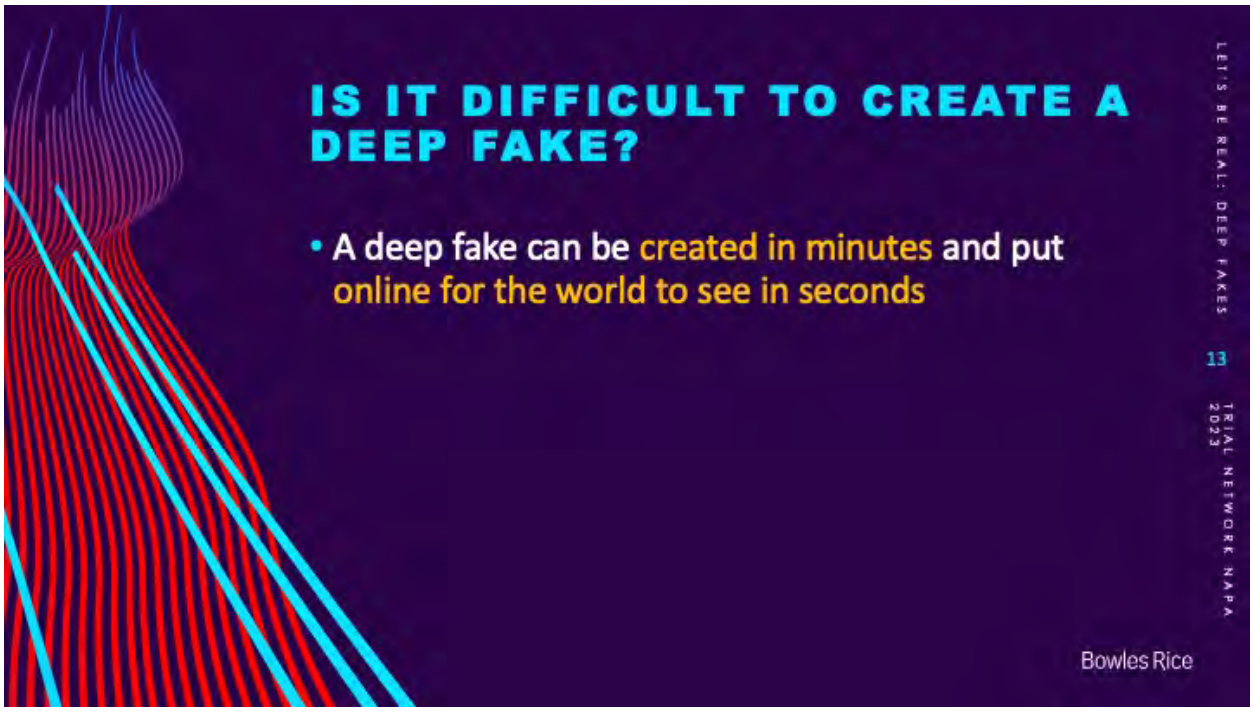

EXAMPLE:
MARK WINNING AN OSCAR

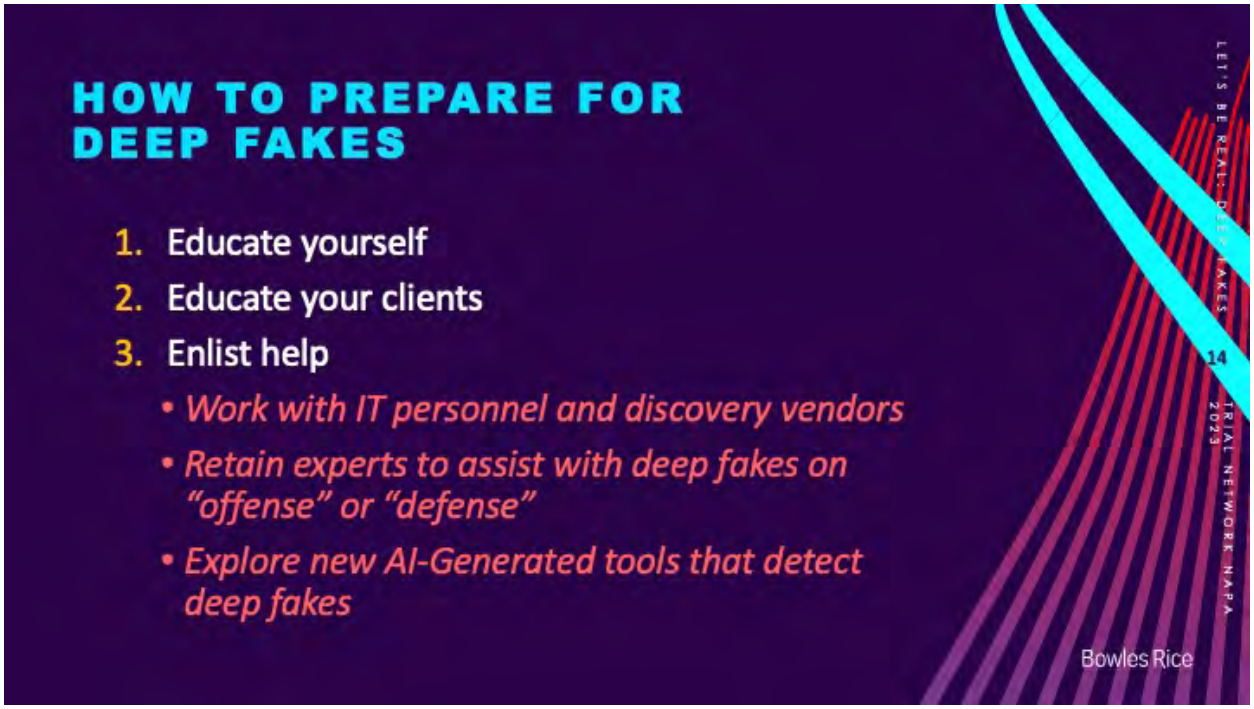

EXAMPLE: MARK
WINNING A MARATHON
ith us, it's personal.

EXAMPLE: MARK RACING FORMULA ONE

IS IT DIFFICULT TO CREATE A DEEP FAKE?

- No expertise is needed
  - *Before AI, you needed technical experts to create fake images or videos*
- Apps fueled by Generative Artificial Attendance
  - *Make this process quick, easy, and hard to detect to the "normal" eye*


IS IT DIFFICULT TO CREATE A DEEP FAKE?
• A deep fake can be created in minutes and put online for the world to see in seconds
LET'S BE REAL: DEEP FAKES
13
TRIAL NETWORK NAPA 2023
Bowles Rice


HOW TO PREPARE FOR DEEP FAKES
1. Educate yourself
2. Educate your clients
3. Enlist help
• Work with IT personnel and discovery vendors
• Retain experts to assist with deep fakes on "offense" or "defense"
• Explore new AI-Generated tools that detect deep fakes
LET'S BE REAL: DEEP FAKES
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TRIAL NETWORK NAPA 2023
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DEEP FAKES AT TRIAL
What if you suspect the opposition is relying on a deep fake?
• Seek discovery related to the metadata and chain of custody for the evidence
• Develop an offensive strategy with your client and technical expert
LET'S BE REAL: DEEP FAKES
17
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WHERE COULD DEEP FAKES SHOW UP?
1. Defamation claims
2. Estate claims
3. Personal injury claims
4. Employment claims
5. Criminal matters
LET'S BE REAL: DEEP FAKES
18
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THANK YOU!
CONGRATULATIONS
YOU ARE NOW AT
UHURU PEAK
AFRICA'S HIGHEST
J. Mark Adkins, Esq.
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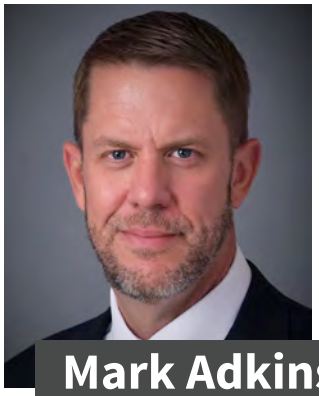

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Mark Adkins

Partner | Bowles Rice (Charleston, WV)

Mark Adkins focuses his practice primarily on complex, high-risk commercial litigation in the areas of banking, construction, energy and commercial contract disputes.

With more than two decades of representative experience in litigation work, including numerous tried-to-verdict jury trials, Mark is well positioned to assist clients in the arena of high-risk, “Bet-the-Company” matters.

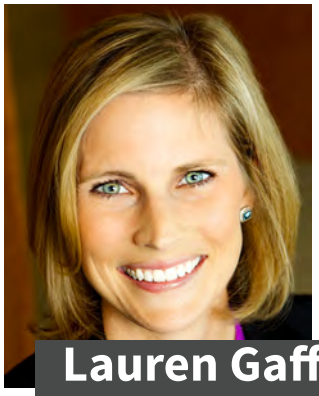
Mark represents banks, lenders and debt collectors in matters involving bank and consumer litigation issues. He also represents clients in matters involving leasing issues, contracts and property rights related to coal and natural gas. He also has significant experience in multi-million dollar construction litigation matters involving commercial, retail and public construction projects.

In addition to his vast litigation experience, Mark is a member of the Bowles Rice Government Relations group. As a registered lobbyist, he regularly works with members of the West Virginia Legislature and administration on behalf of the firm’s clients. Mark served as staff counsel to the West Virginia House of Delegates Judiciary Committee during the 2015 Legislative Session.

Practice Areas
- Business Litigation
- Financial Services Litigation
- Oil & Gas Litigation
- Construction Litigation
- Estate and Trust Litigation
- Professional Liability Defense
- Litigation
- Campaign Finance and Election Law
- Government Relations
- FinTech

Honors
- Ranked by Chambers USA: America’s Leading Business Lawyers (Litigation: General Commercial), since 2022
- Named Best Lawyers’ 2019 Litigation - Banking and Finance Lawyer of the Year in the southern West Virginia region
- Named to The Best Lawyers in America ® (Commercial Litigation Law; Litigation - Banking & Finance; Litigation - Construction; and Government Relations Practice), since 2011
- Peer-Review Rated AV by Martindale-Hubbell
- Recognized by Super Lawyers (Business Litigation), since 2010
- Named a 2020 “State Litigation Star” in General Commercial, Construction, Trust and Estate by Benchmark Litigation

Education
- J.D., West Virginia University College of Law (1997); Member, Moot Court Board of Review
- B.A., Centre College (1994)



Panel: The Inside Scoop on Internal Investigations

Lauren Gaffney
Bass Berry & Sims (Nashville, TN)

The Inside Scoop on Internal Investigations
By Lauren Gaffney

As we move further and further from 2020, when the pandemic brought businesses and the rest of our lives to a grinding halt, we are settling back into old routines and habits and establishing our new normal. One of the most pervasive new normals is hybrid workplaces and other alternative workplace arrangements. A 2023 Pew Research Center survey found that 41% of people with jobs that can be done remotely are working a hybrid schedule and 35% of workers with jobs that can be done remotely are working from home all the time. While the number of fully remote workers has decreased over the last two years, this number is significantly higher than pre-pandemic levels, where only 7% of workers were fully remote.[1]

The conversation around hybrid and remote work is usually about promoting flexibility and work-life balance while maintaining productivity and company culture, but the proliferation of hybrid and remote work impact many other aspects of companies and their employees. One such area is internal investigations. Hybrid and remote work have created new logistical challenges for internal investigations, including gathering relevant documents, interviewing employees and protecting attorney-client privilege.

Internal Investigation Basics
An internal investigation is a formal inquiry performed by a company to determine whether laws, regulations or organizational policies and procedures may have been violated and, if so, what remedial actions the company should take. There are many potential triggers for an investigation, including: a government body contacting the company; allegations from a current or former employee; complaints from a customer, competitor or other third party; reports from an internal or external auditor; or abnormal trends in data or finances. There are numerous benefits to a properly conducted internal investigation. A company can get an early and accurate assessment of potential legal exposure, identify and discipline or remove employees involved in misconduct, identify policies and procedures that need remediation and bolster credibility with enforcement authorities by demonstrating the company's commitment to ethics and compliance.

The first step in any internal investigation is deciding whether to actually conduct an internal investigation. Potential investigators should consider the nature and severity of the allegations or other triggering event and whether the allegations arose from a credible source and have a basis in fact. After deciding that an internal investigation should be conducted, a company should fully scope the problem, determine who should conduct the investigation, preserve and collect documents, conduct witness interviews, review and analyze the information, communicate the results of the investigation and recommend remediation as necessary.

These internal investigation basics have not changed in the remote and hybrid working world, but new considerations may be necessary to ensure internal investigations produce the relevant facts and documents from the relevant people so that investigators can make a fully informed decision about corrective actions.

Gathering Documents
Not only do employees spend more time working from home than ever before, but numerous technology platforms and applications allow documents and data to be stored and shared instantaneously. This means documents, notes and other information relevant to an investigation may be stored in multiple locations, and many of those locations are likely to be outside of a company's physical office. This presents unique challenges for eDiscovery and litigation holds.

When litigation is reasonably anticipated, both state and federal rules of civil procedure require parties to take reasonable steps to preserve potentially relevant,

1 Kim Parker, About a third of U.S. workers who can work from home now do so all the time, Pew Research Center (Mar. 30, 2023), https://www.pewresearch.org/short-reads/2023/03/30/about-a-third-of-us-workers-who-can-work-from-home-do-so-all-the-time/.

electronically stored records and information.[2] A litigation hold puts the organization and key custodians on notice that certain information must be preserved.[3] Litigation holds typically include a brief description of the investigation, a list or description of the types of data, information and documents that are relevant to the hold, the locations or sources of potential data, ramifications for failing to preserve responsive data, and contact information if a custodian has questions concerning preservation.[4]

It is imperative that companies do not wait until problems arise or a litigation hold is in place to begin considering where documents are stored and how to retrieve these documents. Companies should implement strong data policies and security protocols to improve data management and better prepare organizations for internal investigations. A frequent issue with remote and hybrid work is the use of personal devices and email to conduct business. Policies should address whether personal devices and personal email may be used, and if so, outline security measures and retention requirements to ensure data is protected. Companies can bolster security safeguards by prohibiting employees from conducting business unless the employee is connected to a company server and by using VPNs.[5] Policies should also address the use of informal and ephemeral chat applications, such as, WhatsApp, Slack or Mircrosoft Teams.[6]

Data mapping can assist companies in tracking where documents are located, who is generating business data and on which devices. Data mapping is the process of identifying, understanding, and plotting what information an organization has, how the data flows through the organization, who has access to the data, and where the information is stored. Data maps provide details, such as: whether the company collects protected information and what types; whether protected data is kept electronically, on paper, or both; the locations of the data, both within the company and as it resides with third parties; and data security measures that protect the data, such as, whether data is encrypted. Effective data maps help investigative teams quickly determine sources and potential custodians relevant to an investigation.[7]

Once an issue arises and an internal investigation is initiated, investigators should utilize the data map and company policies to consider where key information may reside and mobilize the IT team to perform litigation hold procedures. The IT team should be prepared to turn off automatic deletion for emails and chat platforms, lock or backup central file storage, force preservation settings to company-controlled mobile devices and applications through a mobile device management system, and perform collections from company controlled systems.[8] Even if company policies prohibit the use of personal devices and email for conducting business, investigators should confirm with custodians that no relevant documents are stored on a personal device to which investigators and the IT team do not have access.

Additional safeguards for ensuring proper retention of responsive data include: (1) sending data custodians regular reminders that the litigation hold is in place; (2) encouraging custodians to keep all relevant communications and work product in the company's authorized email and system networks; and (3) conducting training on personal listening devices, such as Amazon's Alexa, in custodians' homes.[9]

If a company has an existing eDiscovery platform, this can be invaluable in conducting internal investigations. Today's best platforms offer built-in artificial intelligence technologies like machine learning, natural language processing and data analytics, which can comb through data quickly to identify relevant data and greatly reduce document review time. Additionally, Cloud-based platforms can give investigators convenient access to diverse stores of data from remote locations and support the collaborative, interdepartmental work that investigations typically involve.[10]

Depending on the scope, complexity, budget and deadlines for an internal investigation, it may be beneficial to enlist the help of a technology vendor or consultant to assist with gathering documents. If a company has an existing eDiscovery provider, this is a good place to start as the company has an established relationship with the vendor.[11]

2 Fed. R. Civ. P. 37(e); Sterling Miller, Litigation Holds: What in-house counsel needs to know, Thomson Reuters, (Sept. 19, 2022), https://legal.thomsonreuters.com/en/insights/articles/litigation-holds-what-in-house-counsel-need-to-know.

3 Sterling, supra note 2.

4 Samantha V. Ettari, INSIGHT: Legal Holds During the Pandemic – Don't Forget Personal Devices, Bloomberg Law (May 27, 2020), https://news.bloomberglaw.com/us-law-week/insight-legal-holds-during-the-pandemic-dont-forget-personal-devices.

5 Epiq, Best Practices for Tackling Internal Investigations in the Era of Remote Work, JD SUPRA (May 26, 2021), Best Practices for Tackling Internal Investigations in the Era of Remote Work | Epiq - JDSupra.

6 eDiscovery Pitfalls in a Remote World, Vinson&Elkins (Mar. 27, 2023), https://www.velaw.com/insights/ediscovery-pitfalls-in-a-remote-world/.

7 Epiq, supra note 5.

8 eDiscovery, supra note 6.

9 Ettari, supra note 4.

10 David Carns, Solving for the Top 3 Challenges of Conducting Remote Internal Investigations, ACEDS (Mar. 3, 2021), Solving for the Top 3 Challenges of Conducting Remote Internal Investigations - ACEDS.

11 Epiq, supra note 5.

Interviewing Employees

With hybrid and remote work environments, interviews related to internal investigations frequently occur remotely through audio only or audio-visual platforms. Remote interviews pose many challenges, but there are a few benefits to remote interviews, including, comfort, efficiency, cost-effectiveness and consistency.[12] An interviewee may feel less nervous and intimidated when being interviewed from the comfort of their home, which can result in more open dialogue.[13] Remote investigations typically leverage existing technology platforms, which can make them both more efficient and less expensive. Additionally, it is more likely that a single, core investigative team will be able to conduct all of the interviews when interviews are remote, which results in a more consistent approach in terms of tone, execution and output of the investigation.[14]

Before the investigative team conducts any interviews, the team will need to select the medium that they will use. Video platforms are preferred to audio-only platforms. Video platforms allow investigators to rely on the non-verbal cues and body language that they would ordinarily watch for in traditional, in-person interviews. Additionally, interviewers will be able to see if there are any unauthorized people present in the background during the interview. If the investigative team has access to a video platform, the team should select whatever platform they feel most confident and comfortable using to, hopefully, minimize technological issues during the interviews. Other technological considerations include confirming with the interviewee that they have access to reliable internet and that the interviewee understands how to join the conference on the chosen platform.[15]

When conducting the actual interview, remember that although the interview medium is different, the fundamentals of conducting an interview remain the same. Interviewers should still ask open-ended questions, ensure the interviewee does most of the talking, actively listen and respond to evasiveness.[16] Interviewers may find it more difficult to establish rapport with interviewees because video tools often disrupt the natural flow of conversation. It can be especially difficult if the interviewee is represented by counsel, as this increases the risk of participants speaking over one another. It can be beneficial to spend a little more time at the beginning of the interview on non-interview topics to establish rapport, and it is often helpful to set guidelines at the outset to avoid multiple participants speaking at once. For example, if an interviewee is represented by counsel, the interviewer can instruct the interviewee to pause for a moment before answering the interviewer's question to permit time for counsel to interject.[17]

A common concern with remote interviews is security and privacy. It is important to ensure that the video platform is secured against potential hackers. A company's internal system may be sufficiently secure, but using meeting passwords and the "waiting room" functionality can help ensure only permitted participants are on the call.[18] Even if only permitted participants are able to log on to the call, an interviewee may have someone else in the room that interviewers cannot see or utilize email or text messaging to communicate with someone else throughout the interview. To mitigate these risks, the interviewer should remind the interviewee that the interview is intended to be private and confirm that there is no one else present with the interviewee. Interviewers should then request that the interviewee not communicate with outside parties during the interview.[19]

Another challenge unique to remote interviews is the recording feature available on most video platforms. It is typically best not to record the interview because it is possible that the recording will become discoverable. Interviewers should double check that they are not recording the interview and make it clear to the interviewee that the interviewee is not permitted to record the interview and the company does not consent to any recording.[20] If the company decides that they want the interview recorded, then the company should consider the laws and regulations governing unauthorized recordings. Some state laws require the consent of only a single party to the communication to permit recording, whereas other states require that all parties consent to a recording. Interviewers should seek an interviewee's express consent to record in all-party consent states.[21]

Protecting Attorney-Client Privilege

Hybrid and remote work environments present new considerations for preserving attorney-client privilege. Attorney-client privilege protects communications between counsel and a client made in confidence for

12 Leading Practices for Conducting Interviews in a Remote Investigation, FTI Consulting (2020), Leading Practices for Conducting Interviews | FTI Consulting; The Challenges (And Surprising Benefits) of Conducting Remote Investigations, FTI Consulting (2020), Challenges of Conducting Remote Investigations | FTI (fticonsulting.com).

13 Leading Practices for Conducting Interviews, supra note 12.

14 Challenges of Conducting Remote Investigations, supra note 12.

15 Leading Practices for Conducting Interviews, supra note 12.

16 Id.

17 Six Tips to Conduct Remote Witness Interviews, Wagner Law (last updated Aug. 29, 2023), Six Tips to Conduct Effective Remote Witness Interviews | Wagener Law | Neutral Investigations | Los Angeles, San Diego, Orange, Ventura.

18 Id.

19 Leading Practices for Conducting Interviews, supra note 12.

20 Lisa LeCointe-Cephas et al., Best Practices for Internal Investigations During Covid-19, Bloomberg Law (Apr. 2020), Health Care Operations & Compliance, Professional Perspective - Best Practices for Internal Investigations During Covid-19 (bloomberglaw.com)

21 Linehan et at., Considerations for Conducting Internal Investigations Remotely, Steptoe (Mar. 30, 2020), https://www.steptoe.com/en/news-publications/considerations-for-conducting-internal-investigations-remotely.html.

the purpose of giving or receiving legal advice. The presence of third parties to a communication may violate the confidentiality requirement and result in waiver of the privilege.[22] Federal law and State law differ on exactly which third parties are permitted, but generally, agents of the attorney, such as a law clerk, and necessary third parties, such as an interpreter, will not deprive the communication of its confidential and privileged character. On the other hand, a casual and disinterested third person would destroy the confidentiality of the communication. There is more variability in the law from state to state and in state versus federal law when the third party is not an agent of the attorney but is also not wholly disinterested. [23] Parties should carefully consider whether the presence of such a third party is necessary to avoid risking waiver of the privilege.

As discussed above, it is more difficult to control the interview environment when conducting remote interviews, so there is a greater chance that third parties may be physically present for or within earshot of the interviewee. The presence of unnecessary and unauthorized parties, such as the interviewee's family, friends or other cohabitants, risk waiver of the privilege. Interviewers can mitigate this risk by scheduling interviews at times when the interviewee is more likely to be alone in the interviewee's workspace, reminding the interviewee at the start of the interview that no third parties are permitted to be present (except for interviewee's counsel or other necessary parties) and documenting the interviewer's request and belief that no third parties are present.[24]

Conducting internal investigations in a hybrid or remote environment also increases the likelihood that documents will be transmitted via email. The investigative team should ensure that privileged documents are marked as "confidential and privileged" and minimize the number of people that these documents are sent to. Double checking the "To" and "cc" fields to ensure that only essential persons are included on the emails, and that no distribution lists are included, can help avoid distribution mistakes. Again, the investigative team should use only their work emails and not their personal emails for communications related to the internal investigation. A personal email account may be shared or accessible by a spouse or other family member, which creates a risk of privilege waiver.[25]

While the fundamental principles of conducting an internal investigation remain largely the same in the context of remote work environments, companies should adapt existing polices, procedures and strategies as needed in order to account for hybrid and other alternative work models.

22 1 McCormick on Evid. §91 (8th ed.) (July 2022 Update).

23 Id.

24 Linehan, supra note 21. https://www.steptoe.com/en/news-publications/considerations-for-conducting-internal-investigations-remotely.html

25 Id.

THE INSIDE SCOOP ON INTERNAL INVESTIGATIONS

November 4, 2023

BASS BERRY + SIMS

CENTERED TO DELIVER SINCE 1922

MEET THE PANEL – ADAM BALFOUR

- Adam is VP and GC for Corporate Compliance and VP for Global Risk Management at Bridgestone Americas
- Adam recently published a book titled *Ethics & Compliance for Humans*.

MEET THE PANEL – KIM WATSON

- Kim is Senior Vice President and General Counsel at EdFinancial Services

MEET THE PANEL- KATHRYN WALKER

- Kathryn is a Member at Bass, Berry & Sims
- Kathryn's daughter is a (second-generation) champion Highland Dancer.

MEET THE PANEL – LAUREN GAFFNEY

- Lauren is a Member at Bass, Berry & Sims
- Lauren won the Collegiate National Cycling Championship in Berkeley, CA in 2003 (Omnium), but now prefers to ride with this crew.

HOW DID WE GET HERE?
Compliance Programs & Internal Investigations

- Compliance Programs: Prevent, Detect and Resolve
- Internal Investigations: Investigate potential wrong-doing and implement corrective action

TOOLS FOR AN EFFECTIVE COMPLIANCE PROGRAM

- Building an effective compliance plan
  - From scratch
  - Evolution
- Compliance Tools

WHERE DO I BEGIN?
Preliminary Questions

- Should I investigate?
  - Nature and severity of the allegations
  - Potential triggers
- Who should investigate?
  - Internal or External
  - Hybrid

WHAT DO I NEED?
Gathering Documents

- Preservation
- Collection
- Pandemic challenges
- Litigation Holds

EPHEMERAL MESSAGING APPS

- Communication platforms that automatically erase messages immediately or after a short amount of time
- DOJ Guidance
  - Effective Policies
  - Employee Training
  - Enforce Policies

WhatsApp

Signal

Telegram

WHO DO I NEED?
The Interview List

- Deciding who to interview
- Determining the order and timing for interviews
  - Complainant → Disinterested → Interested → Target
  - Up then Down or Down then Up?
  - Parallel or Sequential?

HOW DO I GET THE INFORMATION I NEED?
Conducting Employee Interviews

- Interview techniques – Dealing with hesitancy, evasiveness, lies and whistleblowers
  - Techniques for hybrid interviews

- Separating facts, perceptions and emotions in interviews
- To Upjohn or not to Upjohn? That is the question…

Upjohn Warning: In the Matter of Who Had Mickey Mouse First

We are conducting an investigation for the family into certain events related to who had Mickey Mouse first. We believe that you may have facts and/or documents that may be relevant to our investigation and we appreciate you meeting with us.

To be clear, we serve as counsel to the family. Mom and I are not your personal counsel and cannot give you legal advice. If you wish to obtain separate counsel, we will re-schedule this interview so that you may do so and use money from your college fund to pay for this.

In addition, your communications with us, as part of this investigation, are confidential and protected by, among other things, the parent-child privilege. As the family is our client, the parent-child privilege belongs solely to the family because I said so. Accordingly, your Mom and I, in our sole discretion, may elect to waive the privilege and reveal your communications with us to third parties, including your siblings. As part of this investigation, we are interviewing a number of siblings to gain a better understating of the relevant issues. The fact that we are conducting this investigation does not mean we believe you or your siblings have engaged in improper or illegal conduct. It simply is the process through which we ensure that the family maintains the highest standards of integrity. Your candor and honesty are critical to our ability to conduct effectively our investigation. To maintain the integrity of this investigation, we request that you keep our conversations today confidential. We appreciate your cooperation.

May we continue or do you need a snack or to nap first?

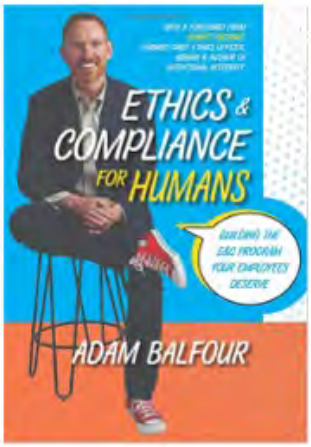
HOW DO I PROTECT THE ATTORNEY-CLIENT PRIVILEGE?

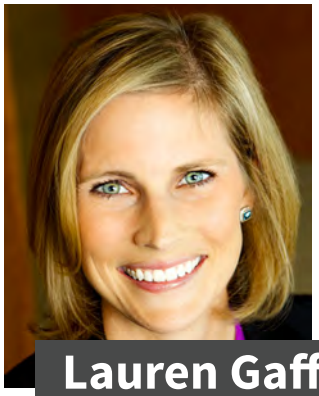
- Protects communications between counsel and client made in confidence for the purpose of giving or receiving legal advice.
- Encourages open and honest communication between attorneys and clients.

ARE WE DONE YET?
Concluding the Investigation

- Next Steps
- Root cause analysis
- Incorporate lessons learned into compliance programming on a go-forward basis
- Documentation

THE MORE YOU KNOW!





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For hospital systems, long-term care providers, physician groups, laboratories and other healthcare providers, Lauren Gaffney analyzes and counsels clients on the regulatory requirements and operational impacts related to day-to-day operations, including those related to fraud and abuse. Lauren also focuses on internal investigations, which involve responding to governmental inquiries regarding potential regulatory, compliance and clinical issues.

Lauren's practice involves Government Enforcement & Compliance – Representing clients in government enforcement & compliance matters; Certificate of Need & CON Hearings – Representing a wide array of healthcare providers; Regulatory & Administrative Proceedings – In addition to CON proceedings, representing clients in regulatory and administrative matters before state and federal agencies, including the Tennessee Ethics Commission, the Tennessee Department of Health, the Tennessee Board of Medical Examiners, the Medicare Appeals Council, and others ; and Mergers & Acquisitions – Advising a variety of national healthcare companies in mergers and other business combinations, as well as providing analysis on the compliance, regulatory and operational implications of potential transactions.

Practice Areas

- Certificates of Need & CON Hearings
- Healthcare Law
- Healthcare Compliance & Administrative Proceedings
- Healthcare Contracting, Regulatory & Operational
- Healthcare Disputes
- Healthcare Fraud & Abuse
- False Claims Act
- Healthcare Reimbursement
- Healthcare Joint Ventures & Syndications
- Healthcare Mergers, Acquisitions & Dispositions
- Compliance & Government Investigations
- Academic Medical Centers
- Children's Hospitals
- Litigation & Dispute Resolution

Accolades

- Leadership Council on Legal Diversity (LCLD) — Fellow (2021)
- Mid-South Super Lawyers "Rising Star" (2014-2021)
- Scholastic Excellence Award — Health Law & Policy; Professional Responsibility
- Vanderbilt Law Review — Notes Editor
- Professional Road Cyclist (2002-2005)
- Collegiate National Cycling Championship (2003)

Education

- Vanderbilt Law School - J.D., 2009; Order of the Coif
- Vanderbilt University - B.S., 2003

Curbing the Authority of Federal Agencies: A Conversation with Isaiah Fields of Axon Enterprises

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

The Supreme Court's Decision in Axon Enterprises, Inc. v. FTC Provides Greater Opportunities for Challenging Administrative Enforcement Proceedings
By Katie Reilly and Natalie West

Last term, the Supreme Court issued its decision in the consolidated cases of Axon Enterprises, Inc. v. Federal Trade Commission and Securities Exchange Commission v. Cochran, unanimously holding that respondents in federal administrative enforcement actions can challenge the constitutionality of those proceedings in federal district courts before exhausting the administrative process.

The Federal Trade Commission Act ("FTC Act") and the Securities Exchange Act ("Exchange Act") give the FTC and the SEC, respectively, the option to prosecute violations of these statutes in federal court or through internal administrative proceedings held before an administrative law judge ("ALJ"). ALJs are removable "only for good cause" as determined by the Merit Systems Protections Board, a separate agency whose own members are similarly removable only for good cause. Each Commission has the authority to review an ALJ's decision, either on its own initiative or at the request of the losing party, and the Commission's final decision is reviewable by the federal courts of appeal.

The respondents in Axon and Cochran filed actions in federal district court to enjoin the administrative proceedings, arguing the Commission's structure is unconstitutional and its proceedings unlawful. Both claimed the ALJs are insufficiently accountable to the President, in violation of separation-of-powers principles. Axon also challenged the combination of prosecutorial and adjudicatory functions in a single agency. As described by the Supreme Court, these "challenges are fundamental, even existential," in that they "maintain in essence that the agencies, as currently structured, are unconstitutional in much of their work." Axon Enterprises, Inc. v. FTC, 598 U.S. 175, 180 (2023).

The district courts dismissed both actions for lack of jurisdiction, concluding the statutory review schemes set forth in both the FTC and the Exchange Acts displace ordinary federal-question jurisdiction when it comes to claims about the agencies' administrative adjudications. But while the Ninth Circuit affirmed in Axon, the en banc panel of the Fifth Circuit reversed in Cochran. The Supreme Court granted certiorari to decide whether federal district courts have jurisdiction to hear such constitutional claims.

The Court answered that question in the affirmative, concluding that neither the FTC Act nor the Exchange Act displaces the district court's jurisdiction under 28 U.S.C. § 1331 to hear constitutional challenges to agency action. Writing for the Court, Justice Kagan relied on three considerations to reach this conclusion, all of which were previously identified in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994). First, the statutory review schemes effectively foreclosed meaningful judicial review of the respondents' constitutional challenges because post-hoc review of an agency's determination cannot remedy (or even address) the "here-and-now" injury of being subjected to unconstitutional proceedings in the first place, irrespective of their outcome. Id. at 192. Second, the challenges in both cases were wholly collateral to the Commissions' ultimate decisions: they challenged "the Commissions' power to proceed at all, rather than actions taken in the agency proceedings." Id. And, third, the respondents' constitutional challenges fell outside the Commissions' expertise. The Court, therefore, held that federal district courts have jurisdiction to resolve the constitutional challenges to the agencies' administrative proceedings before those proceedings take place.

Justice Thomas joined the Court's opinion in full because it "correctly applied precedent to determine" whether the constitutional claims were themselves subject to the administrative review process. But he issued a separate concurring opinion to address "grave doubts" about the constitutionality of the Commissions' ability to adjudicate "core private rights with only deferential judicial review on the back end." Id. at 196. According to Justice Thomas, such rights can only be "adjudicated by Article III courts,"

meaning the statutory review schemes embodied in the FTC Act and the Exchange Act are "likely" unconstitutional. Id. at 203-04. Inviting future challenges, he stated the Court should address that issue "in an appropriate case." Id. at 204.

Justice Gorsuch concurred in the judgment on separate grounds. According to Justice Gorsuch, the district courts' jurisdiction to hear the constitutional questions raised in Axon and Cochran "has nothing to do with the Thunder Basin factors"—a "test we have fabricated." Id. at 204-05. Instead, that jurisdiction "follows directly" from the language of 28 U.S.C. § 1331, which "provides that 'district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.'" Id. at 205 (quoting 28 U.S.C. § 1331) (emphasis added).

Axon could have far-reaching implications for agency enforcement actions. While the FTC and SEC may file enforcement actions in federal court, their internal administrative procedures offer a far more favorable environment for the agencies and, thus, a powerful enforcement tool.

Consider the FTC. If the FTC's five commissioners vote to bring an administrative complaint, the FTC's staff then tries the case in the agency's own administrative court, under its own rules of procedure, and before the agency's ALJ. An adverse decision by the ALJ may then be reviewed by the Commission (which voted to bring the complaint in the first place). While the Commission's final decision is subject to review by a federal court of appeals, that comes only after exhaustion of the time-consuming and costly administrative litigation process that favors the FTC. And even then, appellate review of the Commission's final decision is highly deferential, with findings of fact being deemed "conclusive" so long as they are "supported by evidence." 15 U.S.C. § 45(c).

Given these internal procedures, businesses subject to FTC enforcement actions have long argued the deck is unfairly—and unconstitutionally—stacked against them. The FTC's record certainly suggests as much: as Justice Gorsuch and the Ninth Circuit pointed out, the FTC has not lost an internal proceeding in 25 years. See id. at 216; Axon Enterprise, Inc. v. FTC, 986 F.3d 1173, 1187 (9th Cir. 2021). With those odds, and the potentially massive expense of a years-long administrative proceeding, the prospect of judicial review of any final agency action offers little consolation. That, in turn, gives the FTC added leverage to extract onerous settlement terms the agency would be unlikely to obtain in federal court.

To many, Axon is a significant first step in evening the playing field. Those facing an FTC complaint no longer have to persevere through a lengthy and expensive administrative process to raise constitutional challenges to those proceedings. That means such challenges are not only likely to increase, they are also less likely to evade judicial review when parties settle. And permitting parties to raise such challenges in district court will provide a more impartial forum that allows litigants to develop a factual record supporting those claims—which some have argued is impossible when trapped in FTC administrative actions. For example, more than one amicus curiae argued Axon could not sufficiently develop a factual record to support its constitutional claims due to limitations placed on discovery in internal FTC proceedings.[1]

Further, Axon may ultimately open the door to further erosion of the FTC's authority (as well as that of other agencies). Though the Court deferred on the constitutional challenges to the FTC's and SEC's structure, it seems inevitable that the merits of those questions will eventually reach the Court's docket. Should an adverse decision erode administrative enforcement tools, it remains to be seen whether Congress would step in to reinstate them. In the meantime, such challenges are likely to impact enforcement decisions, as agencies weigh the risks of proceeding internally as opposed to filing enforcement actions in district court in the first instance. One would expect litigants will take to federal court to challenge the FTC's authority to proceed internally when it chooses that path. Those challenges are likely to slow the agency's enforcement efforts, if not outright curtail them if a district court were to stay administrative proceedings while the constitutional questions play out. At this point, however, it remains too early to tell just how impactful Axon will be.

1 Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioner, Axon Enters., Inc. v. FTC, Case No. 21-86 (U.S. May 11, 2022); Brief of Amicus Curiae Pacific Legal Foundation Inc. in Support of Petitioner, Axon Enters., Inc. v. FTC, Case No. 21-86 (U.S. May 13, 2022).


Wheeler Trigg O'Donnell LLP
TRIALS. LITIGATION. APPEALS.
AXON
KATIE A. REILLY
Partner
Interview
Isaiah Fields
CHIEF LEGAL OFFICER


Axon In a Snapshot
Axon is a 30 year-old publicly-traded law enforcement technology company
Best known for TASER electrical weapons and as a market leader in the body worn camera and digital evidence management space
New York
Los Angeles
Clients = some of the largest cities in the world
Chicago
London MET
AXON


Isaiah's Background
Joined Axon in 2011 as in-house litigation counsel
Has worked for years with Jerry Glas of Deutsch Kerrigan
. . . and several other Network firms
Named General Counsel in 2018
Chief Legal Officer in 2022
AXON


VIEVU Acquisition
In May 2018, Axon acquired competitor VIEVU (public safety cameras, digital management evidence)
VIEVU was a small, financially failing supplier; came to Axon as a last resort
Axon, worth $3.5 billion, acquired VIEVU for $13 million
VIEVU's customers included Axon's primary competitors Motorola, Panasonic, Utility, Watchguard, and several others
VIEVU
motorola
WatchGuard
Panasonic
UTILITY

FTC Investigation

- A month after Axon's acquisition, FTC opened investigation into "anti-competitive practices."
- The investigation lasted 18+ months and cost Axon $1.6 million in fees
- 20 to 30 FTC attorneys, paralegals and economists on case

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Anticompetitive Practices

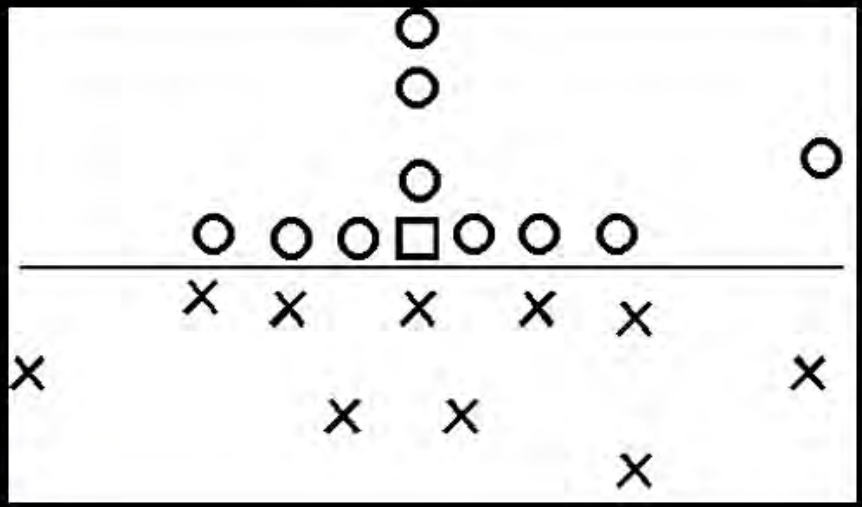
Settlement Discussions (all public record)

- Faced with having to litigate an unwinnable FTC process, and confident the acquisition was lawful and a benefit to customers . . .
  - Axon offered to divest all assets it acquired from VIEVU and give divestiture buyer $5 million
- But the FTC wanted more, demanding a "BLANK CHECK"

Threat of Litigation and FTC Admin Process

- FTC Administrative Process
  - FTC acts as investigator, prosecutor, judge, jury and executioner
  - Limited appeal rights (and on a bad record)
  - FTC hasn't lost within this process <u>in over 25 years</u>
  - Versus FTC's track record in federal court – historically 50% and trending DOWN

A good offense is the best defense



Claims against the FTC

- Quick Google search led to the discovery of ***Whole Foods v. FTC***, where Whole Foods attacked the FTC's process in challenging its acquisition of Wild Oats in 2008

IPOS - AMERICAS DECEMBER 8, 2008 / 4:28 PM / UPDATED 16 YEARS AGO

Whole Foods files suit against FTC in merger battle

WASHINGTON, Dec 8 (Reuters) - Premium grocer Whole Foods Market Inc WFMI.O filed a lawsuit against the U.S. Federal Trade Commission on Monday, saying the agency committed a variety of errors in trying to determine if its merger with rival Wild Oats violated antitrust law.

Axon's case – managing distinct risks

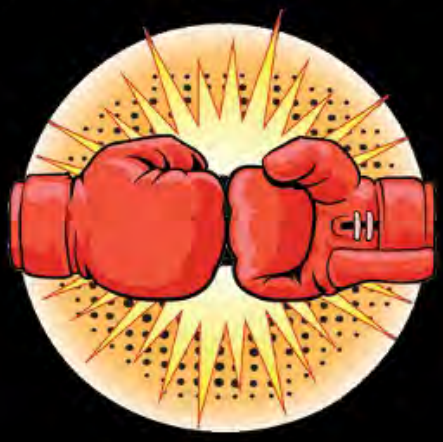
- While preparing its Complaint, Axon also had to plan for shareholder communications
- Needed to balance the tension between optimal positioning for litigation and fair disclosure to investors
- Solution = detailed Complaint, Axon v. FTC landing page, regular and robust updates to investors

AXON

Axon v. Federal Trade Commission Media & Investor Briefing Page

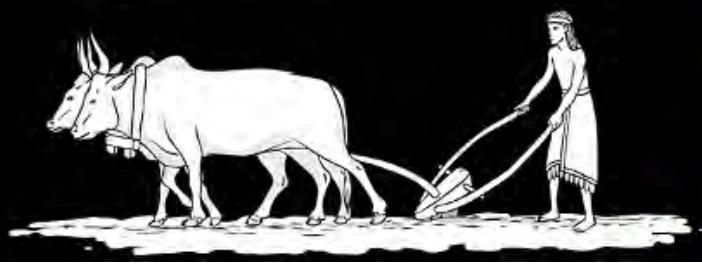
Showtime

- On the morning of January 3, 2020, Axon filed its Complaint against the FTC in Arizona federal court, issued a press release about the litigation, and went live with its landing page
- The FTC filed its complaint against Axon in its administrative court later that same day



Skepticism

- Axon expected immediate support from groups like the Federalist Society, but was largely met with skepticism
- Undeterred, Axon plowed ahead
- Axon defended the FTC case, including **over 60 depositions**
- While prosecuting its case in federal court



Trial Court Jurisdiction

- FTC's motion to dismiss Axon's case was granted on jurisdictional grounds in light of existing precedent
- Unless the Supreme Court overruled prior SCOTUS precedent, Axon's Constitutional challenges had to wait until the conclusion of the flawed administrative process Axon sought to challenge

Ninth Circuit

- Axon appealed and lost a Ninth Circuit panel decision on the jurisdictional question 2 to 1

- Axon's en banc appeal was denied, *but* its request for stay of the FTC case was granted


SCOTUS
· Petition for writ of certiorari was granted
GRANTED
· Oral argument held in November 2022
· In April 2023, nearly 5 years after the acquisition, unanimous 9 -0 Supreme Court ruling upholding Axon's right to challenge the constitutionality of the FTC's structure in federal court
HOME
GUEST
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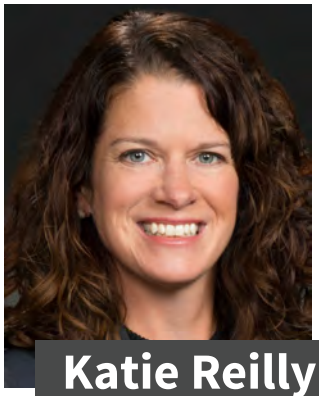
9



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Katie Reilly

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

Katie Reilly represents clients in complex commercial litigation, including antitrust matters and class actions in highly regulated industries. For four straight years, BTI Consulting has named Katie a nationwide Client Service All-Stars MVP based exclusively on input from corporate counsel. Chambers USA ranks her for commercial litigation in Colorado. Katie serves on WTO's 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

Legal Memberships, Activities and Honors
- Chambers USA - Band 2, General Commercial Litigation - Colorado, 2021-2023; Band 3, General Commercial Litigation - Colorado, 2020; Band 4, General Commercial Litigation - Colorado, 2018-2019; Up and Coming, General Commercial Litigation - Colorado, 2016-2017
- BTI Consulting - Client Service All-Star MVP, 2020, 2021, 2022, 2023; Client Service All-Star, 2019
- International Association of Defense Counsel
- The Best Lawyers in America - Bet-the-Company Litigation, 2024; Litigation - Antitrust Lawyer of the Year, Denver, 2021, 2023; Litigation - Antitrust, 2024; Commercial Litigation, 2018-2024; Antitrust Litigation, 2018-2023; Mass Tort Litigation / Class Actions - Defendants, 2022-2024

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

Panel: Autonomous Vehicles - Cases, Rulemaking and Future Considerations

Patrick Seyferth

Bush Seyferth (Troy, MI)

Autonomous Vehicles - Cases, Rulemaking and Future Considerations

By Brian D. King, Charles Basinger, Patrick G. Seyferth, and J. Chandler Bailey

The automotive industry is working to accelerate the implementation of advanced driver assistance systems (ADAS) and, simultaneously, to design and develop autonomous vehicles (AV) in a safe and measured way. Further, as manufacturers and consumers move to keep up with the rapid automated technology advancement, the daily news cycle routinely contains reports questioning the current pace and safety of automated vehicle technology, highlighting challenges cities like San Francisco face with large robotaxi fleets and the massive investments required to further refine and deploy this technology on a larger scale. On August 4, 2023, the Wall Street Journal reported that San Francisco (dubbed "America's most tech-forward city"), was "having doubts about self-driving cars."[1] Showing how swiftly the winds shift in this space, less than one week later, the California Public Utilities Commission voted in favor of two AV proposals. Specifically, Cruise and Waymo, two pioneers in the AV space, were given the green-light to charge fares for their fully driverless ride-hailing service throughout the city of San Francisco. Cruise and Waymo also operate in other major metropolitan areas, including Phoenix (AZ), and Austin (TX), and Cruise has announced plans to begin operations this year in Houston (TX), Nashville (TN), Miami (FL), and Atlanta (GA).

The deployment of both ADAS technologies and highly automated vehicles (e.g., AVs – SAE Level 4 and 5) is now a reality and the pace of innovation is only increasing. This article provides an overview and discussion of general issues related to the development and roll-out of these technologies, including litigation considerations, government regulations, and marketing/advertisement implications.

ADAS Background – Where have we been?

In general, ADAS can be defined as any vehicle system that assists a driver in safely operating a vehicle. There are several distinct levels of ADAS technology – the commercially available systems that provide steering and speed inputs under certain conditions without driver influence – including audio and visual warnings and automatic emergency braking. Because of the wide variations in the levels of automated driving features and the need for a common nomenclature, the Society of Automotive Engineers ("SAE") issued a publication entitled "SAE J3016 Levels of Driving Automation," which defines the different levels of driving automation features.[2] The SAE J3016 definitions break these advanced systems into six (6) different "levels," ranging from zero (0) to five (5).[3] Each level provides some additional automated driving features to support the driver, until reaching Levels 4 and 5, where a human driver may not even be present in order to operate the vehicle.

While the SAE nomenclature is helpful, it should be noted that the public and media oftentimes conflate these technologies. The terms ADAS and AV are often used interchangeably, which is not accurate. For the most part, ADAS ceases at Level 2. Level 3 provides conditional automation that still requires a human driver, with Levels 4 and 5 being more properly characterized as an "autonomous vehicle" or AV.

SAE Levels of Driving Automation:

At Level 0, the ADAS includes very basic functions, such as an audible or visual warning for several different potential hazards.[4] Blind spot alerts, parking warnings, lane departure warnings, and even automatic emergency braking are examples of Level 0 ADAS technology. While this basic level of technology provides assistance in the form of audible and visual alerts, which may assist a driver in taking action to avoid a collision, these systems do not provide any automated driving functions over a

1 Meghan Bobrowsky and Miles Kruppa, America's Most Tech-Forward City Has Doubts About Self-Driving Cars, Wall Street Journal (August 4, 2023).

2 SAE International, J3016 202104: Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles, SAE International (April 30, 2021).

3 Id.

4 Id.

sustained period that would take control of the vehicle's movements; the human driver is still solely responsible for all driving tasks. It is entirely incumbent upon an attentive driver to utilize the vehicle's warnings and respond appropriately.

Level 1 ADAS includes the features of Level 0 but may also provide steering support or brake/acceleration intervention[5] for a sustained period. Level 1 ADAS does not provide both steering and brake/acceleration intervention at the same time. An example of Level 1 ADAS is lane keep assistance, which may maneuver the vehicle inside of the travel lane but will not change speeds.[6] Another example is adaptive cruise control, which may adjust speeds to keep a safe distance from vehicles ahead but will not provide lateral steering support.[7]

Level 2 ADAS provides both steering and brake/acceleration intervention.[8] It is important to note that for Levels 0 through 2, the human driver remains in full control of the vehicle at all times. The ADAS technologies at these levels are simply support systems for an attentive driver and are not intended to "drive" the vehicle in any sense. Level 2 systems are currently offered in some publicly available vehicles. General Motors' Super Cruise was the industry's first true hand-free driver assistance feature when it was released in select GM vehicles in 2017. Since 2017, GM has expanded the number of roads Super Cruise can operate on, and the number of GM vehicles that come equipped with the system in accordance with the company's safe deployment philosophy. GM has also expanded the capabilities of Super Cruise (including automatic lane changes, lane change on demand, industry-first trailering, and vehicle dynamics). In August of 2023, Ford announced that it will include its BlueCruise systems, a Level 2 ADAS technology, as a standard feature for several 2024 vehicle models, which can be accessed through Ford on a subscription basis.[9]

The jump from Level 2 to Level 3, however, is significant both from a technology and a safety perspective, which is reflected by the lack of commercially available Level 3 systems in consumer vehicles. At this level, when the system is engaged, the human driver is no longer responsible for the driving tasks—e.g., providing steering or brake/acceleration input.[10] Instead, the vehicle is processing information about surrounding traffic and providing the necessary inputs for safe travel. However, Level 3 technology is limited by road, traffic, and speed conditions.[11] For example, the system may be able to operate only up to a certain traveled speed, and once that speed is exceeded, control of the vehicle is handed back to the driver. Likewise, at Level 3, the driver must always be ready to resume control of the vehicle. Mercedes-Benz recently announced that its Level 3 "Drive Pilot" system received certification from California state authorities and will include the technology on 2024 S-Class and EQS sedan models.[12] This is the first introduction of a Level 3 system in a standard production vehicle for use on public freeways.

Similar to the jump from Level 2 to Level 3, Level 4 automated systems differ significantly from Level 3 systems. In Level 4 systems, the automated driving features do not require the human driver to perform any driving tasks, assuming the system is operating within its defined operational design domain ("ODD"). In other words, Level 4 systems are truly self-driving in the sense that a human driver is not required to perform the dynamic driving task within the systems' ODD. The Cruise AV, which is based on the Chevrolet Bolt EV platform, and the Cruise Origin, are Level 4 AVs. Level 4 AVs may be equipped with manual driving controls, or, in the case of the upcoming Cruise Origin, they may be designed without any manual driving controls at all—e.g., no traditional driver seat, steering wheel, or pedals.

At Level 5, the vehicle is fully autonomous[13] and has no ODD—it can operate without a human driver in all conditions and is not geo-fenced by a predetermined set of boundaries surrounding the vehicle. At current AV development levels, Level 5 is largely hypothetical, as fully autonomous vehicles being developed today and into the foreseeable future will likely be limited to operating safely within a defined ODD.

DOT Guidance, Proposed Rules, and Publications Related to Automated Driving Systems:

The National Highway Traffic Safety Administration (NHTSA) is responsible for, among other things, enforcing the Federal Motor Vehicle Safety Standards (FMVSS) – a set of comprehensive regulations "written in terms of minimum safety performance requirements

5 Id.

6 Id.

7 Id.

8 Id.

9 Ford BlueCruise Expands Flexibility With Complimentary Trial, Monthly or Annual Offers for Hands-Free Driving Tech (August 14, 2023), available at https://media.ford.com/content/fordmedia/fna/us/en/news/2023/08/14/ford-bluecruise-expands-flexibility-with-complimentary-trial--mo.html (last visited September 15, 2023).

10 SAE International, J3016_202104: Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles, SAE International (April 30, 2021).

11 Id.

12 Mercedes-Benz USA, Conditionally automated driving: Mercedes-Benz DRIVE PILOT further expands U.S. availability to the country's most populous state through California certification, available at https://media.mbusa.com/releases/release-1d2a8750850333f086a722043c01a0c3-conditionally-automated-driving-mercedes-benz-drive-pilot-further-expands-us-availability-to-the-countrys-most-populous-state-through-california-certification (last visited September 15, 2023).

13 SAE International, J3016_202104: Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles, SAE International (April 30, 2021).

for motor vehicles or items of motor vehicle equipment."[14] FMVSS regulations require vehicle manufacturers and their suppliers to certify that each vehicle and regulated component complies with specific safety requirements, as documented through extensive testing conducted by suppliers and manufacturers. The list of regulations is extensive and touches nearly every component of the vehicle – from how a seatbelt functions to the brightness of the headlights. However, there are no FMVSSs that regulate ADAS features or automated driving systems ("ADS").

As ADAS and AV technologies continue to evolve, NHTSA has responded, though the speed and substance of the response has been criticized.[15] In 2016, NHTSA began publishing the Federal Automated Vehicles Policy, which provides a framework for the introduction of ADAS and AV technology to the consumersand coordinates regulatory efforts between various federal and state agencies.

In 2017, NHTSA, in conjunction with the Department of Transportation, published the Automated Driving Systems 2.0: A Vision for Safety. The purpose of this publication was twofold. First, NHTSA offered 12 ADS design elements for consideration by auto manufacturers, which were aimed at advancing safety within ADS technologies and increasing public trust of the software.[16] Second, NHTSA offered technical assistance to states, including a clarification of the role of federal, state, and local governments in regulating ADS technology, as well as best practices for state legislatures and first responders.[17] As noted in Automated Driving Systems 2.0, "NHTSA is responsible for regulating motor vehicles and motor vehicle equipment, and States are responsible for regulating the human driver and most other aspects of motor vehicle operation," such as enforcing traffic laws and registering motor vehicles, including those with any level of driving automation.[18] NHTSA also offered guidance to the states on drafting traffic laws that will impact the implementation of ADAS and AV technology, such as laws requiring that drivers operate a vehicle with one hand on the wheel.[19]

NHTSA offered additional guidance in 2018 with the publication of Automated Vehicles 3.0: Preparing for the Future of Transportation,[20] which focused primarily on the integration of ADS into the commercial vehicle space and the roles of various federal agencies, including the Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA), among others. The guidance from NHTSA outlined the challenges of incorporating ADS into the commercial sector, given the number of agencies tasked with regulating commercial transportation.

In 2020, NHTSA offered its most recent guidance on vehicles equipped with ADS, with the publication of Automated Vehicles 4.0: Ensuring American Leadership in Automated Vehicle Technologies.[21] This publication continued to focus on the interplay between various federal agencies and their regulation of advanced technology, noting that "[t]he White House and the U.S. Department of Transportation (USDOT) developed AV 4.0 to unify efforts in automated vehicles across 38 Federal departments, independent agencies, commissions, and Executive Offices of The President, providing high-level guidance to Federal agencies, innovators, and all stakeholders on the U.S. Government's posture towards AVs."[22]

On May 31, 2023, NHTSA and the FMCSA announced a Notice of Proposed Rulemaking (NPRM) that would implement a new FMVSS requiring automatic emergency braking (AEB) on new vehicles with a gross vehicle weight rating of less than 10,000 pounds.[23] The NPRM specified that AEB systems would be required to detect lead vehicles and pedestrians, and also be tested during daylight and nighttime conditions. Further, the proposed FMVSS would require collision avoidance at speeds up to 62 mph when manual braking is applied, and up to 50 mph when no manual braking is applied. The systems proposed under this NPRM are classified as Level 1 ADAS technology, but manufacturers would have at least 3 years to comply with the rule, if published.[24] On June 22, 2023, NHTSA and the FMCSA expanded the AEB proposal to heavier vehicles and announced a NPRM that would require AEB on vehicles with a gross vehicle weight rating of more than 10,000 pounds.[25]

While the federal government has been proactive in publishing guidance through the Automated Vehicle series, these publications also demonstrate the complexities of regulating new automated driving technologies. Given the number of federal and state agencies involved in our interconnected transportation system, and the continually changing political landscape,

14 NHTSA, Quick Reference Guide (2010 Version) to Federal Motor Vehicle Safety Standards and Regulations (February 2011).

15 Lora Kolodny, A federal agency warns Tesla tests unfinished driverless tech on its users, CNBC (March 12, 2021).

16 NHTSA, Automated Driving Systems 2.0: A Vision for Safety, p.20 (September 2017).

17 Id.

18 Id. at p.20.

19 Id.

20 NHTSA, Automated Vehicles 3.0: Preparing for the Future of Transportation (October 2018).

21 NHTSA, Automated Vehicles 4.0: Ensuring American Leadership in Automated Vehicle Technologies (, January 2020).

22 Id. at p.2.

23 NHTSA, NPRM Docket No. 2023-0021 (May 31, 2023).

24 Id.

25 NHTSA, NPRM Docket No. 2022-0171 (June 22, 2023).

issuing new or updating existing federal regulations to address these new automated driving technologies will take time. With the pace of AV technology innovation only increasing, the lack of updated safety standards along with a patchwork of varying state laws threaten to inhibit U.S. automakers' ability to deploy this technology at scale and compete with foreign rivals.

Crossing Over From ADAS to AV – Where are we now?

Different automotive companies are taking different paths to Level 4 and Level 5 full self-driving. Some companies believe existing lower-cost Level 2 ADAS systems can be advanced to Level 4 systems through more sophisticated artificial intelligence and machine learning software. Others are taking a dual path approach by developing dedicated, but more expensive, Level 4 systems through both advanced software and new hardware sensors (e.g., LiDAR) while separately continuing to improve the performance of dedicated Level 2 ADAS systems. While the paths may differ, the end goal is similar – a fully self-driving Level 4 and/or Level 5 system that may operate safer than a human or eliminate human error, and could reduce the overall rate of crashes, injuries, and fatalities on America's roadways.

Robotaxis and the Political Landscape:

Auto manufacturers are in a race to provide AV technology to the consumer public, with companies like Cruise and Waymo leading the way. Cruise, a subsidiary of GM, and Waymo, a Google owned company, have been providing robotaxi and rideshare services in San Francisco as a test market for their AV product. On August 10, 2023, Cruise and Waymo were granted a Phase I Driverless Autonomous Vehicle Passenger Deployment Permit, which allows the companies to charge fares for their fully driverless ride-hailing service throughout the city of San Francisco, 24/7.[26] Cruise and Waymo's request for a Phase I permit was met with prolonged public comments, lasting over seven hours, before the resolution was passed.[27]

The companies are also operating in cities outside of San Francisco – Cruise provides rides in Austin, Texas, while Waymo provides rides in Los Angeles, California, and both are operating in Phoenix, Arizona.

AV Regulations:

NHTSA's first step in amending the FMVSSs to account for the complexities presented by AVs came on March 10, 2022, when NHTSA published a final rule amending and clarifying the FMVSS crashworthiness standards as they apply to AVs.[28] The FMVSS crashworthiness standards generally focus on occupant safety and protection. However, these standards utilize traditional vehicle terminology, such as "driver's seat" or "windshields." NHTSA's Final Rule provides several amendments to account for AVs that do not have manual controls associated with a human driver.[29] This is an important first step in allowing manufacturers to begin scaled production of AVs, but as noted below, the Final Rule did not answer all questions that a manufacturer might have regarding the applicability of FMVSSs to AVs.

In January of 2020, Cruise announced and debuted the Cruise Origin, the first passenger-carrying, fully autonomous Level 4 shared vehicle designed from the ground-up without any traditional driver controls.[30] In February 2022, GM and Cruise filed a petition with NHTSA seeking exemptions from various FMVSS under 49 C.F.R. Part 555. The various exemptions sought by GM and Cruise focus on portions of:

- FMVSS No. 102; Transmission shift position sequence, starter interlock, and transmission braking effect,
- FMVSS No. 104; Windshield wiping and washing systems,
- FMVSS No. 108; Lamps, reflective devices, and associated equipment,
- FMVSS No. 111; Rear visibility,
- FMVSS No. 201; Occupant protection in interior impact, and
- FMVSS No. 208; Occupant crash protection.[31]

In support of the petition, GM and Cruise report to NHTSA that certain FMVSS requirements are "either not necessary for safety as applied to the Origin's design and performance, or their purpose and intent continue to be met through innovative, alternative means that each provide an equivalent level of safety, and together provide an overall safety level at least equal to the overall safety of nonexempt vehicles."[32] The Origin, unlike traditional motor vehicles, does not contain certain mandated equipment designed to assist a human driver in operating the vehicle – e.g., outside mirrors, sun visors, and windshield wipers. These human-driver-centric mandated components serve no purpose in a vehicle that is driven exclusively by an ADS. Because

26 CPUC Approves Permits for Cruise and Waymo to Charge Fares for Passenger Service in San Francisco (August 10, 2023), available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M516/K992/516992488.PDF (last visited September 15, 2023).

27 Johana Bhuiyan, San Francisco to get Round-the-Clock Robo Taxis After Controversial Vote, The Guardian, (August 10, 2023).

28 NHTSA, Final Rule Docket No. 2021-0003 (March 10, 2023).

29 Id.

30 Roberto Baldwin, Cruise Unveils Origin, a Self-Driving Vehicle with No Steering Wheel or Pedals, Car and Driver (January 22, 2020).

31 Federal Register, Volume 87, No. 139 (July 21, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-07-21/pdf/2022-15557.pdf (last visited September 15, 2023).

32 Id.

the equipment is required by existing standards that were drafted years ago, before AVs were ever envisioned, the Origin technically does not comply with all applicable FMVSS. NHTSA has not addressed the petition, but recently stated that they will issue a decision "in the coming weeks."[33] Approval of the petition would pave the way for Cruise to begin scaling production of the Origin and would prompt other manufacturers to file similar petitions.

The Continuing Evolution of ADAS and AV Litigation – Where are we going?

With the arrival of ADAS and ADS technologies, litigation of automotive product liability cases and legal theories has evolved. The evolution will continue with additional liability theories surrounding ADAS and, ultimately, the introduction of AVs.

Stated simply, product liability claims against auto manufacturers can arise when a component of the vehicle is allegedly defective in its "design" or "manufacturing." A common "design defect" claim entails an allegation that the very design of the vehicle or system was defective and caused the injury. By contrast, a "manufacturing defect" involves an allegation that a manufacturing flaw caused the vehicle to perform in an unsafe manner – such as a defective computer chip preventing an airbag from inflating – and caused the injury.

Defenses to a product liability claim can include alteration of the product, federal preemption, misuse of the product, failure to follow warnings, and state of the art design. However, the initial analysis is focused on whether the plaintiff can even prove the product was defectively designed or manufactured. Jurisdictions vary in the legal standard utilized to evaluate a design defect claim, but often incorporate a "risk-utility" test and/or a "consumer expectation" test. The consumer expectation test focuses on the whether the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[34] The risk-utility test focuses on "whether the benefits of a particular design outweigh the risks of harm it presents to consumers."[35]

ADAS Claims and Defenses:

In the context of ADAS technologies, a common theory of liability alleged by the plaintiffs' bar is a "failure to equip" claim, which alleges that a design defect exists when a vehicle is manufactured without certain ADAS technology. The facts of these cases typically involve a collision that allegedly could have been avoided, or mitigated, with ADAS technology – such as automatic emergency braking (AEB) or front collision warning (FCW). This theory of liability argues that the vehicle was defective in its design because there were no ADAS technologies incorporated into the vehicle. For example, consider a crash involving a driver who has fallen asleep at the wheel and rear-ends a vehicle stopped at a red light. Because the striking vehicle in this hypothetical crash was not AEB equipped, there was no braking prior to the collision. The argument in a "failure to equip" claim would be that the vehicle is defectively designed because the manufacturer failed to equip the striking vehicle with AEB. These failure to equip claims are being filed, not just by the unsuspecting driver waiting at the red light, but also by the sleeping driver. Manufacturers must be prepared to defend the decision to exclude AEB, or other ADAS technologies, due to specific factors such as customer preference or the availability of the technology at the time of production.

Failure to Equip Considerations:

In a recent failure to equip claim, the United Stated District Court for the Eastern District of Oklahoma dismissed plaintiffs' claim that a 2013 van was defective and unreasonably dangerous. Plaintiffs alleged that vehicle was "not designed to avoid foreseeable frontal crashes with its brake and safety systems, was not equipped with FCW or AEB systems to avoid or mitigate collisions, and GM did not adequately warn or instruct consumers about the hazards associated with operating the van without the foregoing systems."[36] The court, relying on the consumer expectation test, noted that "[a]ny ordinary user would have understood that operating this vehicle at highway speeds entailed a potential danger of front-end collisions with objects – including stopped or slowing automobiles – in the vehicle's path."[37] Focusing on the timeframe when the vehicle was designed and manufactured, the court further noted that it "would have been almost universally understood by a user in 2013 that safe operation of the van was entirely dependent – or almost entirely – upon the driver's vigilance and use of the vehicle's braking and other systems."[38] In evaluating the consumer's expectations for a 2013 vehicle, the court cited the minuscule number of vehicles manufactured in 2013 that were equipped with ADAS technologies, such as FCW or AEB. In short, no consumer could have expected that the 2013 vehicle would have been equipped with this technology, or "that the danger of operating the van

33 Ann Carlson, NHTSA Acting Administrator, Automated Road Transportation Symposium (ARTS23) Keynote Address, available at https://www.nhtsa.gov/speeches-presentations/automated-road-transportation-symposium-arts23-keynote-address (last visited September 16, 2023).

34 Restatement (Second) of Torts, § 402A comment i.

35 Walker v. Ford Motor Co., 406 P.3d 845, 850 (Colo. 2017),

36 Youngberg v. General Motors LLC, No. 20-339-JWB, 2022 WL 3925272, at p.*3 (E.D. Okla. 2022).

37 Id. at p.*4

38 Id.

without such systems was more extensive than what a consumer would contemplate, given that a consumer would have expected the van's safe operation to be entirely dependent upon the driver's vigilance and use of manual systems."[39]

Federal Preemption Considerations:
In the field of federal preemption, the Arizona Supreme Court ruled that a plaintiff's failure to equip claim was not preempted by federal law. In Varela v. FCA US LLC, plaintiff claimed that a 2014 Grand Cherokee was defective because FCA failed to equip the vehicle with FCW.[40] FCA moved to dismiss the lawsuit, arguing that the Arizona state tort claim was preempted due to implied obstacle preemption under the Supremacy Clause of the Federal Constitution because there was no promulgated safety regulation requiring the use of FCW in vehicles manufactured in 2014. The court focused heavily on the NHTSA guidance in the AV series of publications (which were discussed above and throughout this article) but ultimately determined that "the published guidance fails to demonstrate any intent by the Agency [NHTSA] to exercise an exclusive regulatory role in the area of automated vehicle and automated driving system testing, development, or deployment."[41]

The court also examined a 2017 NPRM from NHTSA that would have mandated the installation of AEB in all lightweight vehicles. According to FCA, when NHTSA denied implementing the 2017 NPRM, it was evidence that NHTSA "'acted purposefully' in an authoritative and preemptive manner," and, thus, implied preemption should be found.[42] However, the court was not convinced, and determined that NHTSA's denial was based on the "perceived lack of any need for an AEB rule and the lengthy and arduous nature of the rulemaking process."[43] At this time, federal preemption defenses in the context of failure to equip claims present challenges for establishing that state law creates an obstacle to accomplishing the objectives of existing federal regulations. As federal regulations continue to evolve and new regulations are added, the legal analysis surrounding federal preemption claims will evolve with it.

Failure to Warn and Marketing Considerations:
While failure to equip claims continue to be routinely filed, as Level 1 and Level 2 ADAS technologies have become more common in standard vehicle models it will be increasingly common to see allegations that the applicable ADAS software utilized on the vehicle was defectively designed, such as inaccurate software algorithms, or that warning and instructions regarding the technology were inadequate, such as defective warnings and marketing materials describing the ADAS capabilities.

In July of 2022, the California Department of Motor Vehicles (DMV) filed an "Accusation" against Tesla, claiming that Tesla made misleading marketing and advertising statements. The accusation centered around Tesla's use of the terms "Autopilot" and "Full Self-Driving Capability," which the DMV argued were an indication that these systems could operate as fully autonomous vehicles. Tesla noted that explicit disclaimers were present with these vehicles, including the very explicit statement that "[t]he currently enabled features require active driver supervision and do not make the vehicle autonomous."[44] Tesla has also defended a class action lawsuit making similar allegations.[45]

California recently enacted legislation regulating marketing materials for vehicles equipped with ADAS technologies. California Vehicle Code § 24011.5 became effective on January 1, 2023 and requires, among other things, that any dealer or manufacturer selling a new vehicle with Level 2 ADAS technology, provide the buyer "with a distinct notice that provides the name of the feature and clearly describes the functions and limitations of the feature." The statute also prohibits "naming or describing" any Level 2 ADAS technology "using language that implies or would otherwise lead a reasonable person to believe, that the feature allows the vehicle to function as an autonomous vehicle."

Despite the California DMV's accusation against Tesla regarding misleading marketing, Tesla was recently victorious in a California jury trial involving these same technologies. The case, Justine Hsu v. Tesla, involved a 2016 Tesla Model S. Plaintiff Hsu claims she was utilizing the Tesla's "Autopilot" feature, when the vehicle "failed to recognize the center median and malfunctioned, causing the vehicle to swerve into the center median."[46] Tesla argued that "plaintiff misused the Autopilot system by using it on a city street instead of a limited access road," and further, that "plaintiff was at fault for failing to intervene once it was clear the Autopilot was going to drive the vehicle into a curb."[47] The jury, apparently deciding the case under a consumer expectation standard,

39 Id.

40 Varela v. FCA US LLC, et al., 252 Ariz. 451, 457 (2022).

41 Id. at p. 461-463.

42 Id. at p. 463.

43 Id. at p. 464.

44 In the Matter of the Accusation Against Tesla Inc. dba Tesla Motors, Inc., a Vehicle Manufacturer, Case No. 21-02189 (July 28, 2022).

45 Matsko v Tesla, No. 22-cv-05240 (N.D. Cal.).

46 Hsu v Tesla, Verdict and Settlement Summary, Superior Court of Los Angeles No. 20STCV18473, 2023 WL 4102698 (Cal. Super. April 21, 2023).

47 Id.

determined that the Autopilot technology performed as safely as an ordinary consumer would expect, and that Tesla did not make any false statements to plaintiff.[48]

AV Claims and Defenses:
While there are few AVs currently traversing public roadways, product litigation involving these technologies are inevitable. AV product litigation will likely center upon maintenance, control, and ownership. However, the most interesting question in AV litigation may involve the public infrastructure upon which the AVs rely. Whereas vehicles equipped with ADAS technologies are sensing and responding to other vehicles and pedestrians, AVs are also sensing and responding to stop signs, traffic lights, and other traffic control devices. This "vehicle-to-infrastructure" interaction requires proper maintenance and visibility of traffic control devices, so that the AV can determine the appropriate course of action and respond accordingly. Litigation involving an AV crash will focus heavily on the environment around the crash scene, including whether traffic control devices were visible and properly maintained. Consider, for example, a crash at an intersection where a stop sign is obstructed by overgrown foliage. In that scenario, a potential defense of the AV claim may rely on shifting liability to the public entity who was tasked with maintaining the integrity and visibility of the stop sign.

The question of ownership is also vitally important when evaluating the future of AV litigation because the owner will likely be tasked with maintaining the system. In the event of a crash, the manufacturer may claim that the software in an individually owned AV was not updated, or cameras were improperly maintained. In that scenario, manufacturers will argue that liability is properly placed on the vehicle owner, not the manufacturer.

Even assuming the AV is maintained properly, AV litigation presents an interesting issue in the context of owner liability statutes. In general, owner liability statutes provide that a registered or titled owner of a vehicle is liable "for an injury caused by the negligent operation of the motor vehicle," so long as the vehicle is being operated with the owner's consent.[49] Michigan's owners' liability statute, for example, does not provide any exception for vehicles with ADAS technology or AVs. As such, it is conceivable that a private "owner" of an AV could be found liable for an injury where the AV malfunctioned, and, thus, was "negligently operated."

Conclusion
The advancements in ADAS technology and the introduction of AVs are quickly affecting the regulatory, statutory, and litigation landscape. Auto manufacturers are attempting to move the AV timeline forward but can only do so with the approval of various government agencies. And while the AV landscape is changing, we should be mindful that we may still be some time away from the majority of the public owning an AV for daily travel. Indeed, consumer vehicles are currently operating with Level 2 technologies and Mercedes-Benz just received approval for a Level 3 technology to be included in 2024 models. While the manufacturers push ahead, practitioners and litigants must expect that trials involving these technologies will push ahead as well, evolving along with technology itself.

48 Hsu v Tesla, Special Verdict Form, Superior Court of Los Angeles No. 20STCV18473, 2023 WL 3679208 (Cal. Super. April 21, 2023).

49 MCL 257.401.


Network
AUTONOMOUS VEHICLES
CASES, RULEMAKING, AND FUTURE CONSIDERATIONS


PRESENTED BY
Patrick G. Seyferth
Bush Seyferth PLLC
J. Chandler Bailey
Lightfoot, Franklin & White LLC
Charles Basinger
General Motors LLC
Jim Chen
Volkswagen Group of America

AUTONOMOUS VEHICLES IN THE NEWS

California Public Utilities Commission
505 Van Ness Ave., San Francisco

PRESS RELEASE

FOR IMMEDIATE RELEASE
Media Contact: Terrie Prosper, 415.703.1366, news@cpuc.ca.gov
Docket #s: Res TL-19144; Res TL-19145

CPUC Approves Permits for Cruise and Waymo to Charge Fares for Passenger Service In San Francisco

SAN FRANCISCO, Aug. 10, 2023 – The California Public Utilities Commission (CPUC) today approved Resolutions granting additional operating authority for Cruise LLC and Waymo LLC to conduct commercial passenger service using driverless vehicles in San Francisco. The approval includes the ability for both companies to charge fares for rides at any time of day.


SAE
INTERNATIONAL
LEVELS OF AUTONOMY
Society for Automotive Engineers (SAE) outlined 6 levels of automation for automakers, suppliers, and policymakers to use to classify a system's sophistication
0
No Automation
1
Driver Assistance
2
Partial Automation
3
Conditional Automation
4
High Automation
5
Full Automation
LEVELS OF DRIVING AUTOMATION


GOVERNMENT GUIDANCE AND ADAS/AV REGULATIONS
01
Federal Motor Vehicle Safety Standards
02
Proposed Rules on Automatic Emergency Braking
03
Mandated Crash Reporting

THE AV LANDSCAPE ORIGIN, WAYMO, AND ZOOX

What makes it different?

- **No steering wheel**
- **No driver seat**
- **"Campfire" style seating**
- **No brake or accelerator pedals**

CRUISE ORIGIN: Pending 555 Exemption Petition

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2022-0067]

General Motors—Receipt of Petition for Temporary Exemption From Various Requirements of the Federal Motor Vehicle Safety Standards for an Automated Driving System-Equipped Vehicle

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

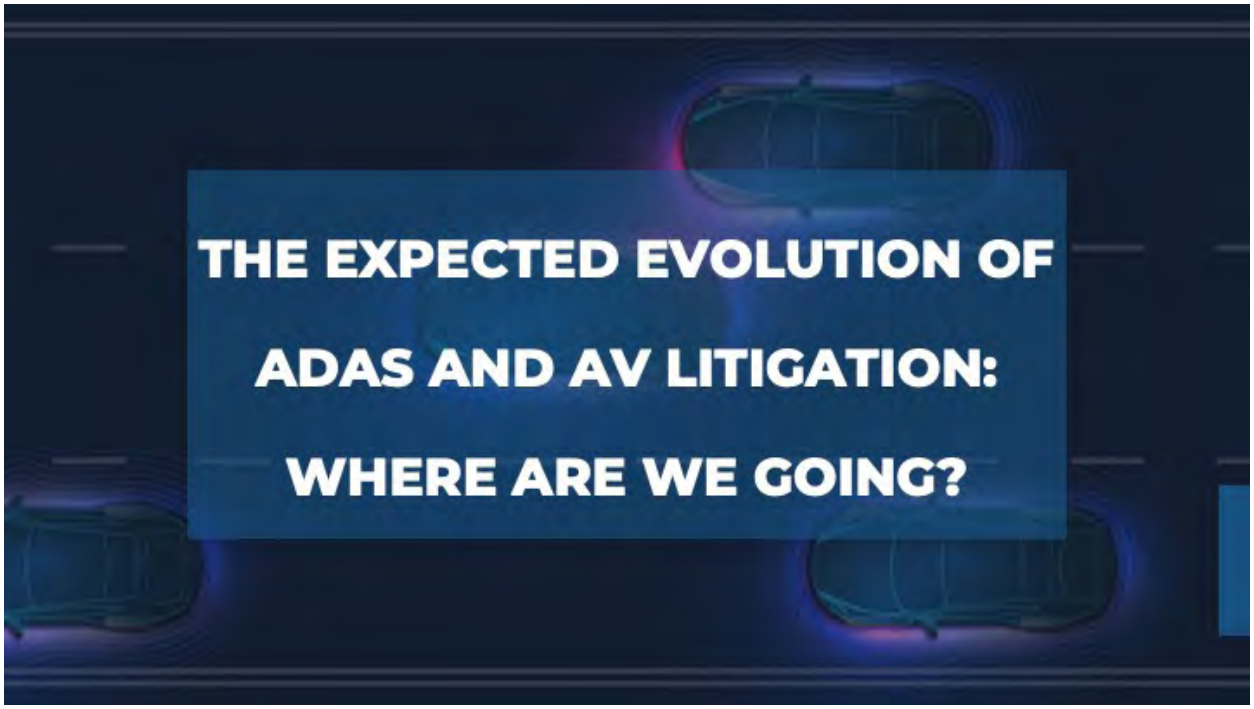
ACTION: Notice of receipt of petition for temporary exemption; request for public comment.

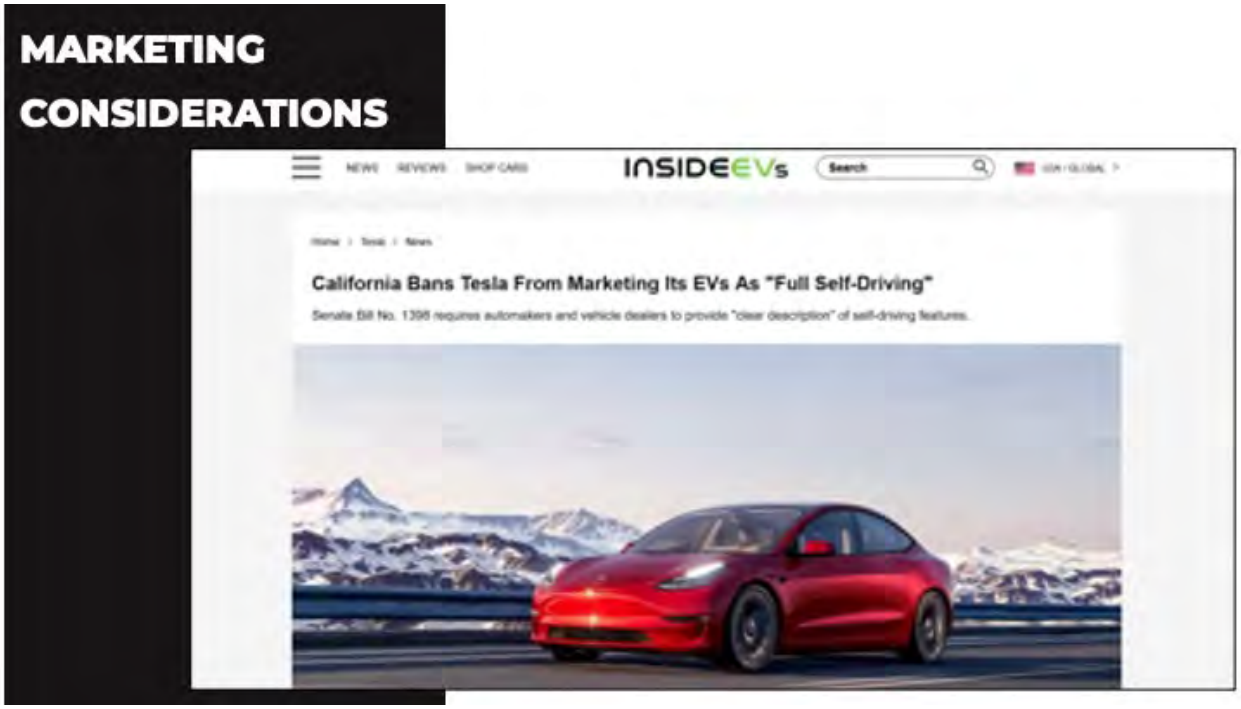
SUMMARY: General Motors (GM) has petitioned NHTSA for a temporary exemption from certain requirements in six Federal motor vehicle safety standards (FMVSS) for its ADS-equipped vehicle, the "Cruise Origin." Specifically, GM seeks exemption from portions of FMVSS No. 102, Transmission shift position sequence,

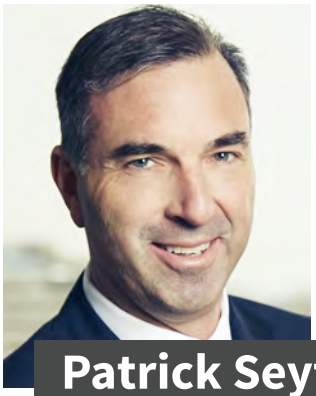
cruise

NHTSA

Does NHTSA apply a higher level of scrutiny to AV issues?


THE EXPECTED EVOLUTION OF
ADAS AND AV LITIGATION:
WHERE ARE WE GOING?


MARKETING
CONSIDERATIONS
INSIDEEVs
California Bans Tesla From Marketing Its EVs As "Full Self-Driving"



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Patrick Seyferth

Founding Member | Bush Seyferth (Troy, MI)

Patrick Seyferth is a co-founder of Bush Seyferth PLLC and a member of BSP's executive committee. In 2022, Patrick was appointed by Chief Judge Jeffrey S. Sutton to the Advisory Committee on Rules for the U.S. 6th Circuit Court of Appeals. He also serves as an Executive Board member for the Federal Bar Association (ED of Michigan); a Sustaining Member to the Product Liability Advisory Council; and on the 6th Circuit Life Member Committee. Patrick was recognized in 2019 by Best Lawyers as Troy, Michigan's Product Liability Lawyer of the Year and was featured in Leading Lawyers Magazine – Michigan Edition 2020.

Patrick has handled catastrophic product liability and commercial cases in 23 states. During the past 25 years, he has gained extensive trial experience, which includes first-chairing complex trials through jury verdict in AZ, MI, OH and TN. Patrick has proudly represented some of America's best-known companies — such as GM LLC, Ford Motor Company, Pulte, VWGoA, Textile Management, Nissan, and Hyundai — as well as several individuals. He has been recognized for his accomplishments as a federal mediator, lectured nationally on trial advocacy issues and managed BSP's $1,000,000 plus charitable foundation since 2003.

Practice Areas

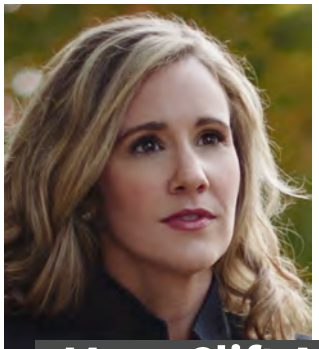
- Product Liability
- Advanced Technologies
- Business and Commercial
- Class Actions
- Securities / Finance

Honors and Awards

- Chambers USA Guide, Product Liability: Automobile (USA – Nationwide) Band 1, Litigation: General Commercial (Michigan) Band 2 (2023)
- Michigan Lawyers Weekly, Hall of Fame (2023)
- Best Lawyers® Lawyer of the Year, Mass Tort Litigation / Class Actions – Defendants (Troy, MI: '23)
- Michigan Super Lawyers, Top 100, (MI: '11-'17, '20-'22)
- America's Top 100 Attorneys® (2018)
- Best Lawyers® Lawyer of the Year, Product Liability Litigation – Defendants (Troy, MI: '19)
- U.S. News Best Lawyers ® ('10-present)
- Inclusion in The Best Lawyers in America©: Commercial Litigation and Product Liability Litigation – Defendants ('12 – present), Mass Tort Litigation/Class Actions – Defendants ('21 – present)
- U.S.D.C. Eastern District of Michigan, Certificate of Appreciation, Merit Selection Panel ('11)
- Michigan Lawyer's Weekly, Leader In The Law ('11)
- Michigan Super Lawyers ('06-present)
- DBusiness Top Lawyers ('08-'18, '21-present)
- Martindale Hubbell ® Peer Review Rating of AV

Education

- University of Michigan Law School, J.D., cum laude, 1992
- Michigan State University, B.S., 1987



Breakout: Non-Competes - What's New and What's Next?

Mary Clift Abdalla

Forman Watkins & Krutz (Jackson, MS)

Non-Competes: What's New and What's Next
By Mary Clift Abdalla

The current upheaval and unrest surrounding the application and validity of non-compete agreements has been building for many years. In 2016, then President Obama encouraged states to ban or limit non-compete agreements.[1] At that time, reports issued by both the White House and Treasury Department noted that "non-competes impact approximately 30 million – nearly one in five – US workers, including roughly one in six workers without a college degree." President Obama's call to action noted that as of that date, three states – North Dakota, Oklahoma, and California – had passed laws essentially making non-compete agreements void and unenforceable.[2] That same year, approximately six other states passed legislation which "required changes to how non-compete agreements [were] regulated and two of which considered outright bans."[3]

The White House provided and encouraged states to implement the following options: (1) ban non-compete clauses for categories of workers, such as those under a certain wage threshold; workers in certain occupations that promote health and safety; workers who are unlikely to possess trade secrets; or those who may suffer undue adverse impacts from non-competes, such as workers laid off or terminated without cause; (2) improve transparency and fairness of non-compete agreements by, for example, disallowing non-competes unless they are proposed before a job offer or significant promotion has been accepted (because an applicant who has accepted and declines other positions may have less bargaining power); providing consideration over and above continued employment for workers who sign non-compete agreements; or encouraging employers to better inform workers about the law in their state and the existence of non-competes in contracts and how they work; and (3) incentivize employers to write enforceable contracts, and encourage the elimination of unenforceable provisions by, for example, promoting the use of the "'red pencil doctrine,' which renders non-competes with unenforceable provisions void in their entirety."

While President Obama urged states to address non-competes, there have been significant steps since then by the federal government to lead the charge to eliminate or significantly curtail the applicability and usage of non-compete agreements. In his July 2021 Executive Order, President Biden compelled the Federal Trade Commission ("FTC")[4] to "curtail the unfair use of noncompete clauses" and noted that non-compete agreements negatively impact a worker's mobility.[5] 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").[6] 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."[7] 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."[8]

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

1 State Call to Action on Non-Compete Agreements, archived at https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf.

2 Id.

3 Id.

4 In 1914, Congress passed the Federal Trade Commission Act ("Act"), which established the FTC to regulate monopolies, eliminate unfair competition, and prevent the use of unfair or deceptive business practices. Pursuant to Section 5 of the Act, the FTC has the authority to prohibit "unfair methods of competition in or affecting commerce." See 15 U.S.C. §§ 41-58, as amended.

5 Clifford Atlas, President Biden Issues Executive Order Calling on FTC to "Curtail Unfair Use" of Non-competes and Other Restrictive Covenants, Restrictive Covenant Report, July 9, 2021, https://www.restrictivecovenantreport.com/2021/07/president-biden-issues-executive-order-calling-on-ftc-to-curtail-unfair-use-of-non-competes-and-other-restrictive-covenants/#:~:text=Today%2C%20President%20Biden%20took%20another,may%20unfairly%20limit%20worker%20mobility.%E2%80%9D.

6 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.

7 See Part I.

8 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."[9] The 2022 Statement superseded all previous statements and reflected a significant departure from the FTC's previous 2015 Statement.[10]

On January 5, 2023, based on its broadened position regarding Section 5, the FTC announced 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.[11] Following the announcement of the proposed ban, the public had until March 20, 2023 to submit a formal comment to the FTC about the proposal.[12] "Comments during the online forum favoring adoption of the Proposed Rule were met in virtually equal measure with comments in opposition. Doctors, nurses, lawyers, CEOs, and an array of special interest groups (such as the U.S. Chamber of Commerce, the National Retail Federation, and the Economic Security Project) marshaled arguments for and against the Proposed Rule. Others favored more streamlined changes to the Proposed Rule, such as narrowing the scope of the ban to only certain workers, eliminating retroactive prohibitions, and broadening exceptions."[13] After receiving nearly 27,000 comments on the proposed ban, it is anticipated that the FTC will vote on this matter in April 2024.[14] As of the end of February 2023, "the FTC had spent about $500,000 on the rulemaking effort… and 47 agency employees, contractors, advisers and consultants had spent more than six thousand hours on the rulemaking."[15]

If the proposed rule is enacted as currently written, the burdens on many current business operations will be enormous and will certainly require a great deal of time and expense for employers to comply. There is also no doubt that if enacted, the rule will face multiple challenges in courtrooms across the country, and it is anticipated that years of costly and complicated litigation will follow.[16]

The National Labor Relations Board

In February 2023, the National Labor Relations Board ("NLRB") issued a decision declaring most confidentiality and non-disparagement clauses in separation agreements unlawful. McLaren Macomb, 372 NLRB No. 58, 2023 WL 2158775 (Feb. 21, 2023). The NLRB, through its General Counsel, Jennifer A. Abruzzo ("Abruzzo"), drafted a Memorandum to elaborate on the potential, and intended, impact of the decision. In the May 2023 Memorandum,[17] Abruzzo made it known that her intention is to invalidate nearly all post-employment non-compete agreements. She wrote that "the proffer, maintenance, and enforcement" of non-compete agreements violates Section 7 of the National Labor Relations Act. Abruzzo's position is that unless an exception exists, any agreement limiting future employment violates Section 7 by denying employees the ability to quit or change jobs, which by default, limits or cuts off their access to alternative employment opportunities.

Abruzzo's memorandum detailed the few exceptions to this proposed rule. First, agreements that relate to limiting managerial or ownership interests in competing businesses are not a violation of Section 7. Second, agreements that restrict independent contractor relationships would be allowed. Abruzzo reasoned that neither type of agreement deals with future employment. The NLRB has not ruled on Abruzzo's theory, but the issuance of the memorandum should signal to employers relying on non-compete agreements to expect a possible floodgate of unfair labor practices challenging these agreements. However, the NLRB only has jurisdiction over "employees" as defined by the Act. This means Abruzzo's memo does not currently impact non-compete agreements for managers and supervisors who are excluded from the scope of Section 7. Further, Abruzzo writes that employers may protect their legitimate business interests in "proprietary or trade secret information" by drafting "narrowly tailored workplace agreements that protect those interests."

The NLRB and the Federal Trade Commission

While the FTC has not yet enacted the proposed ban on non-competes, on July 19, 2023, the FTC and NLRB issued a Memorandum of Understanding ("MOU") regarding non-competes.[18] Abruzzo and Chair of the FTC, Lina M. Khan ("Khan"), drafted the MOU to outline

9 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/Section5PolicyStmtKhanSlaughterBedoyaStmt.pdf.

10 Id. at 1.

11 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.

12 Id.

13 Edet D. Nsemo and Gergory P. Abrams, Proposed Rule Banning Noncompetes: Taking Stock as Comments Flood the FTC, Mar. 17, 2023, https://www.reuters.com/legal/legalindustry/proposed-rule-banning-noncompetes-taking-stock-comments-flood-ftc-2023-03-17/.

14 Dan Papscum, FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses, May 10, 2023, https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses.

15 *Id.*

16 See West Virginia v. EPA, 2022 WL 2347278 (2022) (applying the "major questions doctrine" and holding that 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).

17 Memorandum GC 23-08 from Jennifer A. Abruzzo, General Counsel to NLRB (May 30, 2023) (on file at https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national).

18 *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, July 19, 2022, archived at https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf.

a new partnership between the two agencies and to emphasize the goal of limiting the imposition of one-sided and restrictive contract provisions. Clearly, non-compete agreements and nondisclosure provisions are directly in the crosshairs of both organizations.

Abruzzo wrote:

> Workers in this country have the right under federal law to act collectively to improve their working conditions. When businesses interfere with those rights, either through unfair labor practices, or anti-competitive conduct, it hurts our entire nation …This MOU is critical to advancing a whole of government approach to combating unlawful conduct that harms workers.

Khan echoed the collaborative sentiment, writing:

> I'm committed to using all the tools at our disposal to ensure that workers are protected from unfair methods of competition and unfair or deceptive practices . . . This agreement will help deepen our partnership with NLRB and advance our shared mission to ensure that unlawful business practices aren't depriving workers of the pay, benefits, conditions, and dignity that they deserve.

The NLRB and the Department of Justice

On July 26, 2023, the U.S. Department of Justice's Antitrust Division ("DOJ") and the NLRB issued a Memorandum of Understanding like that of the FTC/NLRB MOU.[19] Assistant Attorney General, Jonathan Kanter ("Kanter"), and Abruzzo outlined the shared interests of the two agencies in "promoting the free flow of commerce and fair competition in labor markets, including through the protection of American Workers." Specifically, the agencies are concerned with protecting workers from interference with the "rights of workers to obtain fair market compensation and freely exercise their legal rights under the labor laws." The departments will share information, consult, and make referrals to one another to, among other things, protect employees from the "imposition of restrictive agreements or workplace rules, such as noncompete, nonsolicitation, and nondisclosure provisions."

States Limiting Non-Competes

While the country awaits the outcome of the proposed FTC ban, the proposed Workforce Mobility Act, and other federal government efforts to limit or eliminate non-compete agreements, many states have presented an ever-expanding hostility towards the enforcement of non-compete agreements. Four states have banned non-compete agreements entirely, including California, Minnesota, Oklahoma, and North Dakota.[20] While many states have not passed legislation banning non-compete agreements, there is an obvious trend to limit broad application of non-competes. This trend "leav[es] employers to grapple with a patchwork of different state-level requirements and federal actions."[21] This patchwork of requirements includes the following: laws banning non-completes for salaries below a certain threshold; laws banning non-competes for certain professions, especially in the healthcare arena; and laws allowing non-competes with the sale of a business, while other states do not.[22] Clearly, with all of these different applications and standards, boilerplate non-compete agreements are no longer as attractive to employers.

New York is the most recent state to propose a noncompete ban. While the ban passed both houses of the New York Legislature, the ban has not been signed by the Governor. In June 2023, the New York Legislature passed a bill that if enacted would broadly ban the use of non-compete provisions with very limited exceptions. Memorandum in Support of Legislation, A1278b, 2023–2024 Leg., Reg. Sess. (N.Y.). If enacted, the bill would prohibit employers from seeking, requiring, demanding, or accepting non-compete agreements from virtually any New Yorker.[23] If New York's proposed bill passes, New York would be the fifth state with almost a total ban on non-competes; along with California, North Dakota, Minnesota, and Oklahoma.

Connecticut also recently amended prior legislation to expand a law banning non-compete agreements in certain circumstances for physicians, to include restrictions on non-compete agreements entered into with physician assistants and advanced practice registered nurses.[24] As of July, nearly a dozen states had enacted laws that limited the use of non-compete agreements in their states.[25] Finally, California enacted a new law that extends the reach of its state's restrictions on contracts signed

19 Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board, July 26, 2022, archived at https://www.justice.gov/opa/press-release/file/1522096/download.

20 Leah Shephard, States Outlaw Noncompete Agreements, SHRM, July 10, 2023, https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/states-restrict-noncompetes.aspx.

21 Id.

22 Id.

23 Joyner, New York State Assembly, Bill No. A01278, archived at https://www.assembly.state.ny.us/leg/?bn=A01278&term=&Summary=Y&Actions=Y&Memo=Y&Text=Y

24 The National Law Review, Connecticut Legislature Passes Law Limiting Physician, PA and APRN Non-Compete Agreements, June 13, 2023, https://www.natlawreview.com/article/connecticut-legislature-passes-law-limiting-physician-pa-and-aprn-non-compete.

25 Bill Kramer, State Laws Limiting Non-Compete Agreements Were a Major Trend in 2023, MultiState, July 6, 2023, https://www.multistate.us/insider/2023/7/6/state-laws-limiting-non-compete-agreements-were-a-major-trend-in-2023.

outside of the state.[26] The law creates a new private right of action for employees whose agreements include restrictive covenants and provides for attorney fees for any current, former, or even prospective employee who successfully brings suit against an employer's use of those restrictive covenants.

How Can Employers Restructure Their Employment Contracts in Light of the Potential Ban?

In light of the anticipated changes, now is the time for employers to prepare in the event that the FTC's likely ban is enacted. Companies need to first ask themselves, "What are we trying to protect and who has access to that information? And, is it necessary for all employees to sign a non-compete?"

There will undoubtedly be litigation surrounding non-competes in the future. 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.[27]

The new rule will require employers to rescind existing non-competes, and put employees on notice that their non-competes are no longer valid.[28] Companies should take an inventory of all current and former employees who have signed non-competes and make sure there is current contact information for each of these individuals. As these are sorted through, it will become easier to identify which ones are necessary and which employees or groups of employees may not actually need to sign a non-compete. Additionally, although the proposed FTC ban is technically limited to non-compete agreements, there are concerns that other restrictive covenants might also be banned if they essentially function as "de facto" non-competes. Thus, all restrictive covenants will need to be narrow enough so as not to fall under this proposed ban.

It is also critically necessary to identify the most important business interests to protect and determine the least restrictive approach to protect those interests. Even if the ban does not go into effect, it's expected that we will see a shift in enforcement. At the very least, understanding and complying with different state's statutes creates an enormous burden on employers and businesses that operate in multiple jurisdictions. Is your company's non-compete necessary to protect a legitimate business interest? After identifying which employees should sign a non-compete, begin to narrowly tailor the agreement.[29] An overbroad boilerplate non-compete isn't going to work in the future.

Lastly, consider what the company is trying to protect. Are there other agreements that could accomplish the same thing? A non-compete is essentially an agreement cocktail, combining non-disclosure, non-solicitation, and trade secret agreements. You can still protect your company's interests through these other avenues, although you may not be able to prevent a former employee from setting up shop next door. In addition, consider tighter policies and procedures on who can access your trade secrets.[30]

26 Joy Rosenquist, Bruce Sarchet, Walter Pfeffer, and Michael Lotito, California Reaches Across State Lines to Invalidate Employee Non-Compete Agreements, Littler, September 6, 2023, https://www.littler.com/publication-press/publication/california-reaches-across-state-lines-invalidate-employee-non-compete.

27 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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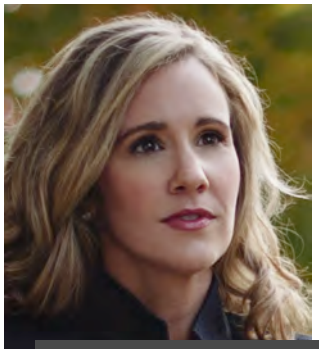

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Practice Areas

- Asbestos
- Benzene
- Product Liability
- Workers' Compensation

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.

Professional Recognition

- A/V Preeminent Rated by Martindale-Hubbell (2023)
- Selected to Mid-South Rising Stars (2015-2022)
- The Best Lawyers in America® since 2019: Product Liability Litigation – Defendants
- Top 10 Honoree, Top 50 Under 40 Business Leader, Mississippi Business Journal (2020)
- Top 50 Leading Lawyers selected by the Mississippi Business Journal
- FormanWatkins Pro Bono Star

Education

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

Breakout: An Introduction to Delaware's Business Courts

Chris Viceconte
Gibbons (Wilmington, DE)

A Practicioner's Introduction to Delaware's Business Courts
By Chris Viceconte

Delaware has been the preferred state of incorporation in the nation for the majority of the last century. Today, more than 1 million corporations and approximately 66 percent of the Fortune 500 are incorporated in Delaware. One of the features that makes Delaware an attractive "home" to companies is its specialized business courts—the esteemed Court of Chancery and, more recently, the Complex Commercial Litigation Division of the Superior Court. Each court serves as a valuable forum in which Delaware business entities may have their disputes resolved. In addition to providing a short history and overview of the courts' structures, this article discusses some of the unique features and procedural aspects of the courts and provides related practice pointers for lawyers and litigants alike.

Court of Chancery
The Court of Chancery, Delaware's trial court of equity, is unique among the nation's trial courts. It traces its roots to feudal England and the English Crown, which developed the chancery court to address matters in equity (e.g., writs, injunctions, and claims for specific performance typically between parties with ongoing relationships) as distinguished from matters in law involving claims for money damages for past harms.

As claims between and among corporate constituents—including shareholders, officers, and directors—for breaches of fiduciary duty have historically been viewed as equitable in nature, and given the number of companies that are organized in Delaware, the Court of Chancery has developed as the most prominent business court in the nation. In addition to fiduciary duty claims, the court has jurisdiction over certain statutory claims pursuant to Delaware's corporation and alternative entity (LLC and LLP) statutes. And all of that is in addition to the court's historical jurisdiction to hear matters seeking equitable relief, including, for example, in matters involving property disputes or the enforcement of non-competition agreements either in the sale of business or employer-employee context.

The Court of Chancery is made up of seven jurists, the Chancellor and six Vice Chancellors, each of whom has specialized knowledge in the subject matters that are regularly litigated in the court. The court is known for its expedited proceedings and ability to provide emergency equitable relief in the form of interim (temporary) and permanent injunctive relief, including interim orders to maintain the status quo in a relationship while a litigation proceeds to a final decision on the merits. As a court of equity, the decisions of the court are ultimately guided by principles of equity and fairness, which afford its judicial officers with the flexibility to fashion remedies that meet the particular circumstances of each case.

Superior Court, Complex Commercial Litigation Division
If a particular business dispute does not satisfy the Court of Chancery's equitable subject-matter jurisdiction and involves more than $1 million at issue, parties may file their matter in the Complex Commercial Litigation Division (CCLD) of the Superior Court. The Superior Court CCLD, which was formed in 2010, consists of five specially assigned judges and has developed as the de facto legal arm of the Court of Chancery. In fact, the Court of Chancery has recently instituted procedures for vetting cases that might be more appropriately assigned to and handled by a Superior Court CCLD judge in order to ensure the Court of Chancery's capacity to properly tend to its busy docket. Parties used to try to fashion their truly legal disputes as equitable in order to seek to obtain subject matter jurisdiction in the Court of Chancery. The existence and significant development of the Superior Court CCLD as a sophisticated business court of law has essentially put an end to that practice.

Unique Feautures and Practice Pointers
Delaware's business courts draw lawyers from around the country who work in association with Delaware counsel, to whom the courts look to maintain the high level of professionalism and practice they expect. The

courts are welcoming to lawyers from across the country, but they are also local courts with unique features, practices, and procedures. The following are some of the more notable features of the courts, along with related practice pointers:

The Court of Chancery and Superior Court CCLD are statewide courts. Most of the members of the Court of Chancery and all of the members of the Superior Court CCLD are resident in New Castle County (Wilmington). Delaware's judges are nominated by the governor and confirmed by the State Senate, and are appointed for terms of 12 years.

The removal of actions filed in the Court of Chancery or the Superior Court CCLD to federal court is relatively rare. Beyond the prohibition against removal by a Delaware defendant under the "forum defendant rule," lawyers and litigants view Delaware's state courts as favorable venues for the resolution of their business and corporate disputes given that Delaware's business-court judges are subject-matter specialists.

From the perspective of a plaintiff instituting an action in Delaware, matters in Delaware's state courts can move faster than in Delaware's federal court, which maintains a very heavy patent-litigation docket. In addition, in response to a motion to dismiss in Delaware state court, a plaintiff need only establish that its claim is "reasonably conceivable," which is a more plaintiff-friendly standard than the federal court's "plausibility" standard.

Given the split jurisdiction of Delaware's trial courts between the Court of Chancery as the court of equity and the Superior Court as the court of law, plaintiffs need to consider the nature of their claims and choose the appropriate court for bringing their actions in order to avoid unnecessary subject-matter jurisdiction disputes.

Punitive damages are not available in the Court of Chancery. If a party wishes to pursue punitive damages, any such claim must be pursued in the Superior Court. In addition, there are no jury trials in the Court of Chancery. All actions are decided by the assigned Chancellor or Vice Chancellor, who serves as the finder of fact. This can result in more predictability in the court's rulings.

The Court of Chancery takes seriously its status as a court of limited equitable jurisdiction. The court will sua sponte assess the propriety of its subject matter jurisdiction in cases brought before it, and parties are cautioned against attempting to fashion a truly legal claim, i.e., one in which there is an adequate remedy at law, as an equitable one in order to improperly gain jurisdiction in the court. That being said, the "clean up doctrine" allows the Court of Chancery to exercise subject-matter jurisdiction over legal claims that are secondary to the predominately equitable claims in a case.

If it is determined that the Court of Chancery lacks subject-matter jurisdiction over an action, the plaintiff has 60 days to transfer the case to the Superior Court. For purposes of applying any statute of limitations, the time of bringing the action will be deemed to be when it was brought in the Court of Chancery.

While the Court of Chancery may exercise subject-matter jurisdiction over secondary legal claims in a case, the Superior Court does not have jurisdiction over equitable claims or defenses. If a party asserts equitable claims or defenses in the Superior Court, they will be subject to dismissal for lack of subject-matter jurisdiction.

A plaintiff seeking both legal and equitable relief, as well as relief that would not be available in the Court of Chancery, e.g., punitive damages, will need to bring parallel actions in both courts in order to properly preserve all of its claims, and it then may seek consolidation of the actions before a single jurist. In circumstances where there are parallel Court of Chancery and Superior Court actions, there is a mechanism, as appropriate, for having a Superior Court judge designated as a Vice Chancellor for purposes of deciding the equitable aspects of the case.

Notwithstanding the Court of Chancery's limited equitable jurisdiction, there are statutory bases for affording Delaware corporations access to the court and its expertise in matters that might not fall within the court's traditional equitable jurisdiction. In particular, the court maintains a "mediation only" docket through which Delaware corporations may be able to have their disputes mediated by a sitting member of the court before bringing a lawsuit. The court also affords jurisdiction to "technology disputes," as defined by statute, that might involve only claims for money damages. Each of these programs is aimed at servicing the dispute-resolution and litigation needs of Delaware corporations.

All complaints and other affirmative claims, including counterclaims, filed in the Court of Chancery must be verified by an individual party or a director, officer, or other appropriate representative of an entity party pursuing the claim.

Plaintiffs in the Court of Chancery may file complaints under seal as confidential filings without prior permission of the court. The confidential filing is pursuant to certain prescribed rules, which include immediate notice to and consultation with the adversary regarding the filing of a

public, redacted version of the complaint, which must be made within three business days of the confidential filing. Confidential filings in the Superior Court require prior permission of the court, and public versions must be filed within 30 days of the confidential filing.

While the courts are liberal in generally allowing confidential filings, they are strict in terms of the scope of redactions allowed in the public versions of those filings. The public's interest in access to court proceedings is paramount, and a party must be able to demonstrate that the harm of public disclosure of its sensitive, non-public information outweighs the public's access in order to support any redactions.

A defendant moving to dismiss a complaint in the Court of Chancery need only file a one-page motion document generally stating the grounds for the motion. The parties will then set a schedule for subsequent briefing on the motion. Given this, if a defendant requests an extension of time to respond to a complaint, the plaintiff may want to require that any motion to dismiss in lieu of an answer be accompanied by the supporting brief, so as not to result in further delay in the prosecution of its case.

In order to avoid multiple rounds of Rule 12(b)(6) motions, a plaintiff in the Court of Chancery faced with a motion to dismiss for failure to state a claim must file an amended complaint or run the risk of a dismissal of its original complaint with prejudice, i.e., without permission to amend the original complaint. The same rule does not exist in the Superior Court.

Similarly, in order to avoid duplicative motion practice, parties are encouraged to refrain from opposing proposed amended complaints on futility (or failure to state a claim) grounds and instead are urged to consent to the filing of amended complaints with a reservation of the right to challenge the merits of the amended complaint after it is filed.

Any matter in the Court of Chancery that seeks temporary restraints or a preliminary injunction, or that calls for a summary proceeding, e.g., pursuant to statute, is to be accompanied by a motion for expedited proceedings and an indication as to the desired pace of the action. Parties are typically expected to attempt to resolve such motions in the first instance by stipulation, subject to the court's approval.

The Court of Chancery and Superior Court each maintain their own set of rules and a body of interpretative case law. The Court of Chancery Rules and the Superior Court Civil Rules generally track the Federal Rules of Civil Procedure (FRCP), and if and as appropriate, the courts may consider federal case law as persuasive in interpreting their rules.

While they generally track the FRCP, the Court of Chancery Rules relating to expert discovery do not include the protections against the disclosure of draft expert reports and communications between lawyers and experts that are contained in the FRCP and the Delaware Superior Court Civil Rules. However, the parties may (but need not) stipulate to the non-discoverability of those items and other parameters for expert discovery. There is a court-approved form of protocol governing expert discovery that parties may consider and modify, subject to the court's approval, to fit the needs of their case.

The assigned jurist either in the Court of Chancery or the Superior Court CCLD will preside over the case from inception through trial. Assigned trial dates are real, and case scheduling deadlines are taken seriously. Decisions on substantive motions and post-trial briefing are to be rendered within 90 days of their submission. There is an automatic right of appeal to the Delaware Supreme Court from final judgments of the courts.

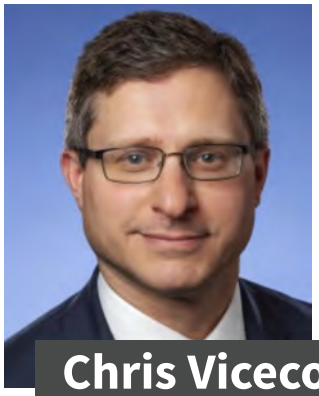
While previously a court of unwritten practices, the Court of Chancery has issued Guidelines, recently updated during COVID, regarding its expectations of counsel and the handling of case scheduling and other litigation and procedural issues before the court, including standards governing document preservation, collection and review, and privilege logs. The Guidelines also include various forms, including forms of confidentiality orders and discovery protocols, which are aimed at assisting parties in resolving procedural issues so they can focus on the merits of their matters. The Guidelines are required reading for any Court of Chancery practitioner.

Given the nationwide practice before the courts, out-of-state counsel regularly appear pro hac vice and are welcomed in the courts. At the same time, they are expected to conduct themselves civilly and professionally. Petty scheduling and discovery disputes are not tolerated. The courts encourage counsel to work with each other on procedural issues and ultimately look to the parties' Delaware counsel to ensure the civil and efficient handling of matters before the courts.

Conclusion

Delaware's business courts provide specialized forums with specialized judges for the handling of complex business and corporate disputes. The courts maintain unique practices and procedures that allow for the handling of those disputes in an efficient and predictable manner and are valuable features for any business entity involved in litigation. A strong working knowledge

of those practices and procedures is essential to any corporate litigant and practitioner.



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Mr. Viceconte defends complex commercial, business tort, and product liability claims. Resident in the firm's Wilmington, Delaware office, he also regularly serves as Delaware counsel for the firm's clients, as well as for out-of-state law firms, in a wide range of matters before Delaware's state and federal courts.

Areas of Focus
- Business & Commercial Litigation
- Products Liability
- Delaware Counsel

Publications
- A Practitioner's Introduction to New Jersey and Delaware Chancery Court Practice
- Gibbons Commercial Litigation News
- Delaware's "Freedom of Contract" Approach to Non-Compete Agreements – Even Between Sophisticated Parties in the Sale-of-Business Context – Has Its Limits
- Delaware Supreme Court Gives Preclusive Effect to Federal Court Dismissal of Derivative Suit for Failure to Show Demand Futility
- Delaware Supreme Court Clarifies Reach of Personal Jurisdiction Over Nonresident Directors and Officers of Delaware Corporations Under 10 Del. C. § 3114
- Business Organizations Seeking Quick and Inexpensive Resolutions of Business Disputes Need to Know About Delaware's Rapid Arbitration Act
- Retroactive Effect Given to Delaware Statute Authorizing Up to 20-Year Statute of Limitations for Certain Breach of Contract Actions
- Service of Discovery Also Subject to New Deadline in Delaware Federal Court
- Put Away that Midnight Oil: New Rule in the District of Delaware
- Delaware Enacts Legislation Authorizing 20-Year Statute of Limitations for Certain Breach of Contract Actions
- Delaware Adopts Less-Stringent Approach to Authentication of Social Media Evidence: The Jury, and Not the Trial Judge, Ultimately Decides

Honors and Awards
- Included on the Best Lawyers® list, Commercial Litigation
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Breakout: Becoming a Sommelier of Insurance Claims

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Becoming a Sommelier of Insurance Claims: Resolving Complex Cases in Challenging Times
By Jason Lien, Ted Le Clercq and Jeremy Krahn

The insurance claim process is a separate, symbiotic relationship between an insured and an insurer that often is the key to successfully resolving complex litigation claims. Like many legal relationships, the insured-insurer relationship has been impacted by outside factors, including plaintiff demands, social inflation and even artificial intelligence, to name a few. This article briefly explores best practices in successfully navigating the claim process in the context of these challenges posed by our ever-changing and more complex world.

Notice

A fundamental component of insurance policies remains the requirement that the insured provide notice to the insurer—within a specified time period, as soon as practicable, or something similar—in the event of a claim or occurrence, or when faced with a lawsuit or even a potential claim.

To be sure, these requirements protect insurer's interests by providing an opportunity to investigate the underlying facts and effectively participate in the defense of a lawsuit as early as possible, which may result in a more favorable resolution. But the notice requirement also benefits the insured by facilitating a smoother claims process and enabling the policyholder to focus on defending the source of the claim itself. The one thing more unnerving than being a party to high-stakes litigation is to find out your insurer is not covering the costs of litigation because it was not timely notified. Take, for example, the recent case of Harvard University, which was stuck with a $15 million legal bill in defending against attacks to its admissions policies because it waited too long to provide formal notice to its excess insurer—despite the highly publicized nature of the underlying lawsuit.[1]

As with other aspects of the law, whether an insurer can properly deny a claim based on late notice depends on the jurisdiction and policy language. In many jurisdictions, courts have concluded that an insured should not be denied coverage solely because notice was untimely, so long as the insurer was not prejudiced by the delay.[2] Other states strictly construe notice requirements and, for certain types of policies, permit the denial of coverage regardless of prejudice.[3] One can imagine a situation where untimely notice could prejudice an insurer, such as losing the opportunity to interview witnesses while memories are fresh, raise a viable affirmative defense, or negotiate a less expensive settlement.

But regardless of the jurisdiction, the dangers of untimely notice are a trap for the unwary. As the Harvard example demonstrates, even sophisticated parties can fall into the untimely notice trap; and when they do, costly litigation frequently follows. To avoid these satellite disputes, parties should consider these best practices:

- Review and periodically revisit the policy. Sounds simple, but memories fade. Better to know the terms of the policy before they are needed.
- Draft policy language with solid deadlines. A specific time period to provide notice to the insurer is clearer than "as soon as practicable" and the like and should, therefore, leave less to be disputed should a conflict arise.
- Have an internal system in place to automatically put insurers on notice.
- Communicate in writing and document everything, including an acknowledgement that notice has been received.
- Provide notice as early as possible—perhaps even pre-claim—and err on the side of providing notice for any and all potential claims. Be proactive and over notify insurers to avoid costly litigation over coverage

1 Nate Raymond, Harvard Cannot Recoup $15 M From Insurer For Race Case Costs, Court Rules, Reuters (Aug. 9, 2023), https://www.reuters.com/legal/harvard-cannot-recoup-15-mln-insurer-race-case-costs-court-rules-2023-08-09/; see also President and Fellows of Harvard Coll. v. Zurich Am. Ins. Co., --- F.4th ---, 2023 WL 5089317 (1st Cir. Aug. 9, 2023).

2 See, e.g., Gen. Star Indem., Co. v. Guthrie, No. 19-cv-314-JWB, 2022 WL 4088066 (E.D. Okla. Sept. 2, 2022) (applying Oklahoma law); PetroSantander (USA), Inc. v. HDI Global Ins. Co., 308 F. Supp. 3d 1207 (D. Kan. 2018) (applying Texas law).

3 See, e.g., Georgian Am. Alloys, Inc. v. AXIS Ins. Co., No. 21-1947, 2022 WL 3971584 (3d Cir. Aug. 31, 2022) (applying Delaware law to claims-made policy); EurAuPair Int'l, Inc. v. Specialty Ins. Co., 787 Fed. App'x 469 (9th Cir. 2019) (applying California law to claims-made-and-reported policy).

issues. Some policies also provide for coverage for pre-claims in order to mitigate the risk of the pre-claim facts turning into an actual claim.
- When in doubt, call or e-mail your broker and ask about which carriers to give notice to and deadline for notice.

Use of Hammer Clauses
Policyholders and insurers often have different interests in mind when considering whether to settle a claim, and for how much. For example, an insurer's primary concern may be in minimizing costs and liabilities, while the policyholder may be more interested in protecting its reputation and assets or dissuading copycat lawsuits. These differing priorities can cause tension when it comes to settling a claim.

To address these differing interests, insurance policies often include a "hammer clause," which vary depending on the precise language but operate to drive a wedge and force settlement or otherwise limit further exposure to the insurer. In one policy, a hammer clause might require the insurer's consent before settling a claim. In another, the insured who goes against the insurer's settlement recommendation may be on the hook for any damages and costs above what the insurer recommended. Another policy may take a softer approach and allow the insurer and insured to share the costs incurred after the insurer would have settled the claim. The rationale for these types of clauses is that an insurer should not be obligated to defend a claim for an insured that wants to continue litigating when it is unreasonable to do so.

Whether these clauses are drafted on the harder or softer side, there exists a potential for conflict should the insurer decide to "bring down the hammer." If and when this happens, it is vital for the insured and insurer to maintain open and honest communication from the preliminary stages of the claim (or, if possible, before pre-claim) and to share relevant information. If the parties are able to discuss their expectations, concerns, and the claim's strength and weaknesses at the start, it follows that they will be more likely to reach a consensus on an agreeable settlement amount later in the process. If these discussions are left until the eve of mediation, there is bound to be ill-will and the chances of resolution shrink.

Timed Policy-Limit Demands and Bad-Faith Exposure
It is common for plaintiffs to make a settlement demand for the coverage limit set forth in the defendant's insurance policy and to put a time-limit on acceptance. These demands create risk for both insurer and insureds. The demands may also create a duty to settle, under certain circumstances, especially where the demand is "reasonable." This type of offer can be a source of intense tension between the insurer's desire to limit the settlement value and avoid bad faith exposure above the coverage limit and the insured's desire to settle for an amount within its policy limits, be done with the lawsuit and not be exposed to an excess judgment. Where the demand is accompanied by a time limit to accept or reject, plaintiffs are looking to force settlement or expose the carrier above policy limits. Faced with this type of demand, an insurer must walk the tightrope between paying too much and alternatively exposing itself beyond its policy limits. For instance, large damages cases with marginal liability facts can create quite a dilemma with a check-all-the-box policy limits demand with a reasonable, but tight, time horizon. Insurers have to take care to ensure their response does not later expose them to allegations of bad faith and exposure above policy limits.

In general, bad-faith exposure may arise when a plaintiff makes a reasonable demand to settle the claim within policy limits, yet the insurer unreasonably rejects, delays, or fails to investigate the demand. Under those circumstances, if the plaintiff ends up prevailing in an amount exceeding the policy limit, the insured may then either assert, or assign to the plaintiff, a bad-faith claim against the insurer. To avoid this, insurers need lawyers who can evaluate claims timely, give insurers a reasonable basis for responding within the time limits and help maintain lines of communication with insureds and their representatives. Investigations into the claim should be done fairly and documented thoroughly.

The insurer is likely to bring in its lawyers to assist in preparing an early case assessment, particularly where the facts of the case are complex or where there is a potential for a high-damages award. And when there is a time limit associated with the demand, the insured and insurer may often try to seek an extension in order to conduct a fulsome investigation. When does the demand create a duty to act by the insurer? Consider the following:

- Is it a case of liability?
- How clear is liability?
- Can damages exceed the policy limits?
- How much higher than policy limits can damages reasonably go?
- Is a complete release offered in exchange for limits?
- Is a "reasonable amount of time" offered to evaluate?
- What does insured say?

Big damages cases and policy limits demands require careful timely attention and transparent communication between insurer, attorney, insured and the other side.

Preparing for Mediation

It is no secret that alternative dispute resolution has become a ubiquitous component of modern civil litigation. Indeed, the most recent federal court statistics reveal that only 0.8% of civil cases filed in federal court are resolved by trial.[4] The decline of trials corresponds closely with the rise of mediation, with some sources reporting that 85% of commercial matters and 95% of personal injury matters end in settlement after mediating.[5] In other words, mediation is a crucial step in resolving most cases.

Given its significant role in many civil lawsuits, it is imperative that the insured and its counsel be informed and prepared before entering mediation. And when an insurer is covering the claim and being asked to fund the settlement, the insurer must also be informed and prepared well in advance of the mediation date. The latter is often easier said than done, and is a common friction point between insurers and insureds. Among policyholders and even their counsel, it is underappreciated the different layers that are required to obtain settlement authority from an insurer, and the amount time that takes. Even when the insured is dutifully updating the insurer with important case developments, it takes more time than one might think to digest those developments and the evidence, assess the insurer's exposure, and escalate up the chain of command. If these steps are not taken far enough in advance (particularly for more complex cases), the insurer may not be in a position to consider settlement, leaving the mediation itself an exercise in futility. Policyholders and insurers must plan accordingly to avoid this result.

Providing relevant information to the insurer at the front end has the added benefit of ensuring there is an appropriate reserve for the claim. When a new claim comes in, an adjuster will set a "reserve" of funds based on an estimate of the amount of money it will take to resolve the claim. The adjuster's estimate might be informed by looking at the complaint and any information available at the time the claim is made. For example, in a personal injury case, the reserve amount may depend on the venue, the age of the parties, pre-existing conditions, medical records and expenses, specific diagnoses, future earning potential, and lost earnings, among other things. But the amount of the reserve may change based on current information. New information should, therefore, be shared with the insurer as early as possible so that the reserve remains accurate heading into mediation.

Impact of "Social Inflation"

So-called "social inflation," is the concept that juries are awarding—and insurers are paying—"nuclear verdicts" that are much higher than economic inflation.[6] Legal commentators have generally attributed this phenomenon to three main drivers.

First, the "varying demographic makeup of jury pools, an increasing public distrust of large corporations, and the influences of social media" all have an impact, with corporate parties often playing the role of villain in the eyes of the public.[7] The "greedy corporation" narrative clearly resonates with juries, as evidenced by a recent Pew Research survey where 71% of respondents stated that corporations negatively affect the country's trajectory.[8] Second, third-party litigation funding is now widespread—in cases big and small—and has an outsized effect on social inflation.[9] Because this type of arrangement requires the litigating party to pay the third-party funder a portion of any award, parties are often unwilling to settle for an amount that puts little money in their pocket after repaying the funder.[10] This, in turn, leads to a more difficult settlement process and higher payouts. Third, the plaintiff's bar is increasingly engaging in aggressive psychological tactics that influence juries based on emotions and bias.[11]

Whatever the root cause, this phenomenon is difficult to quantify and results in unpredictable jury awards, which also makes it difficult to evaluate an insurance claim. In the era of social inflation, it may be prudent for insurers to invest in advance analytics platforms that can mine historical data to identify trends and patterns in claims, which can help insurers predict exposure in future claims more accurately. In addition, the value of skilled claims adjusters and legal experts cannot be overstated, as their expertise is necessary to understand the nuances of the modern evaluation process. Finally, insurers should abreast of the latest trends and remain agile in their approach by regularly reviewing and updating their claims handling procedures to reflect the quickly evolving landscape.

4 Table C-4—U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2022), Admin. Office of the U.S. Courts, https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2022/03/31 (select "Download Data Table").

5 Am. Arbitration Ass'n, A Guide to AAA Disaster Recovery Claims Mediation Procedures at 1, https://www.adr.org/sites/default/files/document_repository/A-Guide-to-AAA-Disaster-Recovery-Claims-Mediation.pdf.

6 Cooling Social Inflation Means Defusing Nuclear Verdicts, Taming Reptilian Tactics, Zurich Ins. Grp., https://www.zurich.com/en/commercial-insurance/sustainability-and-insights/commercial-insurance-risk-insights/cooling-social-inflation-means-defusing-nuclear-verdicts-taming-reptilian-tactics.

7 Social Inflation, Nat'l Ass'ns of Ins. Comm'rs, https://content.naic.org/cipr-topics/social-inflation.

8 Joseph P. Moriarty, Social Inflation: Fighting Back Against the Rise in Nuclear Verdicts, DRI (Jan. 17, 2023), https://www.dri.org/publications/featured-article/2023/social-inflation#:~:text=Social%20inflation%20is%20typically%20blamed,%3B%20and%20(3)%20plaintiffs'.

9 Id.

10 Id.

11 Id.

The Role of AI in Insurance Claim Handling

A single article or breakout session cannot cover all of the issues facing insurers and policyholders in the modern era. But any discussion would be incomplete without at least briefly touching on the role of artificial intelligence ("AI") in the handling of insurance claims.

In case you have not heard, AI is here, and has been used in the legal industry for some time.[12] The insurance industry, already familiar with the use of data and algorithms, is particularly well suited to adapt to the significant changes brought on by AI.[13] "The insurance business model itself is predicated on the use of mathematical and statistical methods to process personal and non-personal data to underwrite risks and price insurance policies, to quantify losses, to pay customers' claims, and to identify and prevent insurance fraud."[14] Insureds, insurers, and their counsel are positioned to harness the advantages of AI in a variety of ways.

First, AI can expedite the handling of claims and identify relevant facts, which could in turn lead to faster settlements thereby reducing costs and legal fees. For example, certain tools can automatically read, interpret, and process documents and images (e.g., extracting information from medical records and evaluating damage).[15] Second, it can "aid in detecting and preventing fraud by analyzing data patterns and identifying suspicious activity, which can help insurers save money by reducing the number of fraudulent claims they pay out."[16] Third, it "can help insurers evaluate risk more accurately by analyzing large amounts of data such as historical claims data, credit scores and social media activity—thereby enabling insurers to offer personalized coverage to customers and price policies more accurately."[17]

AI is already being used in the insurance industry and appears here to stay for the foreseeable future. While the exact role it will ultimately play is still yet to be determined, it should not be ignored, and those involved with insurance claims would be served in embracing its advantages.

Conclusion

This article only briefly explored some of the key issues that are critical to successfully managing the insured-insurer relationship during the claim process. However, there are key takeaways that both insureds and insurers should take note of. From the insured's perspective, it remains critical to provide timely notice of claims, understand how policy terms impact responses to settlement demands, and cooperate with the insurer to evaluate claims and prepare for mediations. From the insurer's perspective, the impact of social inflation has made it even more important to ensure that claims are properly analyzed during the claim process and settlement demands are responded to in a timely manner. Insurers must also harness technological advances, including AI, to make the claim process more efficient and enhance its evaluation of an insured's exposure to the claim.

12 Deloitte, The Legal Department of the Future at 3 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/us-advisory-legal-department-of-the-future.pdf; Karen Turner, Meet 'Ross,' The Newly Hired Legal Robot, The Washington Post (May 16, 2016), https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot/ (reporting on the "hiring" of a robot lawyer to assist with bankruptcy cases).

13 Winston Yong, Is Artificial Intelligence Relevant to Insurance, IBM (May 1, 2023), https://www.ibm.com/blog/is-artificial-intelligence-relevant-to-insurance/.

14 Id.

15 Id.

16 Manish Gupta, Harness the Power of AI in the Insurance Sector, Forbes (Apr. 17, 2023), https://www.forbes.com/sites/forbestechcouncil/2023/04/17/harnessing-the-power-of-ai-in-the-insurance-sector/?sh=3ebf7aeb335d.

17 Id.

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Jason Lien focuses his litigation practice on representing clients from the construction, real estate, financial services, food, and railroad industries. He regularly appears in federal and state court on behalf of design-build firms, general contractors, architects, engineers, specialty contractors, suppliers, property management companies, real estate owners, and lenders. A portion of Jason's practice also involves representing a major U.S. railroad in disputes throughout Minnesota.

Recognized by Chambers USA for construction law in 2016-2023, he is described as "an esteemed trial lawyer with a wealth of experience assisting with litigation mandates relating to construction defects and insurance coverage issues." Prior to joining Maslon in 2002, Jason honed his trial and appellate skills as a Naval Officer with the United States Navy Judge Advocate General's Corps, where he led hundreds of courts-martial, administrative hearings, and military appeals.

In addition to his litigation practice, Jason served as a member of Maslon's Governance Committee from 2017 to 2019 and as the committee's vice chair from 2018 to 2019. Jason was selected for inclusion on the 2015-2022 Minnesota Super Lawyers® lists and prior to that was recognized on the Minnesota Rising Stars lists.

Outside of the office, Jason is an avid triathlete and a three-time Ironman finisher.

Areas of Practice

- Appeals
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- Competitive Practices & Antitrust
- Construction & Real Estate Litigation
- Insurance Coverage Litigation
- Tort & Product Liability

Honors

- Recognized in Chambers USA: America's Leading Lawyers for Business, Construction, Minnesota, 2016-2023
- Recognized on Minnesota Super Lawyers® list, 2015-2023 (Minnesota Super Lawyers® is a designation given to only 5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Selected for inclusion in The Best Lawyers in America®, 2021-2024
- North Star Lawyer, Minnesota State Bar Association, 2015 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2006-2009, 2011-2012 (Minnesota Rising Stars is a designation given to only 2.5% of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Recognized as a Top Lawyer, Minnesota Monthly, 2022-2023 (The research for the Top Lawyers list, created by Professional Research Services, is based on an online peer-review survey sent to all attorneys in Minnesota.)

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- University of Minnesota Law School - J.D, cum laude, 1998
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Breakout: Working DEI and Getting Results

Malissa Wilson

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DEI Initiatives in the Workplace Following Students for Fair Admission, Inc. Decision
By Malissa Wilson

Since the signing of Executive Order 10925 by President Kennedy in 1961, the term "affirmative action" has been associated with providing all Americans access to equal employment regardless of their race. Executive Order 10925 required that government contractors "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color or national origin."[1] Subsequently, "affirmative action" began extending to employment beyond government contractors, including the education sector. Through civil rights legislation to present-day workplace diversity, equity and inclusion ("DEI") programs, the country has taken affirmative steps to achieve the goals of Executive Order 10925 by creating diverse, equitable and inclusive places of employment for all Americans.

However, the United States Supreme Court recently declared race-based admissions for colleges unconstitutional.[2] To fully understand what this decision means for diversity in the workforce, we must first look at what DEI is and the evolution of affirmative action decisions in the United States since 1961. This article will also explore the immediate impact of the Supreme Court's decision on the workforce by analyzing the Equal Employment Opportunity Commission's ("EEOC") response to the case.

DEI Defined
In 2021, President Biden enacted Executive Order 14035[3] "to cultivate a workforce that draws from the full diversity of the Nation." To do this, the President recognized that the Federal Government must be a model for diversity, equity, inclusion, and accessibility. The Order defines diversity as "the practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities." Equity is defined as "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment." The Order defines inclusion as "the recognition, appreciation, and use of the talents and skills of employees of all backgrounds." The President's Order recognizes underserved communities as "populations sharing a particular characteristic, as well as geographic communities, who have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life." The definition explicitly recognizes people of color: "Black and African American, Hispanic, and Latino, Native American, Alaska Native and Indigenous, Asian American, Native Hawaiian and Pacific Islander, Middle Eastern, and North African persons." These definitions hinge on recognizing race and ethnic backgrounds to ensure that the workforce is not only a diverse and inclusive space but also recognizes the challenges that have historically been a part of the fight for anti-discrimination laws.

Race-Conscious Affirmative Action Through The Years
Affirmative action has consistently been a priority for the federal government, even prior to 1961 when President Roosevelt's 1941 Executive Order 8802[4] outlawed discrimination based on "race, color, creed, and national origin in the federal government and defense industries." President Kennedy's 1961 Executive Order 10925 called for employers to act affirmatively to ensure that applicants were not subject to discrimination based on race, creed, color, or national origin. This same Order created the Committee on Equal Employment Opportunity, which would later become the Equal Employment Opportunity Commission (EEOC) after the passage of the Civil Rights Act of 1964. Despite these efforts, it was not until a year after the Civil Rights Act of 1964, when President Lyndon B. Johnson issued Executive Order 11246, that there

1 https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history#:~:text=On%20March%206%2C%201961%2C%20shortly,without%20regard%20to%20their%20race%2C

2 Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

3 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/

4 https://www.archives.gov/milestone-documents/executive-order-8802

was strong enforcement for federal contractors "to take affirmative action to ensure equal opportunity based on race, color, religion, and national origin."[5]

However, the scope, limitations, and constitutionality of affirmative action programming were left to the courts' interpretations. Since the first affirmative action case in 1978[6] made it to the United States Supreme Court, the Court has consistently upheld that diverse student bodies add to the quality of higher education[7] and thus, are "compelling" methods of promoting state interest[8]. Each time an affirmative action case has been heard by the United States Supreme Court, specifically in cases of college admissions, affirmative action has been narrowed further and further until the recent opinion that banned raced-conscious admissions processes altogether.

Regents of University of California v. Bakke (1978)
The concept of "affirmative action" has never been about prioritizing one race over another. Instead, its foundation was about closing the gap for race-based discrimination in employment and education. The United States Supreme Court has consistently struck down admission processes that excluded qualified candidates from being admitted into a school. In Regents, the Court held that a special admissions program that prevented a white student from being admitted due to a set number of spots being dedicated to minority students was illegal because it prevented the student from "competing for all 100 places because of his race."[9] However, the Court also held that race could be one of the factors considered by the school for admissions.[10]

The Court in Regents determined that attaining a diverse student body is a "constitutionally permissible goal for an institution of higher education."[11] Creating an educational space that reflects the diversity of the Nation is essential to the quality of higher education and the professionals produced.[12] Justice Powell noted a prior example provided by the Court discussing how law school would be ineffective if taught in complete isolation from the individuals and institutions that it interacts with and impacts.[13] This case exemplifies that affirmative action is not simply putting different people of different races in the same place but providing students with the opportunity to understand and explore the many varied perspectives that make up our country.

United Steelworkers of America v. Weber (1979)
Following the Civil Rights Act of 1964, employers began trying to eliminate segregation in the workforce. These efforts included actively hiring Black candidates for positions they previously were not considered. In 1979, Weber brought a suit against the United Steel Workers, challenging the legality of hiring employees with less seniority as a part of their affirmative action program.[14]

The Court in Weber held that the affirmative action policy used by United Steel did not violate Title VII's prohibition against racial discrimination because it was a temporary measure. United Steelworker's affirmative action program aimed to "eliminate a manifest of racial imbalance."[15] Since the program was temporary and was only meant to ensure that the workforce mirrored the percentage of Black people in the local labor force, the Court determined that United Steel's affirmative action plan was not unconstitutional. The Civil Rights Act was enacted to dismantle the history of racial segregation and hierarchy in the workforce, so eliminating all affirmative action programs would directly conflict with the statute's purpose.

In Weber, the Court's primary concern was increasing the number of minorities in the workforce, specifically in spaces where they were previously discriminated against. The United States Supreme Court has consistently held that the severe underrepresentation of minorities justified the use of race as a factor in choosing among qualified candidates.[16]

Johnson v. Transportation Agency, Santa Clara Cnty., Cal. (1987)
In Johnson v. Transportation Agency, Santa Clara Cnty., Cal., the United States Supreme Court ruled that where there are significant statistical imbalances between minorities and women, race and gender can be used as "one factor" of employment practices.[17] This practice is consistent with Title VII's "purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed[18]."

5 https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history#:~:text=On%20March%206%2C%201961%2C%20shortly,without%20regard%20to%20their%20race%2C

6 Regents of University of California v. Bakke, 438 U.S. 265, 311-312 (1978).

7 Id. at 312-313.

8 Grutter v. Bollinger, 539 U.S. 306, 333-334 (2003).

9 Regents, 438 U.S. at 280.

10 Id.

11 Id. at 311-312.

12 Id. at 312-313.

13 Id. at 313-314.

14 United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

15 Id. at 208.

16 Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 632 (1987).

17 Id. at 637.

18 Id. at 633.

Gratz v. Bollinger (2003) and Grutter v. Bollinger (2003)

The United States Supreme Court has consistently struck down cases where colleges used students' race to fulfill a quota system. In Gratz, the Supreme Court declared the University of Michigan's use of a point-based system unconstitutional because it gave minority applicants an unfair advantage over nonminority applicants.[19] The Court determined that the school's system was a way of "reserving seats" for minority applicants and directly infringed on the rights of nonminority applicants.[20] The Court further determined that the University of Michigan's College of Literature, Science, and the Arts admission process did not hold up under the required "strict scrutiny" application for all race-conscious admissions and employment programs.

"To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs 'narrowly tailored measures that further compelling governmental interests.'"[21]

The University of Michigan granted 20 points to minority applicants because of their race, which was one-fifth of the points needed for admissions. The Court declared that this process violated the nonminority student's equal protection clause.

In contrast, in Grutter, the United States Supreme Court upheld that a diverse student body is a "compelling" state interest, and colleges could use race as one of the factors in determining college admissions so long as the use was narrowly tailored to serve that interest. The Court upheld the long-established notion that colleges should have deference in deciding the students that attend their school, providing the admissions process does not include racial balancing.[22] The University of Michigan Law School's interest was to "enroll a 'critical mass' of minority students[23]." The Law School's "concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."[24] The Court found that the Law School's admission process was not based on a quota system, but rather a holistic view of the applicant where his/her race was used as a "plus factor" to his/her application.[25]

Students for Fair Admission, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina (2023)

On June 29, 2023, the United States Supreme Court released its opinion declaring race-conscious admissions programs unconstitutional.[26] The Court determined that neither Harvard nor the University of North Carolina's basis for admitting students passed the strict scrutiny test, and that the admissions practices by both institutions violated the Equal Protection Clause of the Fourteenth Amendment that race should never be used as a negative.[27] The colleges' beliefs that the classes would "change meaningfully if race-based admissions were abandoned" convinced the Court that race was more than a "plus" factor added to some of the minority students' admissions.[28] Therefore, the Court declared that colleges and universities could no longer use race as a factor for admissions. However, the Court determined that race should be considered on an individual basis discussing how race has impacted a student's life.[29]

DEI Programs Are Still Legal

The Supreme Court's recent opinion declaring race-conscious admissions unconstitutional has left employers trying to understand what this opinion means for DEI programs in the workforce. In the wake of the Supreme Court's opinion, the EEOC published the following statement regarding the potential impact on DEI programs implemented by employers:

> "[T]he decision in Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[30]

Efforts to Expand the Scope of the Supreme Court Opinion to Employment

Despite the statement issued by the EEOC, thirteen State

19 Gratz v. Bollinger, 539 U.S. 244, 273-276 (2003).

20 Id. at 258-261.

21 Id. at 270.

22 Abigail Fisher sued the University of Texas twice with claims about the school's admissions processes. Both cases were appealed to the United States Supreme Court, where strict scrutiny of colleges' use of race as a factor for admissions was upheld. The Court also upheld the precedent that consideration for race was a compelling state interest. Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013); and Fisher v. Univ. of Texas at Austin, 579 U.S. 365 (2016).

23 Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

24 Id. at 330.

25 Id. at 334.

26 143 S. Ct. 2141 (2023).

27 Id. at 2168.

28 Id. at 2169.

29 Id. at 2176.

30 https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

Attorneys General recently signed a letter addressed to all Fortune 100 Companies stating that the companies' respective DEI programming violates not only the recent Supreme Court opinion but also the Civil Rights Act of 1964 (which outlaws racial discrimination in the workforce). The letter claimed that the recent Supreme Court decision should "place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices."[31]

In response to this letter, twenty-two State Attorneys General (including the District of Columbia) sent a letter to the same companies stating that DEI programs are still legal and should continue to "ensure that the workforce is reflective of the Nation we live in." [32] The letter emphasizes that the Supreme Court's opinion does not address employers or the private sector, so it cannot be assumed that the scope of the opinion is to be extended beyond college admissions. The opinion does not in fact address DEI initiatives or efforts outside the admissions process. The Attorneys General argue that diversity initiatives are not simply quota-driven but rather initiatives to create work environments that represent how diverse the Nation is and bring different perspectives to improve our society.

> "Diversity initiatives raise awareness of the value of collaborating with people of different cultures, backgrounds, perspectives, experiences, races, and ethnicities. They build diverse teams and a workforce that understands its customers—a business imperative. Companies' efforts to foster diversity in the workplace also help to expand markets and attract diverse talent to our states."[33]

On July 17, 2023, United States Senator Tom Cotton from Arkansas sent 51 letters identical to the first letter from the thirteen State Attorneys General to law firms claiming that their DEI programs may violate federal civil rights laws.[34] In doing so, Senator Cotton is attempting to expand the reach of the Supreme Court's recent opinion that outlawed race-conscious admissions process for colleges and universities to employment practices. Senator Cotton's letter also forewarns firms that their continued use of DEI programs could ultimately lead to investigations and litigation.

Although no firms have responded to Senator Cotton's letter, Massachusetts Bar President-Elect Damian Turco has. Being that only two percent of lawyers are Black in Massachusetts and only two percent are Latino/Hispanic, there is a need for more DEI initiatives to inspire more young people of color to pursue a career in law.[35] Turco stated that "Senator Cotton's letter is not legal authority" and that lawyers must educate their clients on "what we're seeing in the law."

On August 22, 2023, the same group that filed the lawsuits that resulted in the decision from the United States Supreme Court declaring race-based admissions for colleges unconstitutional – the American Alliance for Equal Rights – filed two lawsuits against the law firms Perkins Coie LLP and Morrison & Foerster LLP. The lawsuits allege that the firms' diversity fellowship programs are unconstitutional because they exclude applicants who are not students of color, who identify as LGBTQ+ or who have disabilities. In response to these lawsuits and Senator Cotton's letter, the American Bar Association issued the following statement:

The American Bar Association is deeply troubled by the recent efforts of some elected officials and advocacy groups to attack diversity programs at law firms. The legal profession needs to create a more diverse workforce. Diversity also is good for business and something more clients are demanding. Diversity, equity and inclusion programs help remove the barriers that block the recruitment and retention of legal talent from underrepresented groups. Efforts to open the opportunities in the legal field to underrepresented groups would be significantly hurt by the loss of diversity and pipeline programs.[36]

Time will tell what will ultimately happen to workplace DEI programs as the recent (and likely future) lawsuits make their way through the courts. For now, no court has declared workplace DEI programs unconstitutional and the agency charged with enforcing federal workplace anti-discrimination laws – the EEOC – has ensured employers that these programs remain legal.

31 https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf.

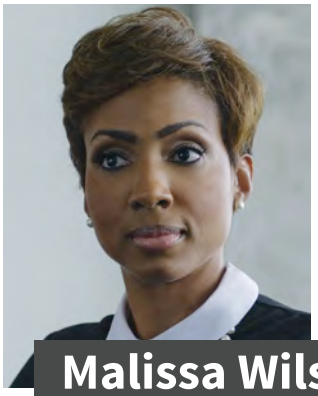
32 https://illinoisattorneygeneral.gov/News-Room/Current-News/Fortune%20100%20Letter%20-%20FINAL.pdf.

33 Id.

34 https://www.cotton.senate.gov/news/press-releases/cotton-warns-top-law-firms-about-race-based-hiring-practices.

35 https://masslawyersweekly.com/2023/07/26/u-s-senator-issues-dei-warning-to-law-firms/

36 https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/statement-of-aba-president-re-diversity-programs-law-firms/#:~:text=WASHINGTON%2C%20Aug.,create%20a%20more%20diverse%20workforce.



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

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

Practice Areas

- Labor & Employment Law
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- Personal Injury
- Political Law
- Premises Liability
- Workers' Compensation

Professional Reognition

- The Best Lawyers in America®, 2023 "Lawyer of the Year" for Jackson, Miss., in Labor and Employment litigation
- The Best Lawyers in America®, 2023: Litigation – Labor and Employment
- The Best Lawyers in America®, 2021: Litigation – Labor and Employment, Workers' Compensation Law – Employers
- Selected as one of Mississippi's 50 Leading Businesswomen by the Mississippi Business Journal (2019)
- Martindale-Hubbell® Silver Client Champion Rating
- Martindale-Hubbell NotableSM Peer Review Rating
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