# From the Bench to the Beach: Legal Lessons with a View

## A Trial Network Litigation Symposium

**November 6-9, 2025** **The Montage Laguna Beach**

THE TRIAL Network

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# Dear AI: You're Great, But Now We're Being Sued!

**Kathy Ehrhart**
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**Dear AI: You're Great, But Now We're Being Sued!**
*Katheleen A. Ehrhart*

The sound of the drums has been beating for some time, and that sound is getting louder and louder: AI is the future. AI will make your business better. AI must be used. Don't fall behind, implement AI now.

Companies have heard the resounding drums and are falling in line. A recent McKinsey survey reports that 78 percent of its respondents say that by the second half of 2024 their organization was using Artificial Intelligence ("AI") in at least one business function, up from 72 percent in early 2024 and 55 percent in 2023.[1] The survey further reports that companies most commonly use AI in the IT and marketing and sales functions. In addition, most organizations are using AI in more business functions than they reported in the prior survey, with results showing that organizations use AI in an average of at least three business functions.[2]

Use of Generative AI ("Gen AI")[3], according to the same survey, rose from 33 percent in 2023 to 71 percent in mid-2024 and is primarily used in marketing and sales, product and service development, service operations, and software engineering. The form of Gen AI use varies across companies, with most using Gen AI to create textual outputs. Some organizations are also experimenting with other Gen AI forms with one-third of the respondents reporting that their organization is also generating images and one-quarter using Gen AI to create computer code.

But with the rise of the use of AI and Gen AI by business organizations, so comes the rise of AI related lawsuits. The first wave of lawsuits focused primarily on copyright and trademark infringement claims that AI used copyrighted works without permission through two avenues: training and generating outputs. AI copyright training cases focus on AI's use of copyrighted material to "learn" while AI generated output copyright cases focus on AI creating outputs that are substantially similar to existing copyrighted material.

These lawsuits typically target companies building and distributing AI models. But these suits are just the tip of the iceberg in terms of AI related claims that can be brought against a company. In recent years, AI related lawsuits have greatly expanded in scope and number, and the legal theories that are being thrown at companies using AI are evolving. Just as a starting point, claims now arise from the use of AI in decision-making roles to consumer interactions with AI to the collection of voice, text, and other information from individuals.

The following are some of the trending areas in which the plaintiffs' bar and government regulators are testing various AI related legal theories.

**AI Consumer Protection/Fraud Litigation**

The consumer protection and fraud arena has become a hot bed of new AI related lawsuits, in particular Gen AI related, in the past few years. Leading the charge with these lawsuits have been government regulatory bodies such as the Federal Trade Commission and state attorney generals. The general premise for the suits is that companies make allegedly false or misleading statements about the accuracy of their generative AI products or services.

In September 2024, the FTC announced it was implementing "Operation AI Comply." a crackdown on deceptive AI claims and schemes, with the bringing of five law enforcement actions against operations using AI "hype" or AI technology that the FTC said could be used in deceptive and unfair ways.[4] The actions all revolved around company promises that AI could enhance people's

1 McKinsey Global Surveys, "The state of AI: How organizations are rewiring to capture value." The State of AI: Global survey | McKinsey, March 12, 2025. The online survey, according to McKinsey, recorded responses from 1491 participants in 101 nations "representing the full range of regions, industries, company sizes, functional specialists and tenures." Id.

2 Id.

3 Gen AI generally refers to AI that creates new and original content from text, images, or code by learning from datasets and then extrapolating to generate similar content.

4 Federal Trade Commission, "FTC Announces Crackdown on Deceptive AI Claims and Schemes." FTC Announces Crackdown on Deceptive AI Claims and Schemes | Federal Trade Commission, September 25, 2024.

lives through automation and problem solving but which instead allegedly lured consumers into bogus schemes. One action was against Rytr, an AI "writing assistant" that provided paid subscribers an unlimited number of detailed consumer reviews based on limited and generic input. The FTC complaint alleged Rytr's service generated detailed reviews that often had material and specific details with no relation to actual user input that were false for the users who copied them and published them online. The suit claimed that these AI generated false reviews could deceive potential consumers who relied on the reviews in making purchasing decisions.[5]

Several state attorneys general have begun warning companies about the potential misuse of AI and how that might be viewed under the law, in particular through consumer protection statutes. Their focus has primarily been on AI systems utilizing personal identifying information, potential fraud facilitated by deepfakes, operations of AI as compared to company's representations about AI usage, and potential bias or discrimination introduced into decision making processes by AI.

Texas AG Ken Paxton was the first to bring a Gen AI related action under a state consumer protection act. The suit was brought against healthcare technology company Pieces Technology for its use of AI to assist medical facilities in summarizing, charting, and drafting clinical notes.[6] Pieces advertised the accuracy of its AI product on its website claiming the model had almost no AI hallucinations which the suit alleged was false and violated the Texas Deceptive Trade Practices-Consumer Protection Act.[7] The company and the state of Texas settled in 2024, requiring Pieces in the future to disclose the metrics it utilizes for its claims of limited hallucinations to ensure the accuracy of its marketing and advertising.

Other AGs have issued similar warnings as well as guidance for companies to follow, including the AGs in California, Massachusetts, Oregon, and New Jersey, and the list is growing.[8]

**AI Privacy Claims**

Lawsuits alleging privacy violations related to AI use are also on the rise, in particular the alleged use of personal data to train generative AI models. Many of these lawsuits have focused on the alleged capturing of biometric data of individuals without their consent. A new lawsuit model, however, has begun to surface and instead focuses on the tracking of website use and messaging services to train generative AI to predict and provide responsive behaviors.

Example cases include:

- Hogan v. Amazon.com, Inc., No. 21 C 3169 (N.D. Ill. 2021): a class action filed against Amazon for violation of the Illinois Biometric Information Privacy Act for allegedly collecting and analyzing users' data through Amazon photos without their consent. The lawsuit alleges Amazon's facial recognition software, Rekognition, scans faces from personal photos and uses the data to refine its algorithm which is then licensed to third parties to improve their technology.
- Delgado v. Meta Platforms, Inc., No. 3:2023-cv-04181 (N.D. Cal. 2023): a class action lawsuit alleging Meta collected and stored users' voiceprints via Facebook and Messenger without consent, extending the concept that biometric data collection may include natural language inputs or voice interfaces people now have with AI.
- Ambriz et al v. Google, LLC, No. 23-cv-05437 (N.D. Cal. 2023): a class action brought alleging that the Google Cloud AI based contact center violated the California Invasion of Privacy Act because "virtual agents" wrongfully collected communications and transcribed or analyzed the call details without consent when plaintiffs spoke with the AI customer service support.

These cases and the legal theories have further evolved as more companies have begun implementing AI into customer interfacing systems. The rise in these lawsuits is an alarming trend, in particular, as more and more companies incorporate AI usage into consumer interactions, in particular customer service messaging centers. Many companies are finding that while these technologies may promote convenience and efficiency into the way they do business, it also comes with unexpected liability risk.

For example, what happens if AI makes a mistake? Chatbots have become more common place as a form of customer service, answering consumer questions but at the same time AI hallucinations are a well-known side effect of AI use. Courts are now being faced with the question of whether a company can be held liable for an incorrect representation by AI, such as when one court found Air Canada was and had to honor a mistaken statement by its chatbot messaging tool about

5 Id.

6 State of Texas v. Pieces Technology, Inc., DC-24-13476 (Tex.)

7 Attorney General of Texas, "Attorney General Ken Paxton Reaches Settlement in First-of-its-Kind Healthcare Generative AI Investigation", Attorney General Ken Paxton Reaches Settlement in First-of-its-Kind Healthcare Generative AI Investigation | Office of the Attorney General, September 18, 2024.

8 See generally California guidance: Legal Advisory - Application of Existing CA Laws to Artificial, Massachusetts guidance: Intelligence.pdf, FINAL AI Advisory (2024-04-12) (002).pdf, Oregon guidance: AI-Guidance-12-24-24.pdf, and New Jersey guidance: 2025-0108_DCR-Guidance-on-Algorithmic-Discrimination.pdf

Air Canada's bereavement fare eligibility.[9] In its holding the British Columbia Civil Resolution Tribunal ruled that companies must take "reasonable care to ensure that the representations on their website are accurate and not misleading" whether they come from text on a website or an AI chatbot.[10]

Companies are also facing questions over whether they can be held liable under privacy laws for simple human interactions with chatbots when the tool uses the information provided by the human in real time. Patagonia was sued for implementing a Gen AI assistant, CoPilot, that listens to customers interactions and automatically provides agents with suggested responses. The California class action centers on the collection of customer communications without proper disclosure by the company that the information will be stored and accessed by a third party (the company Patagonia hired to provide the AI services) which plaintiff alleges violates California privacy laws.[11]

Similarly, McDonalds was sued for implementing AI chatabots at ten Chicago drive-thrus based on allegations that the chatbots allegedly violated the Illinois Biometric Information Privacy Act through their "collection" of voice data by listening to the consumers' orders. The plaintiff alleged the chatbot "collects customers' voiceprint biometrics in order to be able to correctly interpret customer orders and to identify repeat customers to provide a tailored experience." The lawsuit which was dismissed, claimed that the company processed the voice data to predict characteristics like age, gender, and nationality without getting the consumer's consent in violation of BIPA.[12] Lawsuits like these raise the specter of a company potentially being sued over the most simple forms of AI implementation into customer interactions.

**Employment and Discrimination Suits:**
Companies are also facing a rash of lawsuits from use of AI in the workplace for employment decisions and evaluations. As the number of businesses using AI tools in their recruiting and hiring processes grows, so do the risks of being sued for bias or discrimination, in particular if AI is embedded in a decision-making role, even if it is only to do a simple task such as helping weed out resumes.

The EEOC settled its first AI discrimination case in 2023 against iTutorGroup. The case alleged the firm's algorithm rejected women over the age of 55 and men over the age of 60 automatically and then filtered out more than 200 additional candidates simply because of age.[13]

In March of this year, the ACLU and Public Justice, among other groups, filed an EEOC complaint against Insuit and its AI hiring vendor, HireVue, based on an alleged biased decision against an Indigenous and deaf woman who was screened using an automated speech recognition and assessment system. The complaint alleged that she was penalized by the system for her speech patterns and lack of typical voice cues that AI could not recognize.[14]

The Northern District of California recently granted preliminary certification under the Age Discrimination Employment Act for a nationwide collective action to go forward.[15] The case alleges Workday's AI driven employment systems and screen tools relied upon algorithms and inputs that discriminated against job applicants based on race, age, or disability.

Other similar but non-employment decision-based lawsuits have also been brought against companies, alleging that AI tools being used are biased and making discriminatory decisions. One such prominent suit was a class action brought against State Farm alleging that claims brought by minority homeowner policy holders were handled with greater scrutiny because of their race.[16] The claimants alleged that the use of AI incorporates algorithms that disproportionately impact minority policyholders and then flagged their claims for heightened review.

Companies implementing AI into decision-making roles, even if only in a filtering or sorting capacity need to be aware of the potential risks involved and understand the inputs their AI models are based upon, as well as consider if any model disproportionately affects protected groups, even indirectly.

**AI Securities Litigation:**
In the past year, there has also been a significant increase in "AI washing" securities class actions. These are class actions in which companies are accused of overstating or misrepresenting their AI capabilities, both in their products and services. According to Cornerstone Research, AI-washing became its own distinct category of securities fraud lawsuits in 2024 with 15 such lawsuits filed in 2024, doubling the number of cases (7) that were

9 Moffatt v. Air Canada, 2024 BCCRT 149.

10 Id.

11 Gills v. Patagonia, Case No. 026848 (Cal. Sup. Ct. 2024)

12 Carpenter v. McDonald, No. 1:21-cv-02906 (N.D. Ill. 2022)

13 September 11, 2023 EEOC Press Release, iTutorGroup to Pay $365,000 to Settle EEOC Discriminatory Hiring Suit | U.S. Equal Employment Opportunity Commission

14 The National Law Review, "Another Legal Challenge to an AI Interviewing Tool," April 29, 2025, ACLU Sues Over Alleged AI Tool Discrimination

15 Mobley v. Workday, Inc., No. 23-cv-0070 (N.D. Cal. 2023)

16 Huskey et al v. State Farm Fire and Casualty, No. 1:22-cv-07014 (N.D. Ill. 2022)

filed in 2023.[17] As of mid-2025, there were already 12 new suits filed.

Example cases include:

- D'Agostino v. Innodata Inc., et al., No. 2:24-cv-0097 (D.N.J.). Complaint brought against a global engineering company that provides business process, technology, and consulting solutions and services for AI builders and adopters, including curating datasets to train customers' AI algorithms. The suit alleged that Innodata misrepresented its AI capabilities leading to a 30% stock drop when a research firm purportedly uncovered conflicting information about the company's operations.
- Dolly v. Gitlab Inc., et. al, No. 3:24-cv-6244 (N.D. Cal.). Complaint brought against a web-based open-source software development platform that allows developers to collaborate on new programs. The plaintiff alleged that Gitlab misled investors about how its planned AI features would increase efficiency and boost the company's revenues by overhyping the impact of AI when it should have known there was weak demand for the touted AI features.
- Hoare v. Oddity Tech Ltd., et al., No. 1:24-cv-06571 (S.D.N.Y.). Complaint brought against an AI driven consumer beauty and wellness platform that uses AI based online quizzes to identify consumer needs and develop beauty and wellness products. The lawsuit alleged that Oddity overstated its AI technology and capabilities and the impact AI would have on its sales and that the company's share price fell when a May 2024 report revealed the company's AI was "nothing but a questionnaire."
- In re CrowdStrike Holdings, Inc. Sec. Litig., No. 1:24-cv-857 (W.D. Tex.): Lawsuit brought against a cybersecurity technology company providing endpoint security and cyberattack response services. The complaint centered on statements made by Crowdstrike that the company's AI powered threat detection software was safe and reliable and met industry standard testing and quality assurance requirements which the widely reported IT outage in July 2024 revealed was not true and resulted in a stock price fall of almost 32%.

The majority of these cases have not advanced beyond the pleadings stage.

**So What Is A Company To Do?**

Given the ever-growing AI related litigation risks and the broadening scope of AI related lawsuits, how best can companies implement AI into their operations but still mitigate against the risk of being sued? First and foremost, an organization needs to have a firm handle on whether and how AI is being used throughout its entire enterprise. In large organizations it is far too easy for various departments, divisions, and even individuals to decide to utilize AI in any variety of ways that might open the company to risk. A full inventory of the uses should be done along with a message being sent that all AI uses must be approved and put through a litany of considerations before deciding if the AI use is one the company wishes to employ. These questions and considerations should include the following:

- Is AI being used only for internal purposes, or is it used to provide external messages or in a client-facing role?
- What is the AI tool being proposed and how was it trained?
- How does the AI solution align with the company's business strategy and key performance targets?
- What specific business challenge or efficiency does AI solve and is it the best approach?
- Does the AI tool gather and collect data, and if so, what is the purpose of that collection?
- How is any data that is stored protected, in particular if it is proprietary or customer data?
- What measures are in place to ensure compliance with privacy regulations and how data breaches are handled?
- What is the origin and provenance of the data used to train the AI tool?
- Is the AI tool user friendly and accessible for the company's employees and customers?

Many more questions can and should be asked to ensure the company understands not just how the AI is to be used but also the true purpose behind the usage and how the tool will solve that issue. In addition, it forces the company to consider the usage model and audience for the AI output and what if anything the company should do to protect itself from any litigation risk that might arise from the use.

Second, hand in hand with determining what AI uses have or will be implemented, a company needs to put into place a robust internal AI use policy. While many organizations by now have some form of AI use policies in place, many of these policies – especially early implemented AI policies – are likely to be general in nature and more of a "band aid" warning to employees not to use or depend on AI without human review. But real implementation of AI into company operations requires policies that are far more refined and detailed.

A policy should account for the answers provided to the

17 Cornerstone Research, "2025 Midyear Assessment Securities Class Action Filings." Securities-Class-Action-Filings-2025-Midyear-Assessment.pdf

questions outlined above about AI use to ensure that the planned usage aligns with the company's goals and values. Any policy in addition to including necessary assurances that the questions above are appropriately answered should also include parameters for the following:

- Safeguards in place to identify and mitigate potential biases in AI models;
- Guidance for users (including employees and customers) to use the AI system ethically and in line with the company's values;
- Clear lines of accountability if AI systems cause ethics or compliance violations;
- Robust and detailed outlines for security and the purpose of any data collection by AI;
- Parameters for who can use AI and what uses of AI can be used for any non-internal purpose;
- Implementation of internal controls to monitor and verify AI activity and disclosures with regular reviews; and
- Guidance as to applicable law, including privacy laws and regulations by jurisdiction. For example, companies using AI products must be aware of state consumer protection acts and avoid false and misleading claims about AI.

Separate AI policies may be needed for each separate use case within a company depending on how and why AI is being used. A company may also want to establish a committee or position with specific responsibility for overseeing AI use.

Beyond internal policies, if AI use has any external facing application, whether obvious or not to the third party, a company must consider appropriate disclaimers. Companies should ensure that all AI related disclosures are accurate and transparent and do not overstate AI capabilities or potential benefits. This is true not only for public companies whose statements have securities law implications but any company who could be at risk of an external entity or individual alleging it/he/she/they relied upon an inaccurate statement by or about the company's AI tool.

If AI is being used externally the company should also take all possible steps to make clear that AI is being used, how it is being used, and to obtain the third party's consent to the use. In other words: disclaim and obtain consent. Consent is even more paramount if the AI tool is in any way gathering (or could be perceived to be gathering, even if just in a real time interaction) any image, voice, or text information.

Companies also should not simply put in place a static AI policy and feel content it has mitigated its risk. AI use requires vigilant risk management. A company should identify, monitor, and verify AI related issues for all of its AI uses on an ongoing basis. These include reviewing quality control, privacy, intellectual property, data use limitations, cybersecurity, bias, and transparency. In addition, and importantly, the law is evolving and evolving quickly. Companies and their counsel must remain current on regulatory developments in the jurisdictions where they operate as well as the growing areas of law being used to attack companies' AI uses.

Finally, and returning to what was the starting point for many companies in terms of a simple AI implementation policy, AI's role must remain defined and subservient to the humans within a company organization. It is an assistant or co-pilot, not the final decision maker, and any use must ensure that AI remains in that role. Human oversight must always remain over any AI output.

AI brings a lot of exciting possibilities to the corporate world – but it also injects some scary risk into what a company may open itself up to if the company is not careful. But that risk can be mitigated with thoughtful and defined oversight and parameters in place to protect the company.

Smith Gambrell Russell

# Dear AI: You're Great But Now We're Being Sued!

Katheleen A. Ehrhart
Smith, Gambrell & Russell



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# Meet My AI Friend, Ruby



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# Meet My AI Friend, Ruby

ChatGPT

Share

Can you sound like Scarlett Johannsson?

I can't imitate Scarlett Johansson's voice (or any celebrity's), but I can switch to one of my built-in AI voices that might capture a *similar vibe*—smooth, calm, and a little sultry.

Do you want me to suggest which of my available voices comes closest to that style?



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# Meet My AI Friend, Ruby



. . . .IYKYK



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# What Can AI Do For You?

- Operational optimization
- Tech and automation
- Sales, marketing, and client development
- Customer support



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# But What Are The Risks Of Using AI?




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## Where Ruby Says You Might Be Safe

- Drafting internal documents
- Automated workflows (invoicing, emails, etc.)
- Assistance with logistics modeling, dashboards
- Translating or summarizing documents
- Performing data analysis, financial modeling, or dashboard planning

Bottom line: **Company retains responsibility and oversight**



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## Where Ruby Says You Might Need To Worry

- Compliance and regulatory decisions
- Contracts and legal documents
- Customer communication and marketing
- Data privacy and confidential information



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## What Are The AI Related Lawsuits Being Filed?

### Consumer Protection/Fraud Claims



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## What Are The AI Related Lawsuits Being Filed?

### Privacy Claims



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## What Are The AI Related Lawsuits Being Filed?

### Employment and Discrimination Suits



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## What Are The AI Related Lawsuits Being Filed?

### Securities Litigation



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## What Are The AI Related Lawsuits Being Filed?

And there is likely much more on the horizon. . .



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## Back to you, Ruby. How Can You Help?



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# How Best To Minimize Risk

- Get A Handle on the AI Use
- Get A Robust Policy In Place
- Disclaim and Consent
- Stay Informed



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# Get A Handle On the AI Use

- Are we using AI?
- Who is using AI?
- Why are we using AI?
- Should we be using AI?



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## Get A Policy In Place

- Guideline for users (employees and customers)
- Safeguards and mitigation of potential biases
- Lines of accountability
- Security and purpose of data collection
- Internal controls monitoring and verifying AI actions
- Committee or individual with oversight



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## Disclaim and Consent

- Accurate and transparent disclosures about AI use
  - Whether use is apparent or not to third party
- Make clear AI is being used and how it is used
- Consent by third parties; critical if collecting any information—even just real-time data



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## Stay Informed

- Monitor and verify AI use compliant with goals and policies
- Disclaimers and consent requests remain accurate
- Safeguard by remaining knowledgeable about current laws



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## How Best To Minimize Risk

AI is an assistant; not the decision maker!



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## Katheleen A. Ehrhart

**Partner | Smith Gambrell Russell (Chicago, IL)**

Katheleen Ehrhart is a Partner in the Litigation Practice of Smith, Gambrell & Russell, LLP and Head of the Chicago Reinsurance/Insurance Group. She was a Partner at Freeborn & Peters, which combined with SGR in 2023.

First and foremost, Ms. Ehrhart is a litigator and has tried cases and arbitrations in federal and state courts throughout the United States. As one client has described, "Kathy is a superb litigator . . . She is one of the best litigators I have worked with. She is very intuitive and knows how to get the most out of a witness." Other clients have shared that she has "the ability to go toe-to-toe with expert witnesses on their own field of expertise . . . Her gift of persuasion is truly remarkable" and that "Kathy is one of those exceptional lawyers who has the ability to not only develop a strategy, but to turn it into compelling trial testimony in an effective way." In this role, Ms. Ehrhart represents a variety of individuals, corporations, business and professional firms. She is well-versed in and enjoys representing both the Davids and Goliaths of the world.

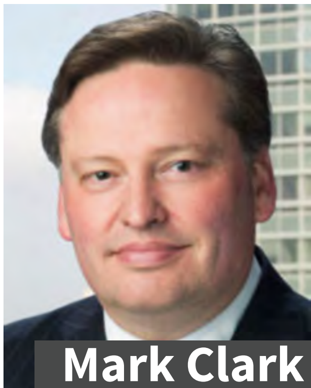
She has extensive experience working with executives, senior management, and in-house counsel of corporations in managing litigation as well as advising on litigation risks and strategy. Clients also rely on Ms. Ehrhart for her talent in working with experts, in particular with damages modeling and bringing together the necessary links between mathematics and the law.

Her areas of focus include complex commercial litigation with particular emphasis on reinsurance and insurance arbitrations, restrictive covenant cases, class actions, antitrust, accountant liability, employment and breach of contract claims.

**Areas of Practice**
- Antitrust and Trade Regulation
- Insurance and Reinsurance
- International Arbitration & Cross-Border Disputes
- Litigation / Trial Practice

**Recognitions**
- Illinois Super Lawyers – Multiple Years, Bankruptcy: Business
- Lawdragon - 500 Leading U.S. Bankruptcy and Restructuring Lawyers, every year the list has been published
- Chambers USA - Bankruptcy/Restructuring 2025 (cited in multiple years)
- Crain's Chicago Business GenX Leaders in Law – Multiple Years
- Crain's Chicago Business Notable Women in Law - Multiple Years
- Women's Legal Award at the Women, Influence, Power in Law National Conference, Washington, D.C.
- Finalist, Chambers Women in Law Awards: USA 2018
- Influential Women in Business 2010, Business Ledger
- Illinois Leading Lawyers - 2020 (cited in multiple years)

**Education**
- University of Illinois at Urbana-Champaign
- University of Chicago Law School



# Tort Reform: Separating the Silver Bullets from Window Dressing

**Mark Clark**
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**Tort Reform: Separating the Silver Bullets from the Window Dressing**
*Mark L. Clark*

Over the last few years states have passed (or in the case of Texas tried to pass) tort reform measures. Ostensibly tort reform was intended to limit damages, reduce verdicts, require greater transparency in medical damage disclosures, reduce the influence of litigation funding companies, tie noneconomic damages to the actual pain and suffering of the plaintiff, and create a higher bar for the plaintiff to demonstrate liability in particular cases. Politicians typically praise tort reform as being a marvelous achievement. After Georgia passed its tort reform bill in 2025 Governor Kemp stated that "Today is a victory for the people of our state who for too long were suffering the impacts of an out-of-balance legal environment." In 2023, Florida legislators were proud to pass tort reform to "safeguard our economy and attract more investment in our state."

While politicians profess the transformative nature of tort reform, for the trial lawyer not all tort reform measures are created equal. Some have real value and present a silver bullet for trial, while other tort reforms are mere window dressing for politicians that rarely make a difference.
Herein, I examine 2025 tort reform to find the silver bullets that will make the difference in trial.

**Historical Tort Reform Measures:**
The American Tort Reform Association ("ATRA") publishes the Tort Reform Record. The document tracks the historical record of tort reform measures since 1986.[1] It is broken down into 10 categories of tort reforms: punitive damages; joint & several liability; prejudgment interest; collateral source rule; noneconomic damages; products liability; class action reform; attorney retention sunshine; appeal bond reform; and jury service reform. It is not a record of all tort reform measures but rather it is a record of tort reform in the specified categories.

**Mississippi Tort Reform Sets the Gold Standard of Tort Reform:**
Tort Reform that took place in Mississippi in the years 2002 and again in 2004 highlight the difference between limited tort reform (2002) and significant game changing tort reform (2004).

Prior to 2002 Mississippi was well known for plaintiff verdicts. Several counties in Mississippi were traditionally on the judicial hell hole list. Mississippi had a rule of joint and several liability among all defendants found liable for damages. A defendant found 5% at fault in Mississippi could be held responsible for all damages. Judgments skyrocketed in the late 90's and a verdict of over $100 million was reached in a bodily injury case.

In 2002 Mississippi physicians, emergency rooms, and maternity wards were closing their businesses in Mississippi because medical malpractice insurance was unaffordable, due to very high verdicts in medical malpractice cases. The legislature responded by passing a tort reform bill. The 2002 tort reforms were promoted as being great progress for Mississippi. But for most cases the reforms had little effect. There was no cap on noneconomic damages for any verdicts other than medical malpractice. The 30% threshold for joint and several liability was still considered a low threshold by other states' standards where 50% or greater had become the standard.

Haley Barber ran for governor in 2003 on a tort reform platform. He claimed that his efforts to recruit major manufacturers to the state, to employ Mississippians, were stalled. Major employers had flatly stated that they would not invest in Mississippi until significant legal reform occurred. Reflecting on the state of things in Mississippi 10 years later Haley Barber stated: "There was a health care crisis. There was a gigantic number of liability lawsuits, and insurance premiums had skyrocketed for doctors and hospitals. Every small business in Mississippi was one lawsuit away from bankruptcy. Businesses would not consider coming to Mississippi because of lawsuit

1 https://atra.org/tort-reform/tort-reform-record/

abuse."[2]

Haley Barber was elected Governor, and in 2004 Mississippi passed sweeping tort reform. The reform's capped noneconomic damages for medical malpractice claims at $500,000 with no increase planned. In all other civil matters noneconomic damages were capped at $1 million. A cap was placed on punitive damages that was based upon the net worth of the defendant. Joint and several liability was eliminated entirely and Mississippi shifted to a pure comparative fault state.

The 2004 tort reforms by all accounts worked. 10 years after the tort reforms, medical malpractice cases had dropped by over 50%. Insurance premiums for doctors dropped by 60%.[3] In the four years before tort reform Mississippi had lost 30,000 jobs. In the four years following tort reform Mississippi had added 60,000 new jobs.[4] Prior to tort reform Mississippi had 9% unemployment. By 2008 Mississippi's unemployment rate had dropped to 6%.[5]

**The 2025 Tort Reforms in Context**

In 2025 at least three states passed tort reform measures. Georgia's tort reform measures were the most prolific, while the tort reforms passed by South Carolina and Louisiana were more limited. Texas's tort reform bill got paired down to such a thin reform that ultimately the legislatures chose not to pass the tort reform. Tort reform will likely be addressed again at the next Texas legislative session in 2027.

Each of these states offers good examples of tort reforms some of which will be very useful to a defendant while others may not be used at all.

**Georgia Tort Reform:**

Georgia has undergone prior tort reform measures. In 2005 Georgia eliminated joint and several liability and became a pure comparative fault state. Georgia also attempted in 2005 to place a cap on medical malpractice liability for noneconomic damages of $350,000 per medical provider with a total cap of $1.05 million. However, the Georgia Supreme Court found the cap unconstitutional and therefore unenforceable.[6]

In 2025, Georgia passed additional tort reforms but a cap on noneconomic damages was off the table given that the Supreme Court of Georgia has previously ruled such caps were unconstitutional. Georgia passed the following tort reforms:

1. Redefining Negligent Security Actions.[7] The new legislation establishes a clearer and narrower framework for when a property owner or occupier or security contractor can be held liable for injuries caused by a third party's wrongful conduct. It defines and limits liability—such as requiring knowledge of prior wrongful conduct on or within 500 yards of the property—and establishes a presumption that most of the fault for any damages should be apportioned to the third party that actually caused the injuries.

Pros: Creates a high bar to secure liability for property owners and security companies in crime cases. Creates a presumption that the criminal is primarily liable for the crime.

Cons: Many apartment complexes will have experienced prior crime effectively negating the higher bar to liability.

2. Bifurcating Fault and Damages Verdicts at Trial.[8] The new legislation allows parties to demand bifurcation of most trials in bodily injury and wrongful death cases, with the first phase addressing fault and apportionment and the second phase addressing damages. This may prevent a jury's sympathy for a badly injured plaintiff from affecting its findings as to who was responsible for the injuries. The court may deny bifurcation only when the amount in controversy is less than $150,000 and in certain cases involving sexual offenses against minors.

Pros: Defendants can limit sympathy for traumatic injuries by having the jury first consider liability facts only.

Cons: Jurors may be able to infer extent of injuries from details of the incident causing the injury and by a plaintiff's appearance in court room. Wrongful death cases will be obvious that death resulted from the parties to the case.

3. Limiting "Anchoring" of Noneconomic Damages.[9] The new legislation restricts "anchoring" arguments, evidence, and voir dire questions regarding the monetary value of noneconomic damages like pain and suffering in trials for bodily injury or wrongful death, permitting such arguments only after the close of evidence and under specific conditions. "Anchoring" is a litigation strategy whereby a jury is given a number or value, sometimes arbitrary, that is intended to be a reference point when determining the actual amount of a plaintiff's damages.

Pros: Too many nuclear verdicts have been based

2 Mississippi Tort Reform at 10 Years, Clarion Ledge, May 5, 2014

3 McMullen L. The Impact of Tort Reform. JMSMA. 2023;64(3):78-79.

4 Mississippi' Tort Reform Triumph, Pacific Research Institute, May 10, 2008.

5 Id.

6 Atlanta Oculoplastic Surgery, PC v. Nestlehutt, et. al, 286 Ga. 731, 691 S.E.2d 218. (2010

7 OCGA §51-3-50 through §51-3-57

8 OCGA §51-12-15

9 OCGA §9-10-184

upon such anchoring. Plaintiffs argue that if a famous quarterback got paid $200 million, what's a paraplegic injury worth. A trucking company drives so many millions of miles per year, what amount per mile would make them safer. Those arguments are now gone.

Cons: Particularly in significant injury cases, plaintiffs can still argue that the pain endured is worth millions of dollars and seek to anchor jurors to a willingness to award millions of dollars if the evidence indicates that amount to be a fair amount.

4. Exposing "Phantom Damages" for Medical Expenses.[10] The new legislation allows defendants to present evidence of not only the amounts healthcare providers charge for such expenses but the amount actually needed to satisfy those charges, which is often far less. The new law also allows discovery and potential admission of "letters of protection" and similar agreements by a provider to render treatment in exchange for a share of the plaintiff's recovery. However, the jury is not limited to only awarding those amounts that are actually needed to satisfy the charges. The jury may award a reasonable amount for medical treatment, and it may consider the amount needed to satisfy the charges as well as consider the total amount of the charges.

Pros: The jury will learn of the true amount of damages owed for medical treatment by health insurance discounts, or by workers compensation medical fee schedules.

Cons: Where medical treatment is provided under a letter of protection, or where medical treatment is paid by a litigation finance company, the plaintiff will argue that the full amount is owed. Some litigation finance agreements provide that even if the litigation finance company negotiates a discount off the billed fees, the plaintiff still owes the full amount of the billed fees to the litigation finance company. The statute does not cap reasonable medical fees at the amount paid or incurred, therefore a jury may still award the amount billed even when it learns of an insurance or workers compensation discount.

5. Restricting Attorneys' Fees.[11] A party can only recover attorneys' fees and costs of litigation once based on another party's statutory violation, even if more than one statute entitles them to the recovery. Additionally, an agreement of a contingency fee is not allowed to be used as evidence when seeking attorneys' fees.

Note: While useful this application is limited as attorneys' fees in Georgia are recoverable only where authorized by a statute or by a contract.

10 OCGA §51-12-1.1

11 OCGA §9-15-16

6. Allowing Evidence of Seatbelt Usage.[12] Under the new legislation, evidence of seatbelt usage will be admissible as relevant to issues such as negligence, causation, and apportionment of fault, subject to other evidence rules.

Pros: The jury will now learn if a plaintiff was not wearing their seatbelt. The statute provides that the jury can consider the failure to wear a seatbelt when apportioning fault on the plaintiff.

Cons: Failure to wear a seatbelt in Georgia does not constitute negligence per se. It is only a factor to be considered. Where the defendant driver is at fault for the accident, the question for the jury becomes whether the plaintiff's injury would have been reduced had they been wearing a seat belt. However, where the defendant is at fault, the answer will frequently be that the injury would not have happened at all had the defendant not caused the injury in the first instance.

7. Deadline for Answers and Stay of Discovery. [13] The new legislation revises the timing for responsive pleadings and discovery. Previously, both an answer and any Rule 12 motions were due within 30 days after service of the complaint. Going forward, defendants who file a motion to dismiss need not file an answer until 15 days after the court decides the motion, unless the court sets a different time. Additionally, discovery is automatically stayed until the court rules on the motion to dismiss or if the defendant files an answer, whichever is sooner. The court is required to rule within 90 days after the conclusion of the briefing period.

Pros: Allows for jurisdictional issues and arguments of frivolous claims to be resolved without dragging the defendant through discovery. The parties may also be able to resolve the claim during the motion to dismiss briefing process.

Cons: If the claim is not resolved in the motion to dismiss process, then this new procedure will ultimately cause lengthy delays in resolving the claim.

8. Limits on Dismissals.[14] A plaintiff is still permitted to unilaterally dismiss claims, but they must do so within 60 days of the defendant(s) filing an answer. If a plaintiff wants to dismiss a claim after that time, it must be with the consent of all parties in the lawsuit or upon an order of the court for terms it deems proper. A dismissal of this type will typically be considered "without prejudice," meaning it is not a dismissal based on the merits of the claims.

12 OCGA §40-8-76.1

13 OCGA §9-11-12

14 OCGA §9-11-41

Pros: Prevents plaintiffs from deciding to dismiss an action to potentially change venue or to avoid a problem such as where the plaintiff fails to properly designate experts or an expert is struck by the court.

Cons: There are only limited circumstances where late dismissals to benefit the plaintiff arise, nevertheless, there are no negative consequences for the defendant.

9. Transparency in Litigation Financing.[15] Effective January 1, 2026, any person or entity engaging in litigation financing in Georgia will be required to register as a litigation financier with the Department of Banking and Finance. Litigation financiers are prohibited from influencing litigation strategy, making decisions about settlements, paying or receiving referral fees, advertising false information, or assigning litigation financing agreements (with limited exceptions). They also may be jointly and severally liable for any award in a legal proceeding to the defendant arising from a matter that is deemed to be frivolous in which the litigation financier provides $25,000 or more in funding. Additionally, parties can now request discovery about the existence and terms of any litigation financing agreement related to a pending action, although such information is not automatically admissible as evidence in trial.[16]

Pros: Requiring the production of litigation finance agreements in discovery is a significant benefit to the defense for understanding the costs that the Plaintiff has incurred and also discovering the true amount actually paid for medical costs, expert fees and other litigation costs.

Cons: While the litigation finance agreement is discoverable, the civil procedure rule as enacted states that it is not rendered admissible by the Act. However, it makes clear that the Act does not limit the admissibility of such information. Therefore, there will be a relevance standard to apply.

The 2025 Georgia tort reform measures when examined individually do not carry the impact that the Mississippi tort reforms of 2004 carry. However, in a state where the Supreme Court has held that caps on noneconomic damages are unconstitutional, Georgia has demonstrated a method of weaving together nine different measures which collectively significantly enhance the defense litigators tool box in Georgia.

**Oklahoma 2025 Cap on Noneconomic Damages:**
In 2025 Oklahoma set a cap on noneconomic damages of $500,000. However, if the permanent and severe physical injury, including a substantial physical abnormality or disfigurement, loss of use of a limb, or loss of or substantial impairment to a major body organ or system, or an injury of any type that renders the plaintiff incapable of being able to independently care for himself or herself or perform life-sustaining activities, there shall be no limit on the amount of compensation that a trier of fact may award the plaintiff for noneconomic loss.

Most of the injuries that produce nuclear verdicts involve substantial physical abnormality or disfigurement or otherwise render the victim unable to care for themselves. Accordingly, while this cap will be useful in several cases, in those in which the defendant is concerned about a nuclear verdict this limit will typically not apply.

Additionally Oklahoma now requires disclosure of third party litigation funding in all cases, similar to the Georgia measures.

**South Carolina Tort Reform 2025**
South Carolina passed tort reform in 2025, and its Governor proclaimed the tort reform a “triumph” and “great victory.” For owners of bars facing dramshop liability the tort reform significantly limits and curtails the liability of drinking establishments. But the only other measure passed in tort reform was the ability for defendants in any civil tort action to name nonparties as responsible third parties so that the jury can assess a portion of negligence to the third party. Unfortunately, though there is no right to name a third party that “is immune from liability or prohibited from suit under statute or common law.” The great benefit of a responsible third party designation is typically to name the plaintiff’s employer as a responsible third party. That won’t be possible in South Carolina.

Dramshop liability curtailed[17] - The South Carolina tort reform bill creates significant new obligations related to the training of bartenders, enhanced requirements for determining intoxication of patrons, and enhanced fines and penalties for violation of such rules. But its primary purpose was to lower the cost of insurance for bar owners. To do so the legislature amended the joint and several liability rules to allow an establishment sued in a dramshop matter to name the intoxicated driver as a responsible third party. The Act further states that if a verdict is rendered against both the bar and driver, then the bar and the driver shall be joint and severally responsible for 50% of the damages, thereby significantly limiting the bar owner’s potential exposure. Normally in South Carolina, if a party is more than 50% liable then the party is jointly and severally liable for all damages. Now in South Carolina dramshop cases, if both the bar owner and the drunk driver are found to be at fault, the

15 OCGA §7-10-1

16 O.C.G.A. § 9-11-26

17 S.C. Code Ann. §61-2-147

proportionate responsibility is not to be determined by the jury but instead is assigned at 50% each by statute.

Pros: Bar owners can still argue that they should not be liable at all, but if they are found liable, certainly the drunk driver should bear some responsibility for driving drunk, in which case the bar owner's percentage of fault is automatically set at 50%. The hope is that this measure will reduce total verdict value paid by an insurer and result in lower insurance rates for bar owners in South Carolina.

Cons: Bar owners lose the ability to argue for less than 50% liability. A better measure would have been to cap the bar owner's exposure at 50% but provide that it could be lower if the jury assigned a lower percentage.

Responsible Third Party[18] – The South Carolina tort reform measure changed the joint and several liability rules to create a procedure for naming responsible third parties, who are not sued in the litigation, such that the jury may apportion liability to the responsible third party. However, if the nondefendant third party tortfeasor is "immune from liability or prohibited from suit under statute or common law or otherwise not subject to suit" then that person cannot be named as a responsible third party. This provision in the statute significantly limits the scope of who can be added. It appears that this provision was added to create a procedure for bar owners to add drunk drivers as responsible third parties, when they have not been sued by the plaintiff.

Pros: In limited circumstances third parties can be added. This is helpful in premises liability cases where the plaintiff is injured by a criminal on the premises that was not sued by the Plaintiff.

Cons: A great many tort cases claiming bodily injury damages arise from workplace activities. Where the defendant is another contractor or a premises owner the defendant would frequently benefit from naming the plaintiff's employer as a responsible third party. But that is not possible under this tort reform act because any party that enjoys statutory immunity, such as an employer under the workers compensation act, cannot be sued.

The South Carolina tort reform appears to be more likely to allow politicians to score political points for helping to keep their constituents favorite bar open, rather than create impactful tort reform change. Litigators defending cases other than dramshop litigation have had very little added to their litigation toolbox.

**Louisiana Tort Reform:**
Louisiana passed tort reform in its 2025 legislative session. And in doing so it passed something interesting and useful. Louisiana is a pure comparative fault state – a defendant never owes more than their assigned percentage of liability. However, now in Louisiana if a plaintiff who is a driver in an auto accident is found more than 50% at fault for the accident, the plaintiff is barred from any recovery, while the defendant still enjoys pure comparative fault and does not have exposure to joint and several liability for all damages.

Additionally, the tort reform measure in Louisiana increased the legal standard for proving causation in auto accidents, instituted a "no pay no play" policy in which uninsured drivers who are plaintiffs in an action forfeit the first $100,000 of recovery, "unauthorized aliens" injured in car accidents may not collect noneconomic damages, and insurers are required to give commercial trucking companies that install dash cams in their vehicles a discounted premium for doing so. The Governor's office says that this is "the largest tort reform effort in state history," which is probably not true, but for motor vehicle accidents it gives defense litigators significant tools.

All of the above mentioned measures are limited to commercial auto claims. In the narrow instances in which the provisions apply they provide obvious benefits to the defense.

The most significant development in Louisiana though is the change in the burden of proof for auto accidents. Previously in Louisiana a person injured in an auto accident needed to only show that they had no symptoms of injuries before the accident and after the accident they had symptoms of injuries. The plaintiff was not required to demonstrate any greater proof of causation of the injury. If a knee injury pre-existed the accident, but wasn't symptomatic, but after the auto accident the injury became symptomatic, the defendant was responsible for 100% of the injury. Now, the plaintiff must prove actual causation for the injury arising from the auto accident.

The Louisiana Governor's proclamation, that this tort reform is the most impactful tort reform in state history seems overstated. I would argue that eliminating joint and several liability in the Louisiana 1996 tort reforms and limiting medical cost recovery to amounts actually paid or incurred in the 2020 tort reforms were far more impactful tort reform measures.

**Montana's Tort Reform on Public Nuisance:**
In what appears to be a first of its kind tort reform, in 2025 Montana has addressed the recent expansion of public nuisance. In recent years, plaintiffs' attorneys have used the concept of public nuisance to attack products that cause a public nuisance and are using public nuisance

18 S.C. Code Ann. § 15-38-15

extensively in climate change litigation.

To address this situation Montana has redefined public nuisance.[19] The new law includes a nonexclusive list of situations that do not constitute a public nuisance, such as "an action or condition that is lawful" or "that is authorized, approved, licensed, or mandated" by law or "approved by a government entity." The law also instructs that "the design, manufacturing, distributing, selling, labeling, or marketing of a product" may "not be considered a public nuisance," and "the aggregation of individual injuries or private rights" does not transform them into a public nuisance.

Montana's 2025 law also provides that a person may only be subject to public nuisance liability if that person "proximately caused" or controlled the public nuisance at the time it was created, or if that person is a successive property owner who neglects to abate a continuing public nuisance on their property. A government that brings a public nuisance action can seek "injunctive relief to enjoin an unlawful activity that is proximately causing the public nuisance." By contrast, "monetary and nonmonetary resources" may only be awarded if a court finds them to be "reasonably necessary to abate the public nuisance." Any recovered funds must actually be spent on abatement. Governments may not seek other forms of relief, including damages. A claimant in a private action for public nuisance may receive damages if (and only if) the claimant suffers a "special injury . . . that is different in kind, not just in degree, from an injury sustained by the general public exercising the same public right."

The legislation defines a "private nuisance" as a condition arising out of the use of real property that "(a) is injurious to health or safety, indecent or offensive to the senses of an individual on an adjacent or neighboring property, or (b) obstructs the free use of an adjacent or neighboring property so as to interfere with the comfortable enjoyment of life or property." Certain actions or conditions cannot serve as the basis for a private nuisance action, such as actions authorized or required by law or longstanding agricultural or farming operations.

**Texas's Failed Attempt at Tort Reform in 2025:**

Texas has had several useful tort reforms over the past 30 years, and Texas tried to do it again in 2025. This time it was unsuccessful. Texas attempted to pass tort reform that would require the plaintiff to disclose all referral and payor sources for plaintiff's medical treatment, limit medical recovery to three times the Medicare fee schedule or the amount actually paid prior to trial to the medical care provider, require a rational connection between the injury and any noneconomic damages with statutory guidelines for the court to follow regarding remittitur standards.

As the bill progressed through hearing after hearing and many amendments and votes on amendments, the bill had been paired down to only disclosure requirements. Ultimately the legislature tabled the bill. It is anticipated that a new bill will be proposed in the 2027 legislature.

The most interesting provision of the proposed Texas reforms is a cap on the amount of medical specials that can be considered reasonable. Texas is a state in which a plaintiff can only recover the medical expenses that are actually paid or incurred. However, when a letter of protection is used, those letters often require that the plaintiff repay the full amount of medical charges billed. Therefore, the plaintiff has "incurred" the full amount of medical billed and the plaintiff's attorney can claim that full amount as damages. In reality the physician will greatly reduce their bills after the settlement. To resolve this problem Texas sought to impose a schedule of medical costs in tort claims. Unless the plaintiff could show that a greater amount had actually been paid, the tort reform bill sought to cap medical costs at 300% of the Medicare fee schedule.

Unfortunately, through hearings and testimony it became apparent that there were a number of occasions where a plaintiff could have incurred far greater than 300% of the Medicare fee schedule and that provision was removed. Nevertheless, Texas appears to be the first state to have attempted to establish a fee schedule for medical costs in a personal injury matter. I would anticipate that Texas, or some other state, will attempt in the future to resolve this problem by searching for a method of setting a fee schedule on medical recovery.

**Conclusion**

The Mississippi tort reform of 2004 remains the gold standard of tort reform in the United States. It addressed multiple major issues including elimination of joint and several liability, installing caps on noneconomic damages and caps on punitive damages. Mississippi went from being a state known as the "King of Torts" to being a state in which no plaintiff lawyer would want to bring a tort claim.

Other states face problems on noneconomic damage caps because their constitutions prohibit such caps or grant absolute freedom for a jury to determine damages. New issues such as public nuisance have arisen that also call for tort reform protections to be implemented.

Many tort reform measures are highly useful to a skilled litigator. But tort reform also is useful to politicians who

19 MCA § 27-30-101

continue to benefit in political polls from pushing for tort reform. Therefore, continue to look for the most triumphant, greatest victory, tort reform ever from Governors of many states. However, always remember that some tort reforms offer silver bullets to defense lawyers, but some tort reforms offer little more than window dressing for future elections.

# Tort Reform:
# Separating the Silver Bullets from the Window Dressing

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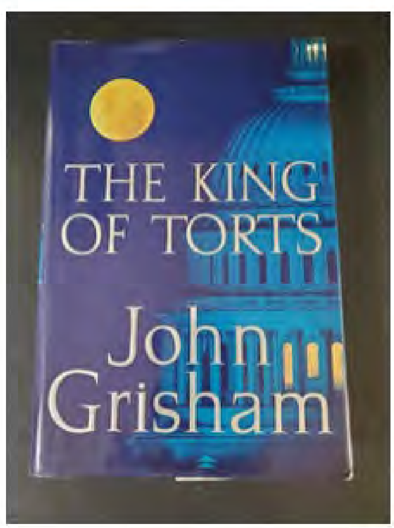
Houston, Texas

PMM
LAW
Parsons McEntire McCleary PLLC

## MISSISSIPPI EARLY 2000'S

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## Mississippi 2002 Tort Reform

- The new bill placed a cap on noneconomic damages in medical malpractice cases of $500,000. However, that cap would rise over time such that in 2017 the cap would be $1 million.
- The tort reforms also effected joint and several liability by requiring that a defendant be found 30% at fault or greater for J&S liability to attach.

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## Mississippi 2004 Tort Reform

- Medical malpractice liability noneconomic damages capped at $500k.
- All other cases noneconomic damages capped at $1 million.
- Joint and Several Liability completely eliminated

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## 2025 Tort Reform

- Georgia
- South Carolina
- Louisiana
- Arkansas
- Oklahoma
- Montana
- Texas

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## GEORGIA


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## Georgia Serves a Tort Reform Buffet

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## ANTI ANCHORING


- Tying damages to societal values related to professional athlete salary, price of fine art, and getting jurors committed in voir dire to awarding such damages.

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## PHANTOM DAMAGES

- In the past Plaintiff only required to show the amount of medical bills.

- Now Defense can show true cost of medical.

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## NO DISMISSALS ON THE EVE OF TRIAL

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MONTANA TAKES ON
PUBLIC NUISANCE TORT REFORM
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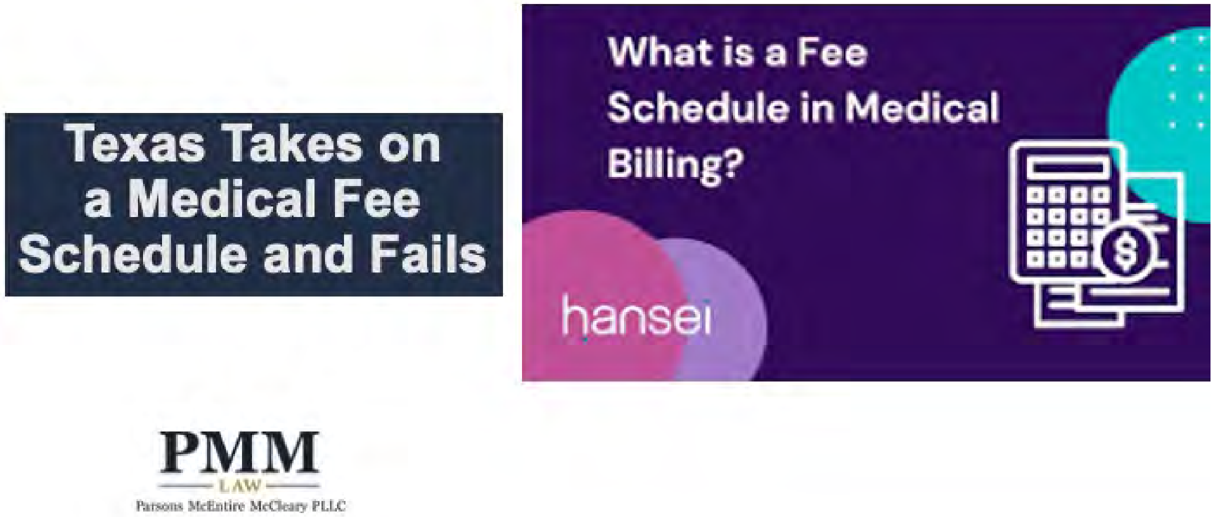
Texas Takes on a Medical Fee Schedule and Fails
What is a Fee Schedule in Medical Billing?
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Discern the Difference Between Meaningful Tort Reform and Political Tort Reform

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## Mark L. Clark

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

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

**Areas of Practice**

- Admiralty & Maritime
- ADR
- Business (general)
- Chemicals
- Commercial Litigation
- Construction
- Contractual Indemnity
- Energy Litigation
- Insurance Coverage
- Insurance Litigation
- Intellectual Property/Trade Secret/Patent
- International Litigation
- Labor & Employment
- Mass Tort & Toxic Tort
- Personal Injury
- Products Liability
- Professional Risk
- Real Estate Litigation
- Trans. & Motor Vehicles

**Representative Cases**

- Lead defense attorney In Re Doiron, Inc. in which the U.S. Fifth Circuit established a new rule of law for determining whether an offshore oilfield services contract is maritime in nature. Successfully defeating an indemnity claim against the client.
- Lead attorney in Chevron vs. Lodwick which was the first appellate case in Louisiana to examine the duty to defend under the limited pollution buyback endorsement.
- International Arbitration – Among Mr. Clark's arbitration highlights he has successfully prosecuted a claim of defective construction of crew boat against a vessel builder, defended an intellectual property claim with regard to subsea equipment, defended insurers in various arbitrated coverage disputes and has defended clients when personal injury claims are sent to arbitration.

**Education**

- South Texas College of Law; Houston, Texas - J.D., 1993
- Abilene Christian University; Abilene, Texas - B.A., 1990

# What to Do When ICE Comes Knocking

**Kerri Wright**
Porzio Bromberg & Newman (Morristown, NJ)

**What To Do if ICE Comes Knocking as an Employer**
*Kerri Wright*

With a new Presidential administration come changes. President Donald Trump and Homeland Security Secretary Kristi Noem have made immigration enforcement a priority. As a result, employers have noted an increase in ICE encounters and activity. Employers should know their critical rights and obligations in this context.

### I-9 Form Requirements and Inspections

One of the forms employers require new hires to fill out is an I-9 form. As of 1986, this has been a requirement for all employees regardless of citizenship status. The form is designed to verify an employee's identity and authorization to work in the United States. Employers are required to have employees fill out Section 1 of the form on the first day of their employment. Section 2 must be completed by the employer within 3 days of the employee's first day of work.

Once the form is completed, employers are required to keep it for 3 years after the hire date, or 1 year after termination, whichever is later. Employers must keep these records secure in either paper, microfilm/ microfiche, or electronic format.

ICE may choose to audit these forms, but before they do so, they are required to serve a written Notice of Inspection or "NOI." Once it is served, the employer has three business days to produce the forms and related documents. Typically, there will be an attached letter specifying the documents ICE wants to review. Unless ICE also presents a valid warrant or subpoena, employers are not required to allow ICE agents to enter non-public areas to review I-9 and inspect related documents.[1]

If a company chooses to store their I-9 forms electronically, they must provide access to the electronic I-9 system within 3 days of receiving an NOI. Notably, ICE may request access to electronic systems, but direct access is not mandatory unless authorized by judicial warrant or subpoena. If ICE presents a judicial warrant that explicitly states that it can seize or copy a company's electronic systems or servers, or access data stored on those systems, then the company must comply with this request.[2]

### Judicial Warrant vs. Administrative Warrant

ICE may come knocking with one of two different types of warrants: a judicial warrant or an administrative warrant. There are key and crucial differences between the two, and employers should tailor their response accordingly.

First, a judicial warrant is issued and signed by a judge. A judicial warrant is usually greater in scope and mandates compliance. It may allow entry into specific areas or seizure of certain documents or individuals.

Alternatively, and more often, ICE agents will present an administrative warrant. Administrative warrants are typically issued by ICE agents themselves and do not authorize entry into non-public areas or allow for a search/seizure without consent. Employers are not legally required to grant access beyond public areas. Notably, administrative warrants do not compel cooperation in regard to search and seizure. Employers are not obligated to consent to a search of non-public areas without a judicial warrant.[3]

However, it is important to note that courts have upheld the validity of administrative warrants in immigration proceedings, stating that the Fourth Amendment permits civil immigration detention due to probable cause determinations made by executive officers rather than neutral magistrates.[4]

### 4th Amendment Implications

In 2020, the Ninth Circuit addressed the Fourth Amendment concerns during ICE encounters. The

1 https://www.ice.gov/factsheets/I-9-inspection and 8 C.F.R. §274a.2(a)(2)(ii)

2 8 C.F.R. § 274a.2(b)(2)(ii)

3 Ramon v. Short, 2020 MT 69 (Supreme Court of Montana)

4 Aguilar v. U.S. Immigration & Customs Enf't Chi. Field Office, 346 F. Supp. 3d 1174 (N.D. Ill. 2018)

court focused on the requirement of probable cause for detaining individuals under immigration detainers. The Ninth Circuit held that the Fourth Amendment mandates a prompt probable cause determination by a neutral and detached magistrate to justify continued detention under an immigration detainer. Furthermore, detaining an individual for a civil immigration offense without such a determination constitutes a Fourth Amendment seizure, which must meet constitutional standards.[5] Since then, the second Trump administration has implemented a slew of new immigration policies—some of which have been challenged in court.

One such challenge was in Perdomo v. Noem, where a class of plaintiffs sued Kristi Noem in her capacity as Secretary of Homeland Security. In that case, some of the plaintiffs were arrested at a bus stop while waiting for a job pickup, while others were U.S. citizens who were detained and questioned by immigration agents. Plaintiffs asserted that these series of arrests, detentions, and questionings were unlawful and violated their 4th and 5th Amendment rights. The federal district court sided with the plaintiffs, holding that the searches and seizures violated the 4th amendment as they occurred not based on reasonable suspicion, but rather based solely on factors like race, language, location, and occupation. The Court also found that denying detainees access to counsel violated their Fifth Amendment due process rights.[6] Kristi Noem's application for a stay of that decision pending a further decision on appeal by the 10th Circuit was granted by the U.S. Supreme Court in July 2025.[7]

While Perdomo and other cases make their way through the courts, it is crucial for employers to be aware of the Fourth Amendment implications surrounding immigration enforcement in the workplace. The key takeaway for employers is the importance of ensuring that any interaction with immigration authorities complies with existing laws. Being aware of these laws allows employers to understand the extent of their obligations and to maintain the integrity of their workplace, as they choose within the boundaries of the law. In most instances, it is the right of an employer to consent to a search of their property, voluntarily, but it is critical to know when such a search is legally required.

**State Cooperation**

Many Republican-leaning states are opting to implement statewide measures to enhance cooperation with ICE. Most prominently, Texas, Indiana, and Arkansas are all considering actions which would mandate sheriff's departments and local law enforcement to cooperate with ICE. The Texas law would require sheriffs to enter into 287(g) agreements with ICE. The 287(g) Program gives participating state and local law enforcement agencies the authority to identify and process removable aliens with pending or active criminal charges, enforce limited immigration authorities with ICE oversight during routine duties and serve and execute administrative warrants on removable aliens in custody. These agreements would give sheriffs limited authority to act as immigration enforcement agents within their jails or in the community, after receiving ICE training. Notably, participating departments do not have the full scope and authority of ICE agents; although they must undergo ICE training to participate, they can only perform limited immigration enforcement under ICE supervision.[8]

Currently, ICE operates three different 287(g) models: The Jail Enforcement Model, The Task Force Model, and The Warrant Service Model. The attached map from ice.gov shows just how many of these programs are currently operating within the United States. The Texas law would mandate these programs for all sheriff's departments within Texas.[9]


Conversely, California is an example of a state that restricts ICE's increased access to workplaces. Under California law, employers are prohibited from voluntarily allowing immigration enforcement agents to enter non-public areas of a workplace without a judicial warrant. This law effectively prohibits voluntary compliance with administrative warrants within the state and imposes penalties on employers who do so.[10] The California law also prohibits employers from voluntarily providing ICE access to employee records without a subpoena or judicial warrant, with certain exceptions for I-9 forms and related documents.[11]

Other states, such as New York and New Jersey, have

5 Gonzalez v. U.S. Immigration & Customs Enf't, 975 F.3d 788 (9th Cir. 2020)

6 Perdomo v. Noem, 2025 U.S. Dist. LEXIS 134409

7 Perdomo v. Noem, 606 U. S. ____ (September 8, 2025)

8 https://www.ice.gov/287g

9 Id.

10 Cal Gov Code § 7285.1

11 Cal Gov Code § 7285.2

issued guidance reminding employers that every resident and visitor to the state has rights regardless of their citizenship or immigration status and providing them with information regarding their rights and responsibilities as employers when interacting with immigration enforcement officers.[12]

### Concluding Thoughts

In the coming months, it will be crucial for employers in every sector to keep an eye on changing federal and state regulations regarding the enforcement of immigration laws. Immigration policy is becoming increasingly political, and it is important to tune out the noise and keep track of the changes that will most affect your workforce. Know your rights when ICE comes knocking, prepare in advance for any possible interaction with ICE, so that both you and your 'front-line' employees know what to do, including the creation of appropriate protocols, policies, and training your staff.

12 https://ag.ny.gov/immigrants-rights/ice-workplace; https://www.nj.gov/humanservices/njnewamericans/newcomers/docs/KnowYourRights-Bus_en.pdf

PORZIO
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## ICE & WARRANTS: WHAT YOUR BUSINESS NEEDS TO KNOW

Kerri A. Wright, Esq.

## WHY MIGHT ICE COME TO YOUR BUSINESS?

**Two main reasons:**

- To conduct an inspection of a business' I-9 employment authorization records
- To conduct an enforcement action to find and detain people, documents, or property within a business

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## INSPECTION: I-9 AUDIT

Federal agencies, including ICE may inspect a business' I-9 forms to ensure compliance:

An I-9 audit begins with a Notice of Inspection (NOI).

Employers are entitled to 3 days' notice.

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## ENFORCEMENT

If federal agents want to enter the private areas of your business to look for:

- Documents
- Property
- People

They must have either your permission or a **judicial** warrant

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# WARRANTS

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# JUDICIAL WARRANTS

A Judicial Warrant can be either a search warrant or an arrest warrant. It must be:

1. signed by a judicial officer (a Judge or Magistrate);
2. describe the place to be searched, and the persons or things to be seized; and
3. have the correct date and have been issued within the past 14 days

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## JUDICIAL SEARCH WARRANTS

A **Search Warrant** is a type of judicial warrant that when properly executed, allows police to enter the address listed on the warrant. The warrant must state specifically the place to be searched and the items to be seized. Officers may only search the areas and for the items listed in the warrant.

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## JUDICIAL ARREST WARRANTS

An **Arrest Warrant** allows police to detain a person in connection with a particular offense. If a warrant is property executed, staff should provide agents with access to areas specified in the warrant.

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AO 442 (Rev. 11/11) Arrest Warrant

UNITED STATES DISTRICT COURT

for the

United States of America
v.

Case No.

Defendant

**ARREST WARRANT**

To: Any authorized law enforcement officer

**YOU ARE COMMANDED** to arrest and bring before a United States magistrate judge without unnecessary delay
*(name of person to be arrested)*
who is accused of an offense or violation based on the following document filed with the court:

☐ Indictment ☐ Superseding Indictment ☐ Information ☐ Superseding Information ☐ Complaint
☐ Probation Violation Petition ☐ Supervised Release Violation Petition ☐ Violation Notice ☐ Order of the Court

This offense is briefly described as follows:

Date:
*Issuing officer's signature*

City and state:
*Printed name and title*

**Return**

This warrant was received on *(date)* , and the person was arrested on *(date)*
at *(city and state)*

Date:
*Arresting officer's signature*

*Printed name and title*

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# IF ICE PRESENTS A JUDICIAL WARRANT

It may identify a person to arrest, list certain locations to search, or identify documents or property to seize.

- Check for an expiration date
- Check for accuracy
- Check that ICE follows the warrant
- Document the actions of the ICE agent

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## ADMINISTRATIVE WARRANTS "FORM I-200"

An **ICE Administrative Warrant** is signed by an immigration officer, not a judicial officer (judge or magistrate). ICE administrative warrants are far more limited than judicial warrants.

An ICE Administrative Warrant allows ICE officers to arrest non-citizens suspected of committing immigration violations.

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DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

**WARRANT OF REMOVAL/DEPORTATION**

File No: ____________

Date: ____________

**To any immigration officer of the United States Department of Homeland Security:**

____________________________________________
(Full name of alien)

who entered the United States at ____________________ on ____________
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- ☐ an immigration judge in exclusion, deportation, or removal proceedings
- ☐ a designated official
- ☐ the Board of Immigration Appeals
- ☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

SAMPLE

____________________________
(Signature of immigration officer)

____________________________
(Title of immigration officer)

____________________________
(Date and office location)

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IF ICE PRESENTS AN ADMINISTRATIVE WARRANT
You do not have to consent to a search
You may decline to answer any questions about the subject of the warrant.
Be mindful of the regulations in your State
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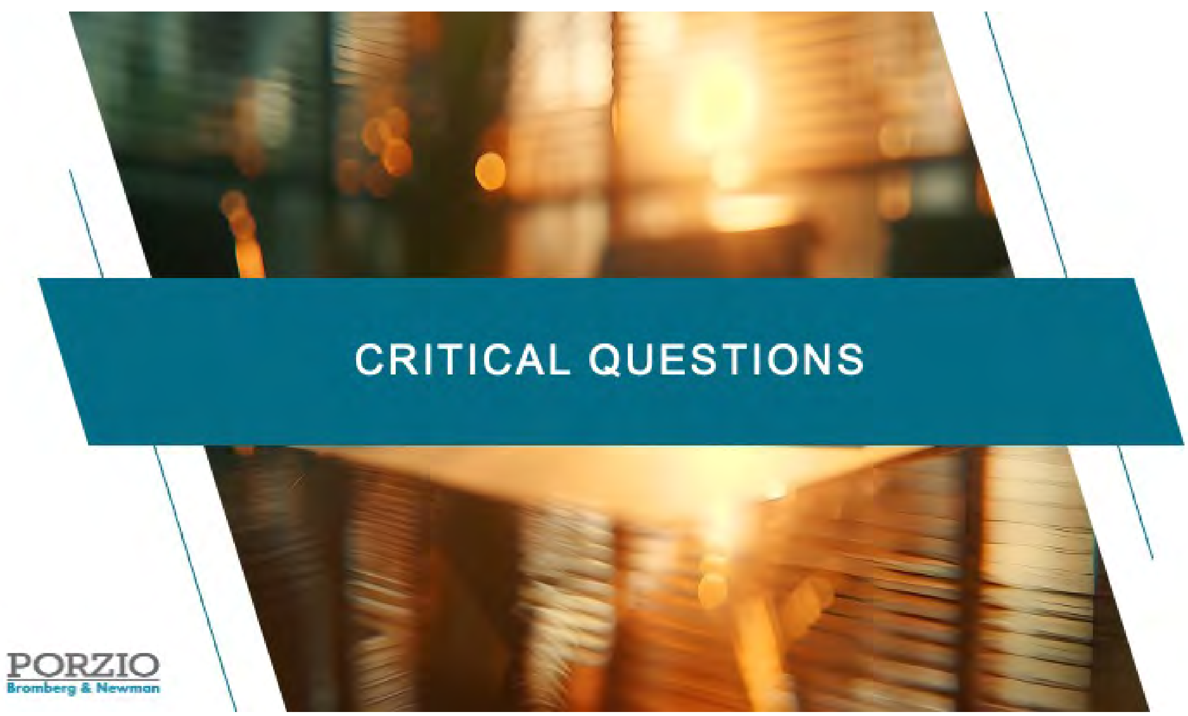
CRITICAL QUESTIONS
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# No warrant means no access, right?

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## EXIGENT CIRCUMSTANCES

ICE does not need a warrant to enter the private spaces of your business when there are "exigent circumstances."

ICE may enter private spaces without a warrant to respond to an emergency, apprehend a fleeing suspect, or stop the destruction of evidence.

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# How do we prepare?

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## PREPARATION

1. Clearly mark private spaces Post signs that say “Private,” “Employees Only,” or “Do Not Enter.”
2. Train your workers and managers.
3. Be mindful with your I-9 files.

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# PREPARATION

4. Establish a protocol.
5. Assign a point person who will:
   - Speak with ICE agents and determine the purpose of their visit
   - Ask to see a warrant
   - Decline to consent to a search if presented with an Administrative Warrant
   - Contact the business owner, attorney, or other authority
   - Document ICE actions

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## Kerri A. Wright

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

Kerri Wright is a principal of Porzio, Bromberg & Newman, P.C. and a member of the firm's Litigation Practice Group, where she co-chairs the Education and Employment Team. She focuses her practice in the areas of education law and employment law, specifically in representation of management in both employment counseling and employment litigation.

Kerri handles a variety of employment law matters for the firm's public and private sector clients in state and federal courts as well as before administrative agencies, including the EEOC and the New Jersey Department of Labor. She has litigation and counseling experience in numerous areas of employment law, including issues involving wage and hour claims, restrictive covenants, harassment, discrimination, and whistleblowing. She has successfully defended management in class-action wage and hour lawsuits and has handled numerous investigations by management into allegations of employee wrongdoing.

Kerri has significant experience representing and counseling school boards, charter schools, private schools and colleges in a variety of areas. She is one of the leading attorneys in the field of reconfiguring school districts, including the creation and dissolution of regional school districts and the creation and termination of sending-receiving relationships.

**Practice Areas and Areas of Focus**

- Education Law
- Employment and Labor
- Litigation
- Disability Accommodations & Leaves of Absence
- Discrimination, Harassment and Retaliation
- Employment Counseling
- HR Training & Policy Development
- Professional Development Training Program
- Restrictive Covenants
- Traditional Labor
- Wage and Hour

**Recognitions**

- The Best Lawyers in America® – Litigation - Labor and Employment (2025-2026)
- New Jersey Law Journal - Women Lawyers of the Year honoree (2022)
- New Jersey School Boards Association - New Jersey Board Member of the Year (2021-2022)
- New Jersey Super Lawyers® (2017-2025)
- New Jersey Rising Stars® (2012-2015)
- New Jersey Law Journal - New Leaders of the Bar (2016)
- NJBIZ - Leading Women in Business Honoree (2025)

**Education**

- Emory University School of Law - J.D., 2005; cum laude
- Seton Hall University - M.P.Adm., 2002
- Seton Hall University - B.A., 2001; magna cum laude

# Depp v. Heard: A Treasure Trove of Critical Issues in Defamation Litigation


**David Lacy**

Christian & Barton (Richmond, VA)


**Depp v. Heard: A Treasure Trove of Critical Issues in Defamation Litigation**
*David Lacy*

It was a match made in Hollywood. And, it was an ending made in Hollywood.

In 2015, former teen heartthrob turned international movie star Johnny Depp married heralded then up-and coming actress Amber Heard. They met around 2009 when Heard was cast in The Rum Diary, a film adaptation of Hunter S. Thompson's novel produced by Depp. Depp played the lead. Heard played his romantic interest. Their performances are commendable and, moreover, their onscreen chemistry undeniable. Both were in relationships at the time, but a few years later in 2014, Heard publicly confirmed they were engaged. A private civil ceremony was held the next year at their mansion in Los Angeles, followed several days later by a wedding celebration at Depp's private island in the Bahamas.

The "salad days"[1] did not last long. On May 27, 2016, approximately fifteen months after they married, Heard filed for divorce and obtained an ex parte restraining order against Depp, alleging domestic violence. Their divorce was finalized in January 2017. And that's when things really heated up.

On April 27, 2018, the British tabloid newspaper The Sun published an article with the headline, "GONE POTTY How Can J K Rowling be 'genuinely happy' casting wife beater Johnny Depp in the new Fantastic Beasts film?"[2] Among other things, the article stated that "[o]verwhelming evidence was filed to show Johnny Depp engaged in domestic violence against his wife Amber Heard." A little over a month later, in June 2018, Depp sued The Sun and the article's author in the United Kingdom for libel.

Then, on December 18, 2018, The Washington Post published on its website an op-ed by Heard entitled, "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. This has to change."[3] The next day, The Washington Post published the op-ed in its hard copy edition under the title, "A Transformative Moment For Women."

Neither version of the op-ed mentioned Depp by name. Nevertheless, on March 1, 2019, Depp sued Heard in the Circuit Court for the City of Fairfax, Virginia, claiming that the op-ed falsely implied that Heard was the victim of domestic abuse at Depp's hands. Depp's complaint asserted three counts of defamation: one for the website publication of the op-ed, one for the hard copy publication, and one for republication of the website op-ed via a tweet. Depp demanded compensatory damages "of not less than $50,000,000."

Depp's libel action in the UK went to trial in July 2020. Both Depp and Heard testified. In November 2020, the court held that the media defendants' statements about Depp were substantially true, finding that "the great majority of alleged assaults of Heard by Depp have been proved to the civil standard."[4]

Back in Virginia, after the UK trial but before judgment was entered, Heard filed counterclaims against Depp. Heard sought a declaration that she was immune from liability for her op-ed based on Virginia's so-called Anti-SLAPP statute.[5] Furthermore, she asserted a claim for defamation based on statements Depp made in a British GQ interview[6] denying Heard's claims of domestic

1 "These were the happy days, the salad days as they say. And Ed felt that havin' a critter was the next logical step. It was all she thought about. Her point was that there was too much love and beauty for just the two of us and every day we kept a child out of the world was a day he might later regret havin' missed." H.I. McDonough, Raising Arizona (Joel Coen & Ethan Coen dirs., Twentieth Century Fox 1987).

2 Dan Wootton, GONE POTTY How Can J K Rowling be 'genuinely happy' casting wife beater Johnny Depp in the new Fantastic Beasts film?, The Sun (Apr. 26, 2018). The next day, The Sun amended the headline to "GONE POTTY How Can J K Rowling be 'genuinely happy' casting Johnny Depp in the new Fantastic Beasts film after assault claim?"

3 Amber Heard, Amber Heard: I spoke up against sexual violence — and faced our culture's wrath. This has to change., The Washington Post (Dec. 18, 2018).

4 The court summarized its judgment thusly: "The Claimant has not succeeded in his action for libel. Although he has proved the necessary elements of his cause of action in libel, the Defendants have shown that what they published in the meaning which I have held the words to bear was substantially true."

5 See Va. Code § 8.01-233.2.

6 Jonathan Heaf, Johnny Depp will not be buried, British GQ (Oct. 2, 2018).

violence, as well as similar statements Depp's attorney made to the press. Heard also asserted a claim under the Virginia Computer Crimes Act,[7] alleging that Depp, either directly or through his agents, "launched a nationwide campaign . . . to harass, abuse, and discredit Heard, and to cause harm to her economically."

In January 2021, the Fairfax circuit court in Virginia dismissed Heard's declaratory judgment and computer crimes claims.[8] The circuit court also held that six of the eight statements underlying Heard's defamation claim were time-barred.[9] On August 17, 2021, the circuit court denied a motion by Heard to have Depp's defamation claims dismissed based on the judgment in the UK case.

The Fairfax case proceeded to trial by jury in April 2022. The presiding judge exercised her discretion under the Virginia Code allowed the proceedings to be broadcast live. For six weeks, eyeballs all around the world were glued to the television. The jury returned its verdict on June 1, 2022. It found in favor of Depp on all three of his defamation counts and awarded him $10,000,000 in compensatory damages and $5,000,000 in punitive damages.[10] The jury also found in favor of Heard on her defamation count and awarded her $2,000,000 in compensatory damages.[11] Both sides appealed but settled before any appellate decisions were rendered.

Depp v. Heard unquestionably provided grist for the gossip mill, but it also involved several issues that are critical to prosecuting or defending a defamation action. In addition to defamation-specific issues, the case raises difficult questions about jurisdiction and choice of law. Thus, any person or company that maintains a presence on the internet would be well advised to heed Depp v. Heard's teachings, especially as defamation seemingly is becoming the tort du jour.

## Jurisdiction

### How Virginia? Jurisdiction and the Internet

Depp v. Heard poses an obvious question: how did this case end up in Virginia? Neither party resided in Virginia. Neither party had meaningful ties to Virginia. How can one Californian sue another Californian in Virginia? Heard asked that very question. The answer hinged on the location of the computer servers used to upload Heard's op-ed to The Washington Post's website.

Heard initially moved to dismiss Depp's complaint based on Virginia's forum non conveniens statute.[12] For that statute to apply, Heard had to demonstrate, as a threshold matter, that Depp's defamation claims arose outside Virginia; under the Virginia statute, convenience is not relevant if the claims arose inside Virginia.[13] Applying Virginia's lex loci rules, discussed in greater detail below, the circuit court held that Depp's claims arose in Virginia. Why? Because The Washington Post posted Heard's op-ed to its website using servers located in Virginia.[14]

Heard objected to venue, not jurisdiction.[15] Nevertheless, the location of computer servers relaying a defendant's internet activity can play a critical role in determining personal jurisdiction. If, for example, a defendant utilizes a computer to perpetrate a tortious act, even if the defendant has no idea that the computer is interacting with a server, the defendant could be subject to personal jurisdiction in the state where the server is located.

In MacDermid, Inc. v. Deiter,[16] for example, the defendant, employed in the plaintiff's satellite office in Canada, became aware of her impending termination and sent an email from her work account to her personal account. The plaintiff, her employer, claimed that the email contained trade secret information and sued her in Connecticut, where the company was headquartered, not in Canada, where the defendant sent the email. The Connecticut district court dismissed for lack of personal jurisdiction, reasoning that the defendant "had not used a Connecticut computer or computer network but had simply sent email 'from one computer in Canada to another computer in Canada.'"[17] The Second Circuit disagreed. Although the defendant "physically interacted only with computers in Canada," forwarding her work email necessarily required her to access the plaintiff's servers, which were located

7 See Va. Code § 18.2-152.1, et seq. The Virginia Computer Crimes Act is primarily a criminal statute but provides a private, civil right of action when "any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act." See Va. Code §§ 18.2-152.7:1 and 18.2-152.7.

8 See Depp v. Heard, 107 Va. Cir. 80, 91 (Fairfax Cir. Ct. Jan. 4, 2021).

9 See id.

10 See Depp, II v. Heard, No. CL-2019-0002911, 2022 WL 2342058, at *1 (Fairfax Cir. Ct. June 24, 2022).

11 See id.

12 See Depp v. Heard, 102 Va. Cir. 324, 325-26 (Fairfax Cir. Ct. July 25, 2019).

13 See id. at 327. See also Va. Code § 8.01-265(i) ("[T]he court wherein an action is commenced may, upon motion by any party and for good cause shown . . . dismiss an action brought by a person who is not a resident of the Commonwealth without prejudice under such conditions as the court deems appropriate if the cause of action arose outside of the Commonwealth and if the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth.").

14 See Depp, 102 Va. Cir. at 331 ("Using the servers located in Springfield[,] Virginia[,] The Washington Post posted [the op-ed] to the internet on December 18, 2018. Therefore, Depp's cause of action arises in Virginia and the prerequisite to dismiss the case based on forum non conveniens is not met.").

15 The circuit court's finding that Depp's claims arose in Virginia likely would have defeated any argument that Heard was not subject to personal jurisdiction. Under the doctrine of specific jurisdiction, a non-resident defendant may be subject to personal jurisdiction if the plaintiff's claims arise out of the defendant's activities in the forum state. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984) ("It has been said that, when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant.") (citation omitted).

16 702 F.3d 725, 727 (2d Cir. 2012).

17 Id. at 728.

in Connecticut.[18]

"The explosive rise of the Internet as a communications medium has had tremendous implications for courts faced with the application of personal jurisdiction doctrines."[19] Put simply, "[t]he result of the technological innovations that make the Internet experience seamless for users is that sovereign states are presented with a stronger basis for the assertion of personal jurisdiction."[20] Indeed, "[m]any courts have found that server location—where the processing of information occurs—implicates a valid state interest."[21]

The issue of servers and jurisdiction is an especially acute concern in Virginia. Loudoun County in northern Virginia is home to hundreds of data centers housing an untold number of servers, leading it to be dubbed "the center of the Internet."[22] Virginia courts have begun cabining jurisdiction based on internet activity,[23] in part because of Depp v. Heard. Under the heading "FAIRFAX COUNTY, VIRGINIA, USA, IS NOT THE WORLD'S DEFAMATION COURT," a judge in the Fairfax circuit court suggested that "[s]ome may have misread the Johnny Depp v. Amber Heard Opinion Letter."[24] Adopting the Fourth Circuit's standard, the judge held that to exercise personal jurisdiction over a non-resident defendant based on the defendant's internet activity, the defendant "must have directed electronic activity into the state with the manifest intent to target and focus on [the forum state] and not an undefined audience of internet users around the world."[25] "Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received."[26] This standard, sometimes referred to as the "Zippo test" after a 1997 federal district court decision in Pennsylvania,[27] has been adopted in many jurisdictions.[28]

**Why Virginia? Anti-SLAPP Considerations**

Depp v. Heard poses another important question relating to jurisdiction: why Virginia? Why did Depp file suit in Virginia instead of, say, California, where both he and Heard lived at the time suit was filed?

Only Depp knows exactly why he filed suit in Virginia. It bears noting, however, that some states provide greater protection from defamation suits than others through so-called anti-SLAPP statutes. SLAPP means "Strategic Lawsuits Against Public Participation." "Generally speaking, anti-SLAPP statutes aim to weed out and deter lawsuits brought for the improper purpose of harassing individuals who are exercising their protected right to freedom of speech."[29] Many states have enacted some form of an anti-SLAPP statute, but they differ greatly in terms of the conduct they protect and, moreover, the extent of protection provided.[30]

Heard suggested in her papers that Depp filed in Virginia to avoid California's anti-SLAPP statute.[31] Generally, California's anti-SLAPP statute applies to any cause of action "arising from any act" of the defendant that was in furtherance of the defendant's "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue," and most notably provides a mechanism for early dismissal—a "special motion to strike"—and an award of attorneys' fees and costs to the plaintiff.[32]

California's statute is perhaps the most robust anti-

18 Id. Contra Amberson Holdings LLC v. Westside Story Newspaper, 110 F.Supp.2d 332, 336 (D. N.J. 2000) ("This court . . . refuses to hold that inter-computer transfers of information, which are analogous to forwarding calls to a desired phone number through a switchboard, should somehow establish sufficient contacts that would subject a defendant to personal jurisdiction.").

19 Jason H. Eaton, Effect of use, or alleged use, of Internet on personal jurisdiction in, or venue of, Federal court case, 155 A.L.R. Fed. 535 (originally published in 1999).

20 Joel R. Reidenberg, Technology and Internet Jurisdiction, 153 U. Pa. L. Rev. 1951, 1962 (2005).

21 Sasha Segall, Jurisdictional Challenges in the United States Government's Move to Cloud Computing Technology, 23 Fordham Intell. Prop. Media & Ent. L.J. 1105, 1122 (2013).

22 See Jonathan O'Connell, Why Ashburn, Va. is the center of the Internet, The Washington Post (Mar. 5, 2014).

23 Federal courts in Virginia, too, have begun tightening the rules governing jurisdiction based on internet activity. Compare Bochan v. La Fontaine, 68 F.Supp.2d 692, 699 (E.D. Va. 1999) ("[C]ourts have focused in large measure on the location of the Internet service provider or the server on which the bulletin board is stored and the role played by this service or hardware in facilitating the alleged tort."), with Fireclean LLC v. Tuohy, No. 1:16-cv-294-JCC-MSN, 2016 WL 4414845, at *6 (E.D. Va. June 14, 2016) ("The Fourth Circuit has 'described as de minimis' the level of contact created by the connection between an out-of-state defendant and a web server located within a forum.'" (quoting Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., 334 F.3d 390, 402 (4th Cir. 2003))).

24 Mireskandari v. Daily Mail & Gen. Tr. PLC, 105 Va. Cir. 370, 386 (Fairfax Cir. Ct. July 27, 2020).

25 Id. at 377 (citing ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002)).

26 ALS Scan, Inc., 293 F.3d at 714.

27 See Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1127 (W.D. Pa. 1997). The Fourth Circuit, in articulating its standard, expressly adopted Zippo. See ALS Scan, Inc., 293 F.3d at 713.

28 See, e.g., Shrader v. Biddinger, 633 F.3d 1235, 1241 (10th Cir. 2011); Dailey v. Popma, 662 S.E.2d 12, 14 (N.C. Ct. App. 2008); Enzyme Env't Sols., Inc. v. Elias, 60 So.3d 1158, 1162 (Fla. Dist. Ct. App. 2011); Burdick v. Superior Ct., 183 Cal.Rptr.3d 1, 9-10 (Cal. Ct. App. 4th 2015) (collecting cases); EnhanceWorks, Inc. v. Dropbox, Inc., No. M2018-01227-COA-R3-CV, 2019 WL 1220903, at *8 (Tenn. Ct. App. Mar. 14, 2019). Accord Anne McCafferty, Internet Contracting and E-Commerce Disputes: International and U.S. Personal Jurisdiction, 2 Global Bus. L. Rev. 95, 120 (2011) ("The growing trend among courts appears to be that mere maintenance of an Internet site or the posting of information on a site is not enough to subject the operator of the site to personal jurisdiction, but that a defendant directing electronic activity into a State with intent to actually engage in business or other interactions in that state is sufficient evidence to assert personal jurisdiction over him or her.") (cleaned up; internal quotations omitted).

29 Fairfax v. CBS Corp., 2 F.4th 286, 296 (4th Cir. 2021). See also Rodney A. Smolla, 2 Law of Defamation § 9:107 (2d ed., May 2025 update) ("A SLAPP suit refers to a suit brought in response to efforts by individuals or groups to participate in the democratic process by some person or entity that claims to have been wronged through that participation.").

30 See generally, Robert D. Sack, 2 Sack on Defamation § 16:2.3 (5th ed. 2017).

31 See Brief of Appellant, Record No. 1062-22-4, at 10 n. 3 (Va. App. Nov. 23, 2022) ("By filing in Virginia, Depp presumably sought to avoid California's strong anti-SLAPP law, which has given rise to an early motion practice in California defamation suits that provides a potentially potent weapon for defendants.") (internal citations and quotations omitted).

32 See Cal. Civ. Proc. Code §§ 425.16(b)(1) and (c)(1). As a "special" motion to strike, it may be filed immediately after service of the complaint, at which point, "[a]ll discovery proceedings in the action shall be stayed" until the motion is resolved. See Cal. Civ. Proc. Code §§ 425.16(f) and (g). Furthermore, the default rule is that the motion is heard "not more than 30 days" after it is served. See Cal. Civ. Proc. Code § 425.16(f). The court may award attorneys' fees to the defendant if the special motion to strike is deemed frivolous or "solely intended to cause unnecessary delay." See Cal. Civ. Proc. Code § 425.16(c)(1).

SLAPP statute of all. Virginia's anti-SLAPP statute,[33] by comparison, although permitting an award of attorneys' fees and costs,[34] only applies to certain types of statements,[35] does not provide for early dismissal and is inapplicable if the defendant published the statements negligently (or with New York Times v. Sullivan actual malice).[36] Thus, for example, if a public figure sues a critic for defamation in California, the defendant has a meaningful opportunity to end the litigation quickly and recover his fees, thereby blunting any effort to chill protected speech, whereas a defendant in Virginia, faced with a properly pled defamation claim,[37] must go through the entire process and prevail on the merits and, even then, must demonstrate not only that he made the statement without actual malice, but also that he was not negligent in making the statement, a potentially very high bar.[38] Consequently, for many defamation plaintiffs, states like Virginia with weak or non-existent anti-SLAPP statutes are much more attractive jurisdictions than California and other jurisdictions with strong anti-SLAPP statutes.[39] Indeed, commentators have suggested that "before filing a defamation action in a particular state, determine whether that state has an anti-SLAPP statutory scheme, evaluate what carve-outs may exist for business disputes, and then tailor the complaint to align with such provisions."[40]

**Choice of Law and the Internet: Good Luck**

Choice of law, or conflict of laws,[41] is another important Internet-related issue addressed in Depp v. Heard, although like jurisdiction, it was addressed indirectly. Dean Prosser observed long ago that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."[42] Choice of law can be all the more complicated in the context of defamation. Dean Prosser acknowledged specifically the "peculiar and baffling difficulties" interstate publication presents in determining choice of law.[43] And these difficulties existed decades before the Internet made interstate publication the norm. As one commentator succinctly stated, "choice of law in defamation cases has been difficult."[44]

The difficulties begin with the rule of lex loci delicti. Under the lex loci rule, "the law of the place of the wrong" governs the parties' substantive rights.[45] The place of the wrong is "the state where the last event necessary to make an actor liable for an alleged tort takes place."[46] "[E]very state originally followed" the lex loci rule, and it was memorialized in the first Restatement.[47] Adherence to the lex loci rule began to wane, however, as courts grew dissatisfied with the results from mechanical application of the rule.[48] Depp v. Heard illustrates these frustrations well.

Most courts in Virginia have held that in defamation cases, the place of the wrong, and therefore the state whose law governs, is the state in which the defamatory statement was first published.[49] But the allegedly defamatory statements in Depp v. Heard were

33 See Va. Code § 8.01-223.2.

34 Virginia's anti-SLAPP statute "permits, but does not require, a court to award attorney's fees to a prevailing defendant and does not create a presumption in favor of a fee award." Fairfax, 2 F.4th at 297.

35 See Rolofson v. Fraser, 904 S.E.2d 284, 296 (Va. Ct. App. 2024) (affirming dismissal of defamation claim but holding that Virginia's anti-SLAPP statute was inapplicable).

36 See Gilmore v. Jones, 370 F.Supp.3d 630, 682 (W.D. Va. 2019) (denying motion for immunity and attorneys' fees under Virginia's anti-SLAPP statute because the plaintiff "has plausibly alleged defamation with actual malice"); Vivera Pharms., Inc. v. Gannett Co., 107 Va. Cir. 394, 400 (Fairfax Cir. Ct. 2021) ("Even if the statements are privileged [under Virginia's anti-SLAPP statute], Vivera's claims should not be dismissed because the complaint properly alleges malice as described above.").

37 Federal courts in Virginia have held that Virginia's anti-SLAPP statute is potentially applicable at the pleading stage if the complaint fails to state a claim. See McCullough v. Gannett, Co., No. 122CV1099RDALRV, 2023 WL 3075940, at *16 (E.D. Va. Apr. 25, 2023) ("It would be nonsensical to read the statute as requiring discovery and a jury trial on a question related to anti-SLAPP immunity when the very purpose of the immunity is to allow defamation defendants faced with meritless civil suits to avoid that discovery and trial. And so this Court, like other courts, finds that the immunity applies when a complaint fails to plead actual malice.") (citations omitted). Yet, even when the statute applies at the pleading stage, the defendant does not automatically recover his fees and expenses under the statute. See id. (declining to award attorneys' fees under Virginia's anti-SLAPP statute because "Plaintiff's allegations are not so groundless, frivolous, or unreasonable so as to justify an award of attorneys' fees") (internal quotations omitted).

38 In the absence of controlling precedent or clear guidance from the Virginia General Assembly, a federal district court in Virginia held that the burden of proof under Virginia anti-SLAPP statute is similar to that of the qualified privilege, such that "(1) the question of whether statutory immunity attaches is a question of law; (2) the plaintiff bears the burden for showing that statutory immunity is lost by virtue of the defendant's mental state; (3) whether the privilege is overcome by virtue of the defendant's improper mental states (i.e., a reckless disregard for the truth or actual or constructive knowledge of a statement's falsity) is a jury question; and (4) to defeat an assertion of statutory immunity, the plaintiff must show, by clear and convincing evidence, that the defendant acted with an improper mental state." Alexis v. Kamras, No. 3:19-CV-00543, 2020 WL 7090120, at *21 (E.D. Va. Dec. 3, 2020). In Alexis, the district held that the anti-SLAPP statute applied to the allegedly defamatory statements at issue, but "because [the defendant's] mental state during the time that he made the allegedly defamatory statements is in contention, the question of whether the statements were made with reckless disregard for their truth or constructive knowledge of their falsity will go to a jury." Id.

39 For example, former California Congressman Devin Nunes has filed multiple defamation lawsuits in Virginia. In transferring one of Nunes's lawsuits to New York, a federal district court in Virginia noted its "significant concerns about forum shopping." Nunes v. Cable News Network, Inc., No. 3:19-cv-889, 2020 WL 2616704, at *6 (E.D. Va. May 22, 2020). But see Nunes v. Twitter, Inc., 103 Va. Cir. 184 (Henrico Cir. Ct. 2019) (denying motion to transfer venue to California, where Nunes resides and where Twitter's headquarters was located).

40 T. Markus Funk & Daniel Graham, Safeguard Business and Personal Reputations Using the Sharp Tool of a Defamation Action [Bloomberg 2025] (Jan. 1, 2025), 85 Ohio St. L.J. Online 1, 9 (2024).

41 Fabricius v. Horgen, 257 Iowa 268, 274 (1965).

42 William L. Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1953). Another commentator described the situation in more generous—albeit less humorous—terms, noting that "the subject of [choice of law] has attracted the best–thinking and the most diligent research of a host of capable scholars, each urging the merits of his particular views." See 29 A.L.R.3d 603 at § 2[a] (originally published in 1970).

43 Prosser, 51 Mich. L. Rev. at 971.

44 James R. Pielemeier, Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation, 133 U. Pa. L. Rev. 381, 393 (1985).

45 See Restatement (First) of Conflict of Laws § 377 (1934). Accord 200 N. Gilmor, LLC v. Cap. One, Nat. Ass'n, 863 F.Supp.2d 480, 483 n.1 (D. Md. 2012).

46 Restatement (First) of Conflict of Laws § 377 (1934).

47 Leigh Anne Miller, Choice-of-Law Approaches in Tort Actions, 16 Am. J. Trial Advoc. 859, 860 (1993) (citing James E. Westbrook, A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism, 40 MO. L. REV. 407, 414-15 (1975)). See also 29 A.L.R.3d 603 § 3 (describing lex loci as the "orthodox rule").

48 See Babcock v. Jackson, 12 N.Y.2d 473, 479 (1963) ("Realization of the unjust and anomalous results which may ensue from application of the traditional rule in tort cases also prompted judicial search for a more satisfactory alternative in that area.").

49 See Edwards v. Schwartz, 378 F.Supp.3d 468, 502-03 (W.D. Va. 2019) (citing Lapkoff v. Wilks, 969 F.2d 78, 81 (4th Cir. 1992)).

published on the Internet. In other words, the allegedly defamatory statements were published in every state simultaneously.[50] "[D]efining the 'place of the wrong' as the place of publication in a case like this raises thorny questions about the nature of online publication, a process that does not necessarily occur at one readily identifiable geographic point."[51] A literal interpretation of the traditional lex loci rule to an online publication "would necessitate separate instructions to the jury on the law of each state and a separate award of damages for the injury suffered in each state."[52] Incredibly, some courts actually attempted this approach when dealing with newspapers published nationwide.[53]

"The Supreme Court of Virginia has yet to address how the 'place of the wrong' should be defined in situations where the defamatory content is published in multiple jurisdictions, such as on a website that can be accessed worldwide."[54] In the absence of controlling guidance, courts forced to grapple with the issue have reached different conclusions.[55] As previously noted, the circuit court in Depp v. Heard concluded that in defamation cases arising out of an online publication, the place of the wrong—the place of publication—is the state in which the communication is uploaded to the Internet, i.e., the state in which the server is located.[56] This conclusion was not without precedent in Virginia,[57] although other courts have held that in online defamation cases, the Virginia Supreme Court would define the place of the wrong as "the state where the plaintiff is primarily injured as a result of the allegedly tortious online content."[58]

Jurisdictions like Virginia that continue to "cling" to the lex loci delicti rule have been referred to as "the Last of the Mohicans."[59] The second Restatement codified a more flexible approach known as the "most significant relationship" test. Under the most significant relationship test, "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties."[60] "Contacts to be taken into account . . . to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."[61] The test, although arguably the new majority rule,[62] is not without its detractors. The Supreme Court of North Carolina recently suggested that "while the application of the lex loci test can be difficult in some circumstances, including cases involving events that occur in and entities associated with multiple jurisdictions, those difficulties pale in comparison with the lack of certainty inherent in the application of a totality of the circumstances test such as the most significant relationship test."[63]

**Res Judicata—What About that UK Judgment?**

Depp sued The Sun for stating he perpetrated violence against Heard, and Depp lost. Depp subsequently sued Heard for implying he perpetrated violence against her, and Depp won. Huh?

Prior to trial, Heard argued that because the court in the UK held that Heard's domestic abuse allegations were substantially true, Depp was collaterally precluded from relitigating the issue.[64] Collateral estoppel is one of the four preclusive effects that a final judgment may have upon subsequent litigation pursuant to the doctrine of res judicata.[65] Collateral estoppel, also known as issue preclusion, "precludes parties to the first action and their privies from relitigating any issue of fact actually litigated and essential to a valid and final judgment in the first action."[66]

50 See Ascend Health Corp. v. Wells, No. 4:12-CV-00083-BR, 2013 WL 1010589, at *2 (E.D. N.C. Mar. 14, 2013) ("In this case . . . the publication of the allegedly defamatory statements occurred over the internet, meaning multistate (if not, worldwide) publication took place.").

51 Gilmore, 370 F.Supp.3d at 665. See also Wells v. Liddy, 186 F.3d 505, 527 (4th Cir. 1999) ("Because of the widespread simultaneous publication of the allegedly defamatory statement in many different jurisdictions, application of the traditional lex loci delicti rule becomes cumbersome, if not completely impractical.").

52 Pielemeier, 133 U. Pa. L. Rev. at 394.

53 See, e.g., O'Reilly v. Curtis Pub. Co., 31 F. Supp. 364, 365 (D. Mass. 1940) (involving a defamation suit arising out of a single issue of the Saturday Evening Post published in 38 states where the court ruled that "[t]he defendant's liability for the libel published in each state is governed by the laws of that particular state").

54 Gilmore, 370 F.Supp.3d at 664 (internal quotations omitted).

55 See id. at 665 n.39 (collecting cases).

56 Depp, 102 Va. Cir. at 331.

57 See, e.g., Wiest v. E-Fense, Inc., 356 F.Supp.2d 604, 608 (E.D. Va. 2005) ("Because Plaintiff alleges that 'the website in question is controlled from Defendant E–Fense, Inc.'s corporate headquarters located in Virginia,' and the allegedly defamatory statements were published on this website, Virginia law applies.").

58 Gilmore, 370 F.Supp.3d at 666. See also Nunes v. Cable News Network, Inc., 31 F.4th 135, 143 (2d Cir. 2022) ("[T]he Virginia Supreme Court would—in the context of online defamatory content published simultaneously in multiple jurisdictions—follow the lead of numerous other courts in lex loci delicti jurisdictions and apply the law of the state where a plaintiff incurs the greatest reputational injury, with a presumption that a plaintiff suffers the brunt of the injury in their home state.").

59 Symeon C. Symeonides, Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey, 69 Am. J. Comp. L. 177, 189 (2021) (internal quotation omitted).

60 Restatement (Second) of Conflict of Laws § 145(1) (1971).

61 Id. at § 145(2).

62 Miller, 16 Am. J. Trial Advoc. at 872 (collecting cases and describing the most significant relationship test as "the choice alternative to lex loci delicti that most states have now chosen"). The American Society of Comparative Law publishes an annual survey of American choice-of-law cases in the American Journal of Comparative Law, available on Westlaw. See, e.g., John F. Coyle, et al., Choice of Law in the American Courts in 2023: Thirty-Seventh Annual Survey, 72 Am. J. Comp. L. 247 (2024).

63 SciGrip, Inc. v. Osae, 373 N.C. 409, 421-22 (2020).

64 See Depp v. Heard, 108 Va. Cir. 382, 383 (Fairfax Cir. Ct. Aug. 17, 2021). Heard also argued that Depp's claims were barred by the doctrine of claim preclusion, an argument the court found "especially puzzling," as the UK case involved a separate defendant who published a different statement in a different publication at a different time. See id. at 388.

65 Bates v. Devers, 214 Va. 667, 670 (1974).

66 Lane v. Bayview Loan Servicing, LLC, 297 Va. 645, 654 (2019) (internal quotations omitted).

The Fairfax circuit court in Depp v. Heard applied Virginia's collateral estoppel rules and held that the doctrine did not apply because Heard was not a party to the UK case, nor was she in privity with The Sun.[67] In reaching this conclusion, the court rejected Heard's contention that Virginia follows the federal common law (adopted by many states) permitting "defensive" collateral estoppel, whereby "a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant," provided the plaintiff "had a full and fair opportunity to litigate the issue in the previous suit."[68]

Notably, the circuit court did not explain why Virginia collateral estoppel law governed the analysis in the first place. If the UK judgment against Depp had been entered by a federal court in the United States, the Fairfax circuit court would have been obligated to apply federal common law to determine the judgment's preclusive effect.[69] Ultimately, the law governing the preclusive effect of a foreign judgment is complex and unsettled.[70]

In addition to collateral estoppel, Heard sought to enforce the UK judgment under principles of comity and the Uniform Foreign-Country Money Judgments Recognition Act.[71] The circuit court rejected the latter, suggesting that the statute only applies when the parties to the action in the United States are the same as the parties to the foreign action.[72] The circuit court rejected the comity argument due to the differences between defamation law in Virginia and England. Virginia will only afford comity to a foreign judgment if, among other things, "the procedural and substantive law applied by the foreign court [are] reasonably comparable to that of Virginia."[73] As the Depp v. Heard court observed, "[t]he Declaration of Independence and the First Amendment of the United States constitution represent major departures from the English Common Law with respect to freedom of speech and freedom of the press."[74]

The differences between defamation law in America and England highlights another important aspect of defamation law: the "phenomenon" known as "libel tourism."[75] Libel tourism is "a form of international forum-shopping in which a plaintiff chooses to file a defamation claim in a foreign jurisdiction with more favorable substantive law."[76] Because "English defamation law tilt[s] the scales dramatically toward plaintiffs," it "encourage[s] individuals to bring suit in the United Kingdom even if they had tenuous ties to the forum and the defendant virtually none," leading England to be labeled "the libel capital of the world."[77] The 2016 movie Denial, for example, recounts historian and holocaust denier David Irving's lawsuit in England against American author Deborah Lipstadt. Lipstadt ultimately prevailed and advocated for federal legislation prohibiting libel tourism.[78] In 2010, Congress enacted the SPEECH Act[79] "to protect United States authors and publishers against judgments against them in foreign jurisdictions that are less protective of free speech."[80] Under the SPEECH Act, a foreign defamation judgment is unrecognizable and unenforceable in the United States unless (a) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the First Amendment, and (b) the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the First Amendment and the constitution and law of the State in which the domestic court is located.[81] "Put differently, a party may enforce a foreign defamation judgment in a domestic court if either (A) the law of the foreign forum, as applied in the foreign proceeding, provides free-speech protection that is coextensive with relevant domestic law, or (B) the facts, as proven in the foreign proceeding, are sufficient

67 See Depp, 108 Va. Cir. at 389. Collateral estoppel also failed because Heard could not show mutuality. See id. at 387. "[A]ccording to the principle of mutuality, to which there are exceptions, a litigant is generally prevented from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result." Norfolk & W. Ry. Co. v. Bailey Lumber Co., 221 Va. 638, 640 (1980). Virginia is one of the few remaining jurisdictions to require mutuality as an element of collateral estoppel. See Snavely v. AMISUB of S.C., Inc., 665 S.E.2d 222, 228 (S.C. Ct. App. 2008) ("While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.").

68 Thurston v. United States, 810 F.2d 438, 445 (4th Cir. 1987) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979), and Blonder-Tongue Lab'ys, Inc. v. Univ. of Illinois Found., 402 U.S. 313, 329 (1971)). At one point the Virginia Supreme Court appeared ready to adopt defensive collateral estoppel, before subsequently rejecting it outright. See Angstadt v. Atlantic Mut. Ins. Co., 249 Va. 444, 447 (1995).

69 See Glasco v. Ballard, 249 Va. 61, 64 n.* (1995) (noting that "a prior federal court judgment is accorded the preclusive effect in subsequent state litigation that the federal courts would have attached thereto"); Mallory v. LeClairRyan, 102 Va. Cir. 338, 342-43 (Richmond Cir. Ct. Aug. 8, 2019) (applying federal common law rules for collateral estoppel to determine the effect of a prior judgment entered by a federal court exercising federal question jurisdiction).

70 See, e.g., 18B Wright & Miller, Fed. Prac. & Proc. Juris. § 4473 (3d ed.) ("The preclusion effects of judgments entered in other countries cannot be described here in any systematic way.").

71 See Depp, 108 Va. Cir. at 389-92.

72 See id. at 392 ("Defendant has cited no Virginia case applying the UFCMJRA when the parties are not mutual. Consequently, the UFCMJRA is inapplicable here and does not mandate the dismissal of Plaintiff's case.").

73 Am. Online, Inc. v. Nam Tai Elecs., Inc., 264 Va. 583, 591 (2002).

74 Depp, 108 Va. Cir. at 390 (citing Telnikoff v. Matusevitch, 347 Md. 561, 584 (1997). The circuit court also acknowledged that "[n]ot only are the substantive laws of the UK different than Virginia, but so too are the procedural laws." Id. (citations omitted).

75 Bruce D. Brown & Clarissa Pintado, The Small Steps of the Speech Act, 54 Va. J. Int'l L. Dig. 1, 2 (2014).

76 Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481, 487 (5th Cir. 2013).

77 Brown & Pintado, 54 Va. J. Int'l L. Dig. at 2.

78 See Michael J. Broyde and Deborah E. Lipstadt, The "libel tourism" threat, The New York Times (Oct. 11, 2007).

79 See 28 U.S.C. §§ 4101-4105. SPEECH stands for "Securing the Protections of our Enduring and Established Constitutional Heritage." Pub. L. No. 111-223, 124 Stat. 2380 (Aug. 10, 2010).

80 Takagi v. Twitter, Inc., No. 22-MC-80240-VKD, 2023 WL 1442893, at *7 n.8 (N.D. Cal. Feb. 1, 2023) (emphasis omitted).

81 Trout Point Lodge, 729 F.3d at 487-88.

to establish a defamation claim under domestic law."[82]

**Defamation—Gatekeeping**

Notably, prior to trial, both Depp and Heard tried to have the other's defamation claims dismissed on the grounds that the alleged statements did not support a claim for defamation as a matter of law. In this respect, Depp v. Heard illustrates a key component of defamation litigation: the trial court's "gatekeeping" function.[83]

Defamation implicates free speech rights under the First Amendment and its state constitution counterparts. Therefore, the court must decide as a threshold matter whether a statement is actionable in defamation.[84] Critically, in exercising their gatekeeping function, courts "have historically given close scrutiny to pleadings" because "the defense of baseless defamation claims imposes an additional cost, in the form of potentially deterred speech."[85] Indeed, "[e]nsuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may inflame a jury to an award of damages, is an essential gatekeeping function of the court."[86]

For defamation defendants, the importance of utilizing the court's gatekeeping function cannot be overstated. Virginia Citizens Def. League v. Couric is a prime example.[87] Couric involved a documentary film portraying firearms as a serious social problem and advocating for greater gun control. The plaintiff was a guns rights advocacy organization interviewed for the film by Katie Couric, who also served as narrator and an executive producer. At one point in the film, Couric asks the group, "If there are no background checks for gun purchasers, how do you prevent felons or terrorists from purchasing a gun?" The group alleged that Couric and the other defendants manipulated the footage to falsely suggest that the question had dumbfounded its members, when in fact they had provided answers.

Those not familiar with a court's gatekeeping function might assume that the group's allegations of selective editing would suffice at least to defeat a motion to dismiss on the pleadings. However, the district court, exercising its gatekeeping function, considered the members' actual answers and determined that the implication arising from the as-edited footage was not false: "In reality, members of the VCDL did not answer the question posed by Couric. They talked about background checks and gun laws generally, but did not answer the question of how to prevent felons or terrorists from purchasing guns without background checks. The editing simply dramatizes the sophistry of the VCDL members."[88] Couric thus demonstrates the importance of availing the court's gatekeeping function if there is any question as to whether the statement is actionable in defamation.

**Depp's Defamation Claims**

Depp based his defamation claims on four statements[89] in Heard's op-ed:

1. "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change."
2. "Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out."
3. "I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse."
4. "I write this as a woman who had to change my phone number weekly because I was getting death threats. For months, I rarely left my apartment, and when I did, I was pursued by camera drones and photographers on foot, on motorcycles and in cars. Tabloid outlets that posted pictures of me spun them in a negative light. I felt as though I was on trial in the court of public opinion—and my life and livelihood depended on myriad judgments far beyond my control."

Depp claimed that each of these statements "falsely implied that [Heard] was a victim of domestic abuse at [Depp's] hands."[90]

Availing herself of the court's gatekeeping function, Heard challenged all four as not being actionable in defamation.[91] Under Virginia law, a statement is actionable in defamation if it is (i) a false statement (ii) that

82 Id. at 488.

83 Schaecher v. Bouffault, 290 Va. 83, 94 (2015).

84 See, e.g., Nestler v. Scarabelli, 77 Va. App. 440, 452-53 (2023).

85 See Edwards v. Schwartz, 378 F.Supp.3d 468, 500 (W.D. Va. 2019). See also 19 A.L.R.5th 1 at § 2[c] (originally published in 1994) (collecting cases and explaining that "[s] ome courts have expressed a strong policy of disposing of libel cases by motion rather than trial where possible because of a concern that unfounded libel suits may chill free speech").

86 Webb v. Virginian-Pilot Media Co., LLC, 287 Va. 84, 90 (2014).

87 No. 3:16-CV-00757-JAG, 2017 WL 2364198, at*1 (E.D. Va. May 31, 2017), aff'd, 910 F.3d 780 (4th Cir. 2018).

88 Id. at *3. See also Virginia Citizens Def. League v. Couric, 910 F.3d 780, 786 (4th Cir. 2018) ("To be sure, the film gives the impression that Couric's final question stumped the panelists. But at worst, the plain, ordinary meaning of this edit conveys that these particular members of the VCDL, after answering a series of related questions, did not have a ready-made answer to a nuanced policy question. Even with the benefit of every inference, the edited footage is not reasonably capable of suggesting that the VCDL and its members are, as they contend on appeal, 'ignorant and incompetent on the subject to which they have dedicated their organizational mission.'").

89 See Depp v. Heard, 104 Va. Cir. 377, 378 (Fairfax Cir. Ct. Mar. 27, 2020).

90 Depp, 104 Va. Cir. at 381.

91 Defamation can take two forms: libel and slander. Libel "consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words," whereas slander "consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those" categorized as libel. See Restatement (Second) of Torts § 568 (1977). "While most jurisdictions maintain the traditional distinction between libel and slander, some treat them as one tort, for 'defamation.'" Smolla, 1 Law of Defamation § 1:10. Virginia, whose law governed in Depp v. Heard, is one of those jurisdictions that treats libel and slander as a single cause of action for defamation. See Jackson v. Hartig, 274 Va. 219, 227 (2007).

is defamatory and (iii) of and concerning the plaintiff.[92]

Heard argued that the statements constituted opinion protected by the First Amendment. Preliminarily, the term "opinion," in the context of defamation, can be misleading. In its seminal decision Milkovich v. Lorain J. Co.,[93] the Supreme Court "declined to adopt an artificial dichotomy between 'opinion' and 'fact.'"[94] "Rather, the question is whether the statement at issue 'presents or implies the existence of facts that can be proven true or false.'"[95] That is, the statement must be "susceptible of being proved true or false."[96] "Speech which does not contain a provably false factual connotation is sometimes referred to as 'pure expressions of opinion[.]'"[97]

Because there is no categorical exemption for "opinion," the fact that Heard's statements appeared in an op-ed was not dispositive.[98] Even expressions of "opinion" can "imply an assertion of objective fact."[99] For example, "[i]f a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."[100] "Simply couching such statements in terms of opinion does not dispel these [factual] implications."[101] Thus, it has been said that under Milkovich, "an opinion may constitute actionable defamation, but only if the opinion can be reasonably interpreted to declare or imply untrue facts."[102]

Separating factual statements from "pure expressions of opinion," i.e., non-factual statements, can be difficult. "The line between fact and opinion is far from clear."[103] Although there is no "silver bullet," courts are more likely to deem a statement "opinion" if the basis for the statement is explained. "When the bases for the conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related."[104] But the speaker still must be careful to get his facts straight. "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact" that could support a defamation claim.[105] Simply put, "[f]actual statements made in support of an opinion . . . can form the basis for a defamation action."[106]

The circuit court in Depp v. Heard held that the first three statements implied that "Mr. Depp abused Ms. Heard,"[107] while the fourth statement "lack[ed] any factual underpinning that Mr. Depp abused Ms. Heard."[108] In reaching this conclusion, the circuit court did not speak in terms of the "implied assertion of fact" analysis required to distinguish actionable statements from "pure" expressions of opinion, but instead relied on the more general "defamation by implication" analysis. As the circuit court observed, a plaintiff may be "defamed not by statements of fact that are literally true but by an implication arising from them."[109] Defamation by implication can be tricky for defendants, since a defamation plaintiff ordinarily is not required to prove that the defendant actually intended the defamatory implication.[110] Still, "[d]efamatory implication is not analogous to psychoanalytical free association in which a therapist asks a person to freely share anything that comes to mind."[111] "[T]he meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation. The province of the innuendo is to show how the words used

92 See Jordan, 269 Va. at 575-76; Schaecher, 290 Va. at 99. The modern cause of action for defamation heavily depends on the particular circumstances of the case and the jurisdiction in which the suit is brought. The modern action includes some or all of the following elements: (a) "a statement of fact"; (b) "that is false"; (c) and defamatory"; (d) "of and concerning the plaintiff"; (e) "that is published to a third party (other than the plaintiff and defendant)"; (f) "not absolutely or conditionally privileged"; (g) "that causes actual injury (this requirement is sometimes obviated by the device known as presumed harm, which remains available in certain cases)"; (h) "that is the result of fault by the defendant (this requirement is also waived in certain cases, which may be governed by strict liability; when 'fault' is required it may range from 'actual malice' to ordinary negligence, depending on the circumstances and jurisdiction)"; and (i) "that causes special (pecuniary) harm in addition to generalized reputational injury (this requirement is often excused, if under the law of the state the defamation is categori[z]ed as 'libel per se' or 'slander per se')." Smolla, 1 Law of Defamation § 1:34.

93 497 U.S. 1, 19 (1990).

94 Snyder v. Phelps, 580 F.3d 206, 218-19 (4th Cir. 2009), aff'd, 562 U.S. 443 (2011).

95 Richards v. Union Leader Corp., 176 N.H. 789, 804 (2024) (Countway, J., concurring in part and dissenting in part) (cleaned up and quoting Gray v. St. Martin's Press, 221 F.3d 243, 248 (1st Cir. 2000)).

96 Milkovich, 497 U.S. at 21.

97 Yeagle v. Collegiate Times, 255 Va. 293, 295 (1998) (internal quotation omitted).

98 See, e.g., Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 735 (1986) ("Although the appearance of the column on the op-ed page, without more, is not at all dispositive, it is nevertheless some indication that the statements made in the column are opinions.") (citation omitted).

99 Milkovich, 497 U.S. at 18.

100 Id.

101 Id. at 19 ("As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words "I think."'") (alterations in original).

102 See Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998).

103 Taylor v. Southside Voice, Inc., 83 Va. Cir. 190, 192 (Richmond Cir. Ct. July 19, 2011). See also Edwards, 378 F.Supp.3d at 504 (stating that "the evanescent distinction may be hazy at times" (quoting Carto v. Buckley, 649 F. Supp. 502, 506 (S.D.N.Y. 1986))).

104 Biospherics, Inc., 151 F.3d at 185 (internal quotations omitted). See also Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1439 (9th Cir. 1995) ("A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning."); Moldea v. New York Times Co., 15 F.3d 1137, 1144-45 (D.C. Cir.), modified, 22 F.3d 310 (D.C. Cir. 1994) ("Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation."); Phantom Touring, Inc. v. Affiliated Pubs., 953 F.2d 724, 730-31 (1st Cir. 1992) (explaining that when a statement provides the factual bases for its conclusion, it is a "personal conclusion" rather than a statement of fact subject to a defamation claim).

105 Milkovich, 497 U.S. at 18-19.

106 Lewis v. Kei, 281 Va. 715, 725 (2011) (internal quotation omitted).

107 Depp, 104 Va. Cir. at 381.

108 Id. at 385.

109 Webb, 287 Va. at 89.

110 See Pendleton v. Newsome, 290 Va. 162, 173-75 (2015). Federal courts applying Virginia law have held that, at least in cases involving public figures, issues of public concern, or the news media, a defamation plaintiff must demonstrate that "the author intends or endorses" the defamatory implication. See Agbapuruonwu v. NBC Subsidiary (WRC-TV), LLC, 821 F.App'x 234, 241 (4th Cir. 2020) (citing Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092-93 (4th Cir. 1993)). See also Malone v. WP Co., LLC, No. 3:22-CV-00046, 2023 WL 6447311, at *7 n.11 (W.D. Va. Sept. 29, 2023).

111 Morrissey v. WTVR, LLC, 432 F.Supp.3d 617, 624 (E.D. Va. 2020).

are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain."[112]

Applying these rules, the Depp v. Heard court held that the first statement "could reasonably imply that the 'sexual violence' Ms. Heard 'spoke up against' was in fact perpetrated by Mr. Depp."[113] Curiously, the circuit court's opinion does not address the fact that the first statement was the op-ed's headline. A headline can, under certain circumstances, support a defamation claim.[114] But usually op-ed headlines are written by the news outlet, not the author, in which case the headline is the outlet's statement, not the author's. Perhaps Heard authored the headline. If The Washington Post authored the op-ed's headline, however, Heard might have been liable under the theory that Heard's participation in authoring the op-ed was sufficiently great to render her liable even for portions (the headline) authored by The Washington Post.[115] Heard might also have been liable under the republication rule, the theory being that the headline merely summarized, i.e., republished, Heard's statements in the body of the op-ed.[116]

The circuit court's analysis of the third statement—"I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse"— is also noteworthy. There was no dispute that Depp had, in fact, been accused of domestic abuse. Nevertheless, the circuit court held that "to reference one who was accused of abuse and protected by an institution can reasonably imply—at the demurrer[117] stage—that the person in fact committed the abuse of which he was accused without extending the words beyond their ordinary meaning."[118] Other courts in Virginia have reached the opposite conclusion. Alexander v. The Martin Agency,[119] for example, concerned news articles reporting that the plaintiff had been accused of sexual harassment. The plaintiff claimed that the articles implied the sexual harassment claims against him were true. The trial court dismissed the plaintiff's defamation claims on demurrer, and the Virginia Court of Appeals affirmed. "[T]he articles accurately describe the accusations made against [the plaintiff]. The fact that [the plaintiff] disputes the underlying validity of the accusation itself does not make reporting on the existence of accusations defamatory."[120] The Virginia Court of Appeals in Alexander relied heavily on Dangerfield v. WAVY Broad., LLC, in which a federal district court in Virginia held that "Plaintiff may not extrapolate beyond the plain and natural meaning of words to claim that Defendants' broadcast stated that Plaintiff was a 'rapist,'" when the defendants had broadcast merely that "Plaintiff was 'accused of rape.'"[121]

Lastly, the op-ed never mentioned Depp by name, but Heard did not challenge any of the statements on the grounds that they were not "of and concerning" Depp.[122] Had Heard done so, it is unclear whether she would have prevailed. Under Virginia law, a defamation plaintiff "need not show that he was mentioned by name in the publication."[123] "[T]he plaintiff satisfies the 'of or concerning' test if he shows that the publication was intended to refer to him and would be so understood by persons reading it who knew him."[124] Heard stated in her op-ed that she became a public figure representing domestic abuse "two years ago," a date which, as the circuit court observed, was around the same time Heard first accused Depp of domestic violence.[125]

**Heard's Defamation Claims**

Heard alleged defamation based on eight statements, some directly from Depp, and some from Depp's attorney allegedly acting as Depp's agent.[126] Generally, each statement essentially denied Heard's allegations that Depp had abused her. The circuit court held that five of

112 Carwile v. Richmond Newspapers, 196 Va. 1, 8 (1954).

113 Depp, 104 Va. Cir. at 382.

114 See Sack, 2 Sack on Defamation § 2:4.5.

115 See Zimmerman v. Al Jazeera Am., LLC, 246 F.Supp.3d 257, 273 (D.D.C. 2017) (explaining that publication "requires a defendant to have 'published or knowingly participated in publishing the defamation'" (quoting Tavoulareas v. Piro (Tavoulareas I), 759 F.2d 90, 136 (D.C. Cir. 1985) (emphasis added)).

116 Under the republication rule, "the author or originator of a defamation is liable for a republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication." Weaver v. Beneficial Finance Co., 199 Va. 196, 199 (1957).

117 A demurrer in Virginia is the functional equivalent to a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

118 Depp, 104 Va. Cir. at 384.

119 No. 0272-24-2, 2025 WL 2598200, at *1 (Va. Ct. App. Sept. 9, 2025).

120 Id. at *5.

121 228 F.Supp.3d 696, 702 (E.D. Va. 2017) (emphasis in original). See also Demetro v. Nat'l Ass'n of Bunco Investigations, No. CV146521KMSCM, 2019 WL 2612687, at *11 (D.N.J. June 25, 2019) ("In sum, then, the May 22 Post is fairly read as communicating that Demetro was accused of misconduct. That was truthful.") (emphasis in original). Accord Sack, 2 Sack on Defamation § 3:8 (collecting cases and opining that "[o]ne can imagine an argument that reporting an arrest or other official accusation of misbehavior implies that the person arrested or accused is in fact guilty of the charged misbehavior . . . . The argument is unlikely to prevail").

122 See Depp, 104 Va. Cir. at 377 (observing that the op-ed "does notf1 name Plaintiff explicitly"). To prevail in a defamation cause of action under Virginia law, "a plaintiff must establish that the alleged defamatory statements published were 'of or concerning' him." Dean v. Dearing, 263 Va. 485, 488 (2002) (citation omitted). See also Webb, 287 Va. at 88 ("A common law complaint for libel or slander historically included three elements: the inducement, an explanation of the facts demonstrating that the allegedly defamatory statement is actionable; the colloquium, an explanation of how the allegedly defamatory statement refers to the plaintiff, if he is not explicitly named; and the innuendo, an explanation of the allegedly defamatory meaning of the statement, if it is not apparent on its face.") (emphasis added and citations omitted).

123 Gazette, Inc. v. Harris, 229 Va. 1, 37 (1985). See also Restatement (Second) of Torts § 564 ("A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.").

124 Gazette, Inc., 229 Va. at 37 (citation omitted). It is insufficient that the plaintiff, or persons who know the plaintiff, actually believed that the defendant intended to refer to him. To state a claim for defamation, their subjective belief must be objectively "reasonable." See id. (quoting Restatement (Second) of Torts § 564 cmt. b).

125 See Depp, 104 Va. Cir. at 384 ("This conclusion is further supported by Defendant saying she attained this status 'two years ago,' which would have been the same time the parties' divorce was unfolding.").

126 See Depp, 107 Va. Cir. at 81.

the eight statements were barred under Virginia's one-year statute of limitations.[127] The three statements found not to be time-barred were:

1. On April 8, 2020, Mr. Depp, through his attorney, told The Daily Mail that "Amber Heard and her friends in the media use fake sexual violence allegations as both a sword and shield, depending on their needs. They have selected some of her sexual violence hoax 'facts' as the sword, inflicting them on the public and Mr. Depp."
2. On April 27, 2020, Mr. Depp, through his attorney, again told The Daily Mail that "[q]uite simply this was an ambush, a hoax. They set Mr. Depp up by calling the cops but the first attempt didn't do the trick. The officers came to the penthouses, thoroughly searched and interviewed, and left after seeing no damage to face or property. So Amber and her friends spilled a little wine and roughed the place up, got their stories straight under the direction of a lawyer and publicist, and then placed a second call to 911."
3. On June 24, 2020, Mr. Depp, through his attorney, accused Ms. Heard in The Daily Mail of committing an "abuse hoax" against Mr. Depp.

Like Heard, Depp availed himself of the circuit court's gatekeeping function and sought to have these statements dismissed as a matter of law.

First, Depp argued that these statements constituted non-actionable "opinion." The circuit court disagreed. Unlike when the circuit court analyzed Heard's opinion defense to Depp's defamation claims, this time the circuit court acknowledged that "even opinion statements are actionable if they 'imply an assertion of objective fact.'"[128] The circuit court held that each statement "impl[ied] that Ms. Heard lied and perjured herself when she appeared before a court in 2016 to obtain a temporary restraining order against Mr. Depp," and "[m]oreover, they impl[ied] that she has lied about being a victim of domestic violence."[129]

Second, Depp argued that the statements were protected by the fair report privilege. The fair report privilege "is an exception to the rule of republication liability. It is a privilege to publish accounts of public proceedings or reports despite their defamatory nature."[130] Courts have cited three policy rationales to support the official report privilege: "agency, public supervision, and the public's right to know."[131] "Under the agency rationale, a reporter acts as an agent for those who could inform themselves."[132] "The public supervision rationale is the idea that government should function openly with an eye toward its public responsibilities."[133] "The informational rationale, or the public's right to know, focuses on the public's interest in important matters."[134]

While the scope of the privilege "differs dramatically from jurisdiction to jurisdiction,"[135] in Virginia, "[t]he publication of public records to which everyone has a right of access is privileged, if the publication is a fair and substantially correct statement of the transcript of the record."[136] Depp claimed that the three statements were fair and substantially correct reports of his own lawsuit.[137] Avoiding thorny questions about whether and to what extent a party may "self-confer" the fair report privilege by republishing his own allegedly defamatory statements made in court filings,[138] the circuit court rejected Depp's fair report privilege on the grounds that "the statements do not appear to have been made in the context of attempting to recount litigation."[139] Although Virginia law on the specific subject is underdeveloped,[140] it has been suggested that "[t]o be covered by the fair report privilege, the publisher must attribute the material to the official proceeding that is being reported upon."[141]

Lastly, Depp argued that the statements were protected by the "self-defense" privilege,[142] sometimes referred to

127 See id. at 88-90.

128 Id. at 86 (quoting Schaecher, 290 Va. at 103).

129 See id. at 85.

130 Lee v. Dong-A Ilbo, 849 F.2d 876, 878 (4th Cir. 1988).

131 Id. (citations omitted). See also Sack, 2 Sack on Defamation § 7:3.5[B][2].

132 Lee, 849 F.2d at 878 (citation omitted).

133 Id. (citation omitted).

134 Id. (citation omitted).

135 Sack, 2 Sack on Defamation § 7:3.5[B][1].

136 Alexandria Gazette Corp. v. West, 198 Va. 154, 159 (1956) (citations omitted).

137 See Depp, 107 Va. Cir. at 86.

138 The circuit court in Depp cited Bull v. Logetronics, Inc., in which a federal district court in Virginia held, with little analysis, that the defendant's press release summarizing the allegations in his own pleading were privileged. See 323 F. Supp. 115, 135 (E.D. Va. 1971) ("The publication was a fair and accurate account of the issues in suit and no action lies from such publication."). Allowing a defendant to self-confer the fair report privilege raises obvious concerns about the potential abuse. See Sack, 2 Sack on Defamation § 7:3.5[B][4] ("[A] party could file a complaint primarily for the purpose of having its defamatory contents disseminated."). The second Restatement includes the following comment: "[a] person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated." Restatement (Second) of Torts § 611 cmt. c. A leading case observes that notwithstanding the comment's seemingly absolutist terms, "[t]he commentators and cases interpret [the second Restatement] as conferring protection upon any persons who do not act maliciously by commencing judicial proceedings in bad faith and then later repeating their own defamatory statements under the aegis of privilege." Rosenberg v. Helinski, 328 Md. 664, 685 (1992). Thus, "the privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place. That is the true danger against which the self-reported statement exception must guard." Id. (collecting cases).

139 Depp, 107 Va. Cir. at 86.

140 A federal district court in Virginia has held that to fall within the fair report privilege, the report must "properly attribute[ ]" the information to the official record or proceeding, and that "[a] publisher properly attributes a report if the average reader is likely to understand that the report summarizes or paraphrases from" the official record or proceeding. See Ditton v. Legal Times, 947 F. Supp. 227, 230 (E.D. Va. 1996), aff'd, 129 F.3d 116 (4th Cir. 1997). See also Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 254 (4th Cir. 1988).

141 Smolla, 2 Law of Defamation § 8:67.50. But see Kinsey v. New York Times Co., 991 F.3d 171, 180 (2d Cir. 2021) ("[O]ur case law does not require that the court filing, the court, or the jurisdiction be specifically identified in the article" to "enjoy the protection of the fair report privilege") (cleaned up).

142 See Depp, 107 Va. Cir. at 86.

as the "privilege of reply."[143] Generally, under the self-defense privilege, "a defamed person to respond to the extent reasonably necessary to defend himself, even to the point of defaming his accuser."[144] "As a leading commentator on libel and slander explained more than a century ago: 'Every man has a right to defend his character against false aspersion . . . Therefore communications made in fair self-defense are privileged."[145] Courts have rationalized the privilege by opining that "an individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations, especially those of a heinous character."[146]

The Virginia Supreme Court has held that "[s]tatements made in an honest endeavor to vindicate one's character or to protect one's interests are usually regarded as qualifiedly privileged, even though they are false, if they are made in good faith and without malice."[147] Thus, the privilege is conditional, not absolute.[148] The privilege is lost if (1) the reply includes substantial defamatory matter that is "irrelevant" or "non-responsive" to the initial attack; (2) the reply includes substantial defamatory matter that is "disproportionate" to the initial attack; or (3) the publication of the reply is "excessive," i.e., is addressed to too broad an audience.[149]

The circuit court in Depp v. Heard held that the self-defense privilege applied to the three remaining statements, but it also found that Heard had sufficiently alleged that the statements were made with "malice."[150] In the context of defamation, there are two types of malice: common law malice and "actual malice," as the Supreme Court defined that term in its seminal decision New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). In Virginia, common law malice subsumes actual malice and encompasses five types of statements: (1) statements made with knowledge that they were false or with reckless disregard for their truth; (2) statements communicated to third parties who have no duty or interest in the subject matter; (3) statements motivated by personal spite or ill will; (4) statements employing "strong or violent language disproportionate to the occasion"; and (5) statements made in bad faith.[151] Any one of these elements, if proved by clear and convincing evidence, defeats the privilege.[152] Accordingly, because Heard sufficiently alleged one or more of the elements of common law malice, the circuit court held that it was up to the jury to decide whether the statements were privileged, or whether Depp had abused, i.e., lost, the privilege.[153]

**Conclusion**

Defamation is sometimes thought of as an issue for the news media and public figures. But defamation is prevalent in many different contexts, most notably employment law. Moreover, as the internet becomes the dominant form of communication, potential exposure to defamation has increased exponentially. The Alexander v. The Martin Agency[154] case addressed above demonstrates this point. In Alexander, the allegedly defamatory statements were set forth in news articles written by third-parties. The defendant simply posted the articles to its webpage because, overall, they reported positively on the defendant's culture and work. But because the articles contained statements the plaintiff considered defamatory, the company found itself mired in litigation over articles it did not write. Fortunately, both the plaintiff and the defendant in Alexander resided in Virginia, but had it been otherwise, Depp v. Heard teaches that the defendant might have been dragged into some foreign jurisdiction and governed by foreign law concerning complex and strange issues.

143 *See, e.g., Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 18-19 (1st Cir. 2011).

144 See id. at 18. See also Restatement (Second) of Torts § 594 cmt. k ("A conditional privilege exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment . . . . Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another, including the statement that his accuser is an unmitigated liar."); Smolla, 1 Law of Defamation § 8:47 ("There is a conditional common law privilege to make statements for the protection of the speaker's own legitimate interests," including "statements made to defend one's reputation in response to attack by another. . . . The privilege is roughly analogous to the common law privilege of self-defense in response to physical attack, or the privilege of self-help to defend property. As is the case with those privileges, the conditional privilege to defend legitimate self-interest is usually regarded as forfeited if the speaker publishes more than is reasonably required to defend his or her interest, or if the speaker publishes beyond the circle of persons to whom the self-defensive action is relevant.").

145 Foretich v. Cap. Cities/ABC, Inc., 37 F.3d 1541, 1559-60 (4th Cir. 1994) (quoting William Blake Odgers, A Digest of the Law of Libel and Slander (1st Am. ed. Bigelow 1881)).

146 Lluberes, 663 F.3d at 19. See also Foretich, 37 F.3d at 1563 (involving grandparents making limited public appearances to rebut molestation accusations made by their daughter-in-law and the Fourth Circuit determining that their "primary motive was to defend their own good names against [her] accusations and that their public statements can most fairly be characterized as measured defensive replies to her attacks, rather than as efforts to thrust themselves to the forefront of a public controversy in order to influence its outcome"); Clyburn v. News World Commc'ns, Inc., 903 F.2d 29, 32 (D.C. Cir. 1990) ("[W]e have doubts about placing much weight on purely defensive, truthful statements made when an individual finds himself at the center of a public controversy but before any libel occurs; it is not clear why someone dragged into a controversy should be able to speak publicly only at the expense of foregoing a private person's protection from defamation.").

147 Haycox v. Dunn, 200 Va. 212, 231 (1958) (quoting 33 Am. Jur., Libel and Slander, § 134).

148 Smolla, 2 Law of Defamation § 8:47 ("[A]n individual is granted a conditional privilege to defend himself or herself against a reputational attack.").

149 Foretich, 37 F.3d at 1559 (citations omitted). See generally, 41 A.L.R.3d 1083 (originally published in 1972).

150 See Depp, 107 Va. Cir. at 87.

151 Cashion v. Smith, 286 Va. 327, 339 (2013) (citations omitted).

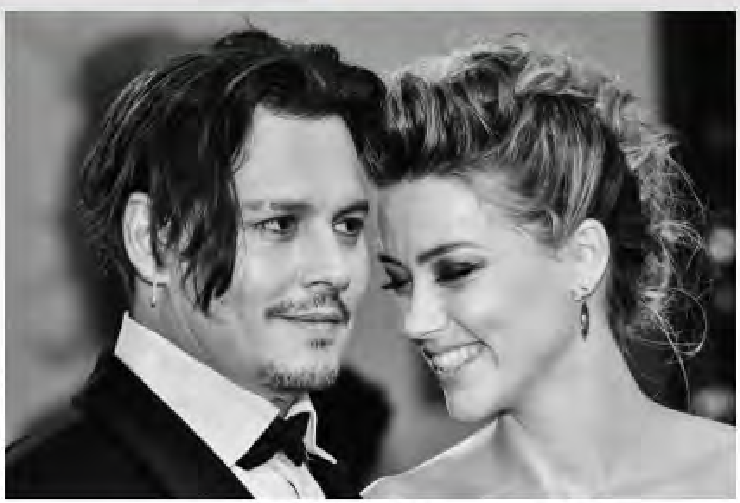
152 Id.

153 See Depp, 107 Va. Cir. at 87 ("[I]t is the court's duty to determine as a matter of law whether the occasion is privileged, while the question of whether or not the defendant was actuated by malice, and has abused the occasion and exceeded his privilege are questions of fact for the jury.") (quotation omitted).

154 No. 0272-24-2, 2025 WL 2598200 (Va. Ct. App. Sept. 9, 2025).

# Depp v. Heard: A Treasure Trove of Critical Issues in Defamation Litigation

## LOVE!



Amber Heard and Johnny Depp arrive for the screening of "The Danish Girl" at the 72nd Venice International Film Festival on September 5, 2015, during their 15-month marriage. Giuseppe Cacace / AFP via Getty Images File

## MARRIAGE!

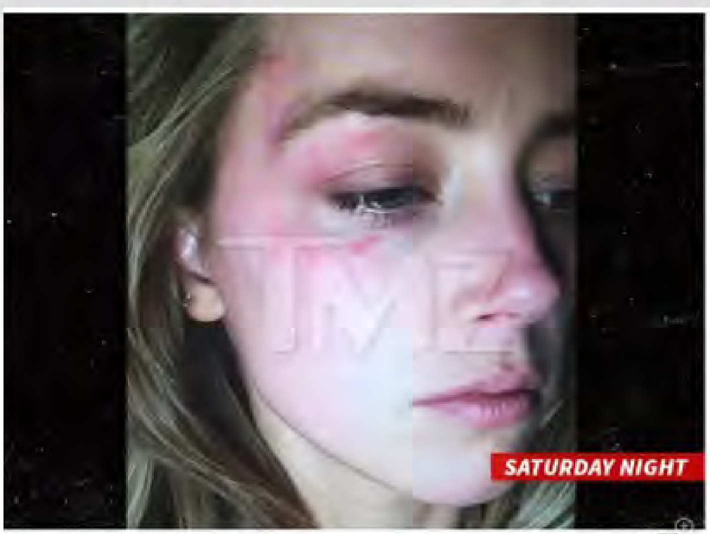
Johnny Depp & Amber Heard's UNSEEN Romantic & Wedding Footage Make For A Fairytale Journey; WATCH

## LITIGATION!

Amber Heard and Johnny Depp (Photo Illustration by Salon/Getty Images)

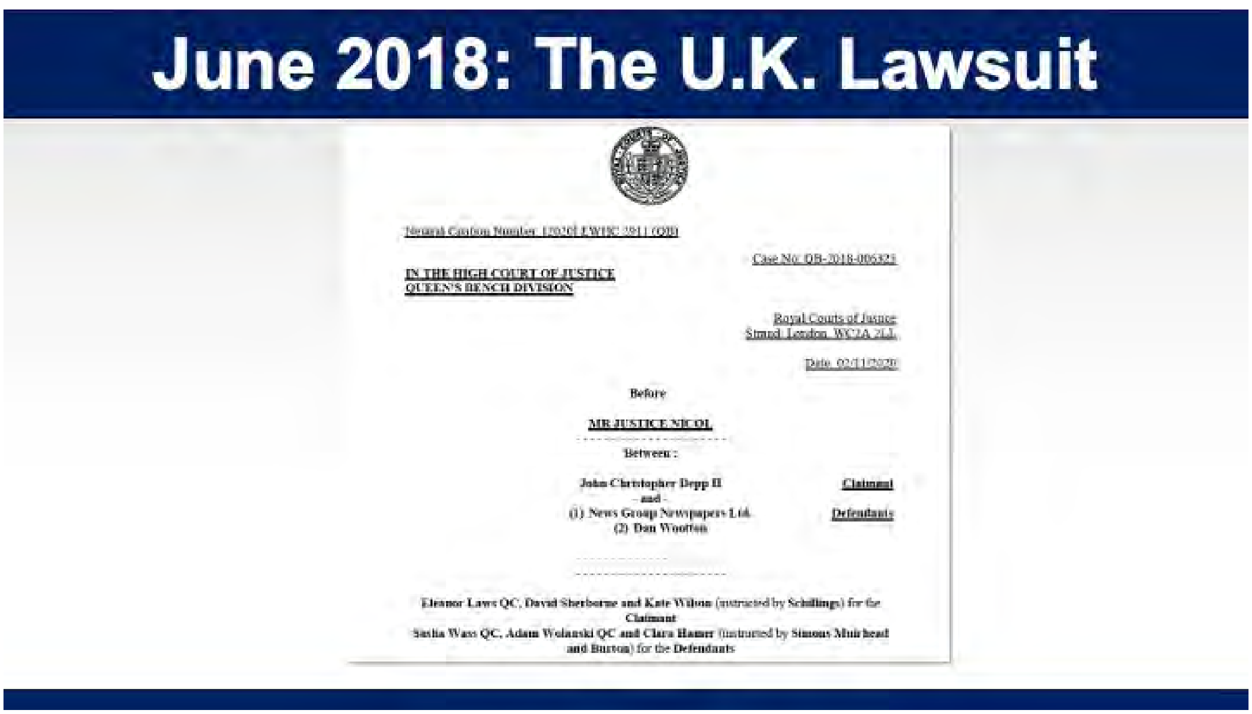
# How Did We Get Here?


# May 2016: The Restraining Order




AMBER HEARD
**CLAIMS DOMESTIC VIOLENCE**
**Gets Restraining Order Against Johnny Depp**

EXCLUSIVE


Neutral Citation Number: [2020] EWHC 2911 (QB)

Case No: QB-2018-006323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2020

Before

MR JUSTICE NICOL

Between :

John Christopher Depp II — Claimant
- and -
(1) News Group Newspapers Ltd.
(2) Dan Wootton — Defendants

Eleanor Laws QC, David Sherborne and Kate Wilson (instructed by Schillings) for the Claimant
Sasha Wass QC, Adam Wolanski QC and Clara Hamer (instructed by Simons Muirhead and Burton) for the Defendants

# December 2018: The Op-Ed

The Washington Post

*Democracy Dies in Darkness*

Opinion

## Amber Heard: I spoke up against sexual violence — and faced our culture's wrath. That has to change.

December 18, 2018

# March 2019: The Lawsuit

# Heard Counterclaim


VIRGINIA:

AMBER LAURA HEARD

COUNTERCLAIMS

# November 2020: U.K. Judgment

## Johnny Depp loses libel case over Sun 'wife beater' claim

**Johnny Depp has lost his libel case against the Sun newspaper over an article that called him a "wife beater".**

Mr Depp, 57, sued the paper after it claimed he assaulted his ex-wife Amber Heard, which he denies. The Sun said the article was accurate.

Judge Mr Justice Nicol said the Sun had proved what was in the article to be "substantially true".

He found 12 of the 14 alleged incidents of domestic violence had occurred.

2 November 2020

# November 2020: U.K. Judgment

**Conclusion and summary**

584. It follows that this claim is dismissed.

585. The Claimant has not succeeded in his action for libel. Although he has proved the necessary elements of his cause of action in libel, the Defendants have shown that what they published in the meaning which I have held the words to bear was substantially true. I have reached these conclusions having examined in detail the 14 incidents on which the Defendants rely as well as the overarching considerations which the Claimant submitted I should take into account. In those circumstances, Parliament has said that a defendant has a complete defence. It has not been necessary to consider the fairness of the article or the defendants' 'malice' because those are immaterial to the statutory defence of truth. The parties will have an opportunity to make submissions in writing as to the precise terms of the order which should follow my decision.

2 November 2020

# June 2022: Fairfax Verdict

**Johnny Depp-Amber Heard jury sides primarily with Depp in defamation trial**

Updated June 1, 2022 at 6:13 p.m. EDT | Published June 1, 2022 at 1:45 p.m. EDT

Circuit Court of Virginia
Fairfax County

John C. DEPP, II, Plaintiff and Counterclaim-Defendant,
v.
Amber Laura HEARD, Defendant and Counterclaim-Plaintiff.

No. CL-2019-0002911.
June 24, 2022.

**Judgment Order**

At the conclusion of the trial and deliberations, the jury returned a verdict in favor of Mr. Depp on all three remaining defamation counts, and awarded Mr. Depp $10 million in compensatory damages and $5 million in punitive damages, and a verdict in favor of Ms. Heard on her defamation count, and awarded Ms. Heard $2 million in compensatory damages. The jury verdict is hereby incorporated into this Order by reference and made a part of this Order. It is therefore

ORDERED that the jury verdict of $5,000,000 in punitive damages in favor of Mr. Depp is hereby reduced to $350,000, the statutory cap pursuant to Virginia Code § 8.01-38.1; and it is further

ORDERED that with respect to the Complaint, Judgment is hereby ENTERED in favor of Mr. Depp against Ms. Heard in the amount of $10,350,000, with interest at the statutory rate of 6% per annum from the date of this Order; and it is further

ORDERED that with respect to the Counterclaim, Judgment is hereby ENTERED in favor of Ms. Heard against Mr. Depp in the amount of $2,000,000, with interest at the statutory rate of 6% per annum from the date of this Order.

THIS ORDER IS FINAL.

**ENTERED** this 24 day of June, 2022.

# December 2022: Settlement

IN THE
Court of Appeals of Virginia

AMBER LAURA HEARD,

v.

JOHN C. DEPP, II,

BRIEF OF APPELLANT

**Amber Heard, Johnny Depp reach $1 million settlement in defamation case**

The actor said she decided to settle the case after she 'lost faith in the American legal system'

Updated December 19, 2022 More than 2 years ago

# Depp v. Heard

The **FUN** Issues:

- Jurisdiction
- Choice of Law
- Res Judicata

The **BORING** Issues:

- Actionable Defamation Claims

# Depp v. Heard

COURT OF APPEALS OF VIRGINIA

Present: Judges Fulton, Causey and Lorish
Argued by videoconference

JOE ALEXANDER

v. Record No. 0272-24-2

THE MARTIN AGENCY, ET AL.

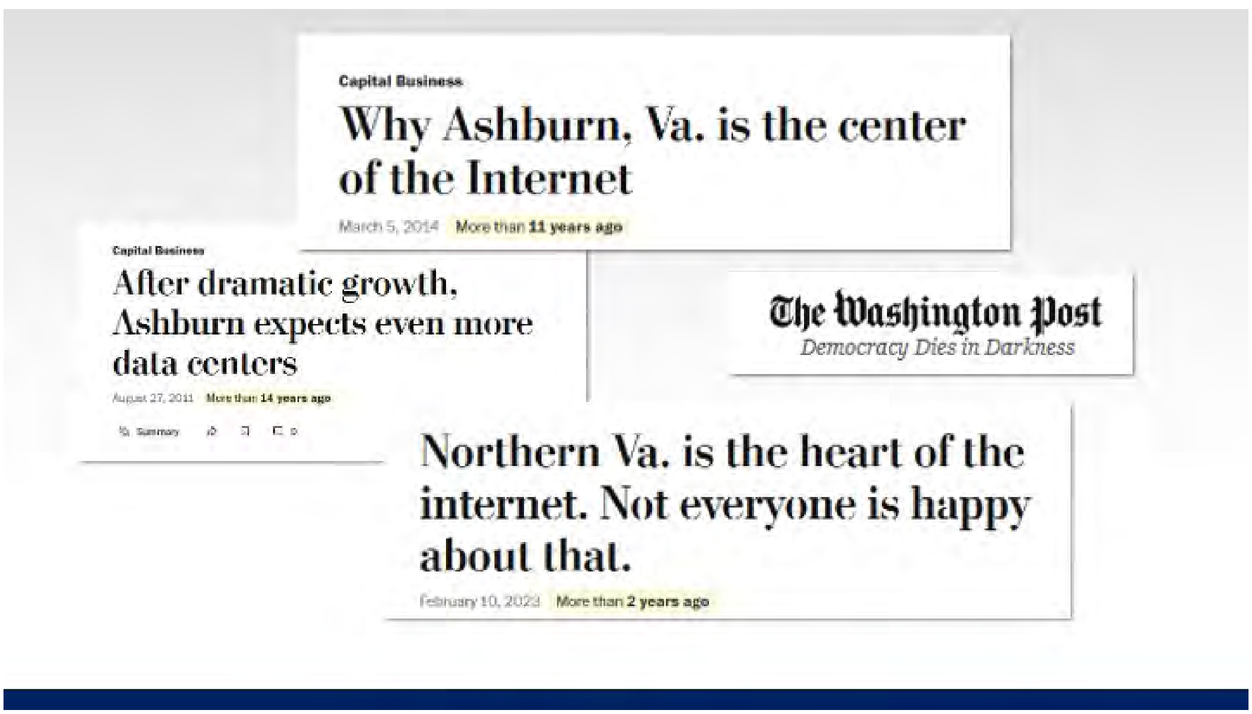
MEMORANDUM OPINION* BY
JUDGE DORIS HENDERSON CAUSEY
SEPTEMBER 9, 2025

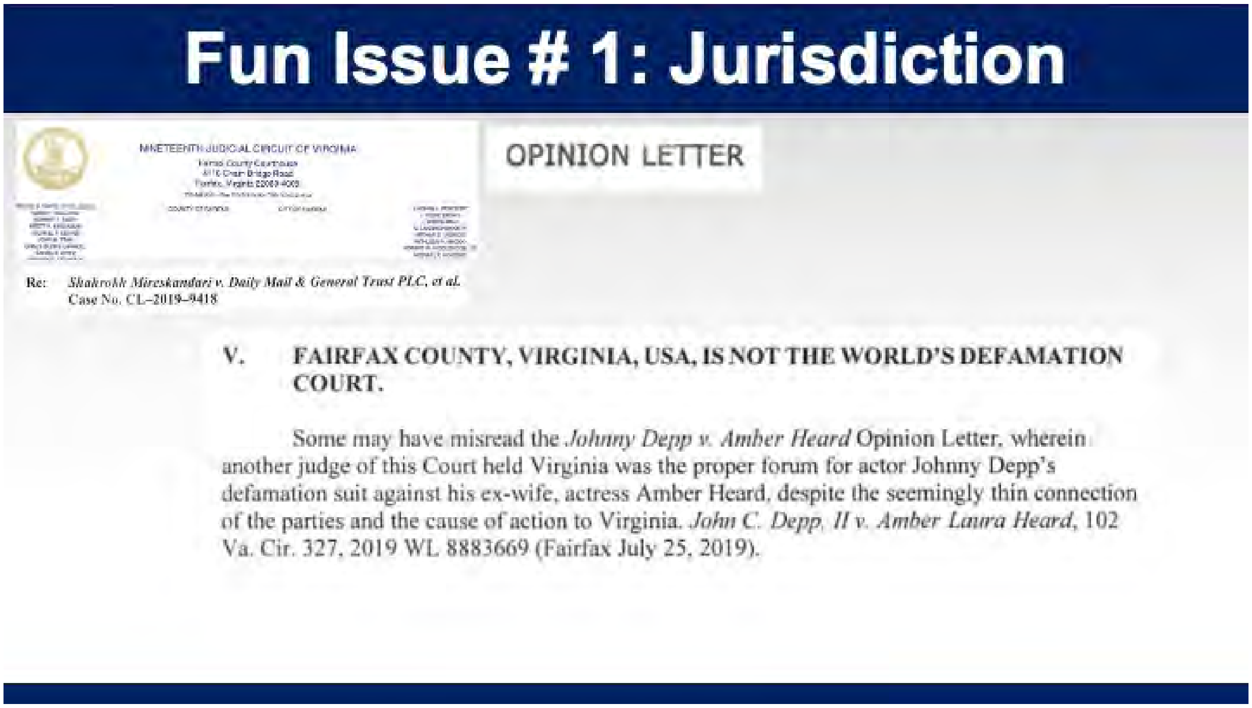
In October 2019, Joe Alexander sued The Martin Agency (Martin), Kristen Cavallo, and Martin's parent company, the Interpublic Group of Companies, Inc., for defamation. The defamation claim was based on four articles that Martin reposted on its website about Cavallo's success at Martin. In discussing Cavallo's ascension, the articles referred to the sexual assault allegations against Alexander that led to his resignation. Defendants demurred and the circuit

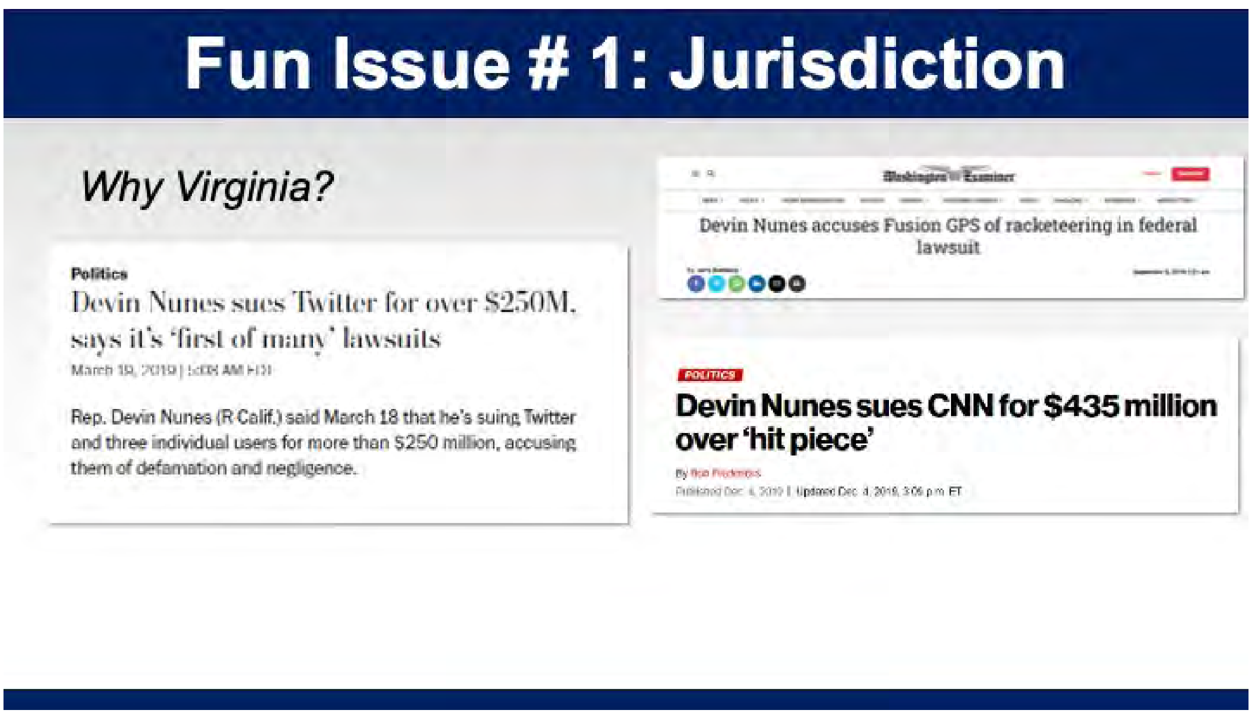
# Fun Issue # 1: Jurisdiction

# Fun Issue # 1: Jurisdiction

"The explosive rise of the Internet as a communications medium has had tremendous implications for courts faced with the application of personal jurisdiction doctrines." 15 A.L.R. Fed. 535




Fun Issue # 1: Jurisdiction
NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
OPINION LETTER
Re: Shakrokh Mireskandari v. Daily Mail & General Trust PLC, et al.
Case No. CL–2019–9418
V. FAIRFAX COUNTY, VIRGINIA, USA, IS NOT THE WORLD'S DEFAMATION COURT.
Some may have misread the Johnny Depp v. Amber Heard Opinion Letter, wherein another judge of this Court held Virginia was the proper forum for actor Johnny Depp's defamation suit against his ex-wife, actress Amber Heard, despite the seemingly thin connection of the parties and the cause of action to Virginia. John C. Depp, II v. Amber Laura Heard, 102 Va. Cir. 327, 2019 WL 8883669 (Fairfax July 25, 2019).


Fun Issue # 1: Jurisdiction
Why Virginia?
Politics
Devin Nunes sues Twitter for over $250M, says it's 'first of many' lawsuits
Rep. Devin Nunes (R-Calif.) said March 18 that he's suing Twitter and three individual users for more than $250 million, accusing them of defamation and negligence.
Washington Examiner
Devin Nunes accuses Fusion GPS of racketeering in federal lawsuit
POLITICS
Devin Nunes sues CNN for $435 million over 'hit piece'

## Fun Issue # 1: Jurisdiction

**Nunes cannot sue Twitter over accounts posing as his mother and a cow, judge rules**

By Brian Fung, CNN
2 min read · Updated 9:06 PM EDT, Wed June 24, 2020

## Fun Issue # 2: Choice of Law

- "[C]hoice of law in defamation cases has been difficult."
- "Orthodox" rule: *Lex Loci*—Place of the Wrong
- When statement published on the internet, where is the place of the wrong?

## Fun Issue # 2: Choice of Law

- The state where the servers are?
- The state where the injury was primarily suffered?
- The state that has the most significant relationship?

## Fun Issue # 3: Res Judicata

- Depp lost in UK but won in Fairfax . . . Huh?
- Bar/Claim Preclusion
- Collateral Estoppel/Issue Preclusion
- Uniform Foreign-Country Money Judgments Recognitions Act
- Comity
- The SPEECH Act and "Libel Tourism"

# Boring Issue # 1: Gatekeeping

- Whether statement "actionable" in defamation is a question of law of the court
- Gatekeeping function critical to avoid improperly chilled speech
- *Virginia Citizens Def. League v. Couric*

# Boring Issue # 2: Depp's Claims

Three Statements at Trial:

1. "Amber Heard: I spoke up against sexual violence—and faced our culture's wrath. That has to change."
2. "Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out."
3. "I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse."

## Boring Issue # 2: Depp's Claims

Heard's argument: OPINION

*BUT,* opinion is actionable in defamation if implies facts that are false and defamatory

Court held Heard's statements implied Depp abused her, which can be proven true or false

## Boring Issue # 2: Depp's Claims

Other potential arguments:

- Heard didn't author headline (first statement)?
- "accused" of doing something doesn't imply actually did it (third statement)?
- Depp not expressly named so not "of and concerning"?

## Boring Issue # 3: Heard's Claims

- Started with 8 statements
- 5 dismissed under Virginia's 1-year statute of limitations
- 3 surviving statements by Depp's attorney in run up to trial published by *The Daily Mail*: "Hoax"

## Boring Issue # 3: Heard's Claims

- Depp's "opinion" argument rejected—Court found statements imply Heard lied about abuse
- Fair report privilege rejected—Court found not reporting on court proceedings, just riffing about Heard
- Depp's self-defense privilege ACCEPTED—but jury to determine whether abused

# Boring Issue # 3: Heard's Claims

Other potential arguments:

- Can defendant "self confer" fair report privilege?
- Is attribution required under Virginia law?

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# David B. Lacy

**Partner | Christian & Barton (Richmond, VA)**

David B. Lacy, a partner with the firm's Litigation department, represents a wide variety of business entities and individuals in complex business and commercial disputes, such as employment disputes, products liability, premises liability, media law, medical malpractice, patent infringement and warranty litigation. Mr. Lacy spends a significant part of his practice advising clients in employment litigation matters, including non-competition covenants, discrimination claims, trade secrets and securities arbitration. He also assists media clients on prepublication, access and defamation matters.

**Practice Areas**

- Trials / Appeals / Alternative Dispute Resolution
- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Products Liability and Torts
- Medical Malpractice
- Communications and Media

**Experience**

- Defense of numerous employers and individuals in claims involving restrictive covenants, including non-competition, non-solicitation and no-hire covenants.
- Defense of employment discrimination actions, including sex, race, age and disability discrimination.
- Defense of broker-dealers and financial advisors in NASD/FINRA arbitration proceedings.
- Defense of business conspiracy, trade secret and interference with contract claims.
- Defense of forklift manufacturer against claims of breach of warranty and negligence.
- Defense of landlord in complex wrongful death and premises liability action.
- Defense of security company against claims of assault and vicarious liability.
- Defense of automobile manufacturer in Lemon Law actions.
- Defense of broadcasters against defamation claims arising out of investigative journalism television segment.
- Defense of newspaper against defamation claims arising out of article reporting individual's criminal record.
- Defense of newspaper and television reporters against criminal charges of obstruction of justice and breaching police barricade.
- Intervention to unseal closed wrongful death settlements.
- Defense of developer against architect's claims of copyright infringement.
- Representation of biomedical company in patent infringement case against competitor.

**Recognitions**

- Virginia Super Lawyers - General Litigation, 2019-2025
- Legal Elite (Virginia Business) - Alternative Dispute Resolution, 2024; Civil Litigation, 2016; Young Lawyer, 2015
- Virginia Rising Stars - General Litigation, 2014-2015

**Education**

- William & Mary Law School, J.D., 2005 - Board Member, William & Mary Moot Court Team; Director, 2005 William B. Spong Moot Court Invitational; Recipient, Dean's Certificate, 2005
- Southern Methodist University, B.A., Political Science, 2001

# From Courtrooms to Contacts: Developing Law Affecting Supply Chain Requirements Contracts

**Moheeb Murray**
Bush Seyferth (Troy, MI)

**From Courtrooms to Contracts: Developing Law Affecting Supply-chain Requirements Contracts**
*Moheeb Murray*

Requirements contracts are a staple of commercial supply chains, particularly in the manufacturing sector. They can offer flexibility and predictability, allowing buyers to secure supply without committing to a fixed quantity up front, while sellers benefit from a steady stream of business. But in Michigan—the heart of the U.S. automotive industry and a leading jurisdiction in requirements-contract law—a flurry of recent rulings by state and federal courts has reexamined the circumstances and contractual language necessary to create a requirements contract. These rulings are causing many buyers and sellers, including those who have been doing business together for years or even decades, to reconsider the nature of their contractual relationships. This article will discuss the recent developments and provide some recommendations for companies that use requirements contacts in connection with their business.

**UCC Article 2 and the Essential Nature of Quantity Terms**
The Uniform Commercial Code's Article 2 governs contracts for the sale of goods, including requirements contracts. It provides a flexible framework for commercial transactions, including various "gap fillers" that supply missing terms such as price, delivery, and payment timing when the parties have not specified them.

An important exception, however, is quantity, which is not a gap-fillable term under Article 2. Section 2-201—the UCC's statute of frauds—requires that contracts for the sale of goods priced at $1,000 or more[1] be in writing and include a quantity term to be enforceable. Courts have consistently held that the quantity term is essential because it defines the scope of the parties' obligations and allows for meaningful enforcement. But it can be difficult for a buyer, particularly in a manufacturing, agricultural, or food-service industry, to predict precisely how much of a product it will need over time when there is fluctuating demand for the product. A buyer's lack of certainty can create issues for sellers that want the business but also need some basis to estimate the volume of product it may be obligated to supply. Requirements contracts are the UCC's answer to dealing with that challenge.

**Requirements Contracts and How They Work**
Under UCC § 2-306(1), a requirements contract is one in which a buyer agrees to purchase all—or a specified portion—of its needs for a particular good from a seller during a defined period. In the context of requirements contracts, the quantity may be expressed by terms like "all of buyer's requirements" or a specified percentage of buyer's needs, but it must be objectively measurable. The standard is good faith: "requirements of the buyer means such . . . requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate, or in the absences of a stated estimate to any normal or otherwise comparable prior . . . requirements may be tendered or demanded." UCC § 2-306(1). In some states, a requirements contract must be an agreement where the buyer purchases the goods exclusively from the seller, while other states do not mandate exclusivity. Compare, e.g., Indiana (Indiana-Am. Water Co. v. Town of Seelyville, 698 N.E.2d 1255, 1259 (Ind. Ct. App. 1998)) (requiring exclusivity) with California (Amber Chemical, Inc. v. Reilly Indus., Inc., 2007 WL 512410, * 8 (E.D. Cal. Feb. 14, 2007)) (not requiring exclusivity).

Often, parties effectuate requirements contracts by the buyer issuing overarching purchase orders establishing the general terms of purchase with a quantity term intended to indicate that the buyer seeks to purchase enough goods to satisfy its requirements while the contract is in place. The buyer subsequently issues periodic releases for specific quantities of the goods to be delivered at specific times over the purchase-order contract's life. This structure allows parties to adapt to fluctuating demand while maintaining contractual stability. But issues can arise where the contract uses a quantity term that arguably does not establish that the buyer agreed to purchase

1 See MCL 440.2201. Some states have enacted this UCC provision with different minimum dollar amounts, so it may vary by jurisdiction.

or the seller agreed to sell the buyer's "requirements." Examples of such disputed quantity terms are "blanket" or "as needed," among others. The Michigan Supreme Court, in MSSC, Inc. v. AirBoss Flexible Products Co., 511 Mich. 176 (2023), recently ruled that using terms like "blanket" or "as needed" for the quantity is insufficient and renders a contract unenforceable because it fails to establish a buyer's clear commitment to purchase any quantity. AirBoss was only the beginning. Michigan state and federal courts have since continued grappling with Airboss's broader implications, with some of those issues likely to return to the Michigan Supreme Court sooner rather than later.

**The AirBoss Decision: A Turning Point**

The Michigan Supreme Court issued the Airboss decision in July 2023. It reshaped the legal framework for requirements contracts in Michigan, and potentially beyond. The Court held that a blanket purchase order lacking a specific quantity term does not satisfy the UCC's statute of frauds (§2-201), rendering the contract unenforceable.

A. Airboss's Facts and Ruling

In Airboss, the parties—both automotive suppliers—agreed to a "blanket purchase order" which stated various general terms and conditions, including price. The order stated that it was "valid and binding on [Airboss] for the lifetime of the program or until terminated," and that MSSC would "issue a 'Vendor Release and Shipping Schedule' to [Airboss] for specific part revisions, quantities, and delivery dates for Products." Airboss, at 341.

Notably, the agreement did not obligate MSSC to place a specific number of firm orders, nor did it require Airboss to fulfill a defined portion of MSSC's needs (such as "all" or a percentage). Id. Instead, MSSC was to periodically send "releases" for parts based on its current and projected needs. Id.

In 2019, MSSC sued Airboss for anticipatory breach of contract and sought specific performance under the agreement after Airboss announced it would cease future supply due to financial losses. Id. at 342. The Court of Appeals ruled in MSSC's favor, holding that the term "blanket order" constituted a quantity term sufficient to satisfy the UCC's statute of frauds. Id. As such, in assessing the agreement, the court considered the parties' course of dealing, concluding that the agreement reflected a requirements contract.

But, in July 2023, the Michigan Supreme Court reversed that decision. The Court held that merely labeling an agreement as a "blanket purchase order" does not, on its own, create a requirements contract obligating a supplier to fulfill all future releases. Id. at 343. While a requirements contract can be nonspecific as to quantity, it must still have a quantity term that can be evaluated further using parol evidence. Id. Such terms may include a commitment to supply "all" or a specified percentage of the buyer's needs.

Further, MSSC's releases, which specified quantities and projected future needs, did not constitute a quantity term. Instead, the Court emphasized that the releases "only constituted an obligation binding Airboss as to each individual release if Airboss accepted—not a promise to fulfill all future releases." Id.

The Michigan Supreme Court contrasted the language of the purchase order in Airboss with that in Cadillac Rubber & Plastics, Inc. v. Tubular Metal Sys., LLC, 952 N.W.2d 576 (Mich. Ct. App. 2020). In Cadillac Rubber, the purchase order permitted the buyer to purchase any quantity between one unit and 100% of its requirements. Id. at 578. The Court of Appeals deemed this buyer-friendly language a valid quantity term, which permitted the use of parol evidence to interpret the parties' intent. In a footnote, the MSSC court declined to overrule Cadillac Rubber, reasoning that the issue was not properly before it. Id. at 345 n.4.

B. The Airboss Court Distinguishes "Release-by-Release Contracts" from "Requirements Contracts"

In reaching its decision, the AirBoss Court articulated the concept of the "release-by-release contract." These are umbrella agreements that govern future fixed-quantity releases but do not oblige either party to transact. Unlike requirements contracts, release-by-release agreements lack a binding quantity term and are enforceable only to the extent specific releases are issued and accepted.

This distinction is critical. In a release-by-release contractual relationship, either party may walk away at any time, and the overarching purchase-order terms apply only to accepted releases. This model resembles spot-buying and offers less predictability than a true requirements contract. For example, a seller can plausibly threaten to withhold future shipments if a buyer doesn't acquiesce to a seller's demand for a price increase, or a buyer can plausibly threaten to stop purchasing any product if the seller doesn't meet some particular demand by the buyer. Market pressures and uncertainty arising from events like commodity price spikes, logistics shocks from global pandemics, or imposition of tariffs, often prod one side or the other to seek new contract terms. And recently, there have been plenty of reasons for buyers and sellers to fight about whether they have a requirements contract, even after Air Boss.

**Post-AirBoss Developments in Michigan State and Federal Courts**

Since AirBoss, Michigan state and federal courts have grappled with its implications. In May 2025, FCA US LLC v. Kamax Inc., the Michigan Court of Appeals affirmed a trial-court ruling by upholding a contract stating the buyer would purchase “approximately 65%-100% of its requirements,” finding it enforceable despite the qualifier “approximately.” FCA US LLC v. Kamax, Inc., __ N.W.3d__, 2025 WL 1420392 (Mich. Ct. App. May 15, 2025) This decision diverged from a March 2025 federal court ruling in FCA US LLC v. MacLean-Fogg Component Solutions LLC, No. 24-11165, 2025 WL 877534 (E.D. Mich. Mar. 20, 2025) where identical language was deemed unenforceable under the UCC because the quantity was not sufficiently ascertainable. The MacLean-Fogg court relied on the Sixth Circuit’s May 23, 2024 decision in Higuchi Int’l Corp. v. Autoliv ASP, Inc., which, based on its interpretation of AirBoss, held that quantity terms must be “precise and explicit” and cannot be clarified through parol evidence. Higuchi Int’l Corp. v. Autoliv ASP, Inc., 103 F.4th 400, 406 (6th Cir. 2024). This split between state and federal courts creates uncertainty for litigants and contract drafters alike.

Less than a month after Kamax, a federal judge in the Eastern District of Michigan issued an opinion in Kiekert de Mexico S.A. de CV v. Brose Jefferson, Inc., No. 24-cv-11734, 2025 WL 1668318 (E.D. Mich. June 12, 2025). There, the parties’ contract authorized the buyer to issue releases “in accordance with its needs.” The court rejected buyer’s argument that “its needs” meant its requirements. Id. at *7. The court noted that the parties’ agreement also gave the buyer discretion to issue releases in any quantity it wanted and it was not obligated to buy anything beyond that. Id. The buyer further argued that Kamax, by allowing requirements to be nonspecifically stated as a range (i.e., 65% to 100% of requirements), supported “in accordance with its needs” as creating a requirements contract. Id. But the court observed that although a percentage range was nonspecific, “it was still a quantity term that could be ‘evaluated further using parol evidence.’” Id., quoting Kamax at *4. In other words, the purchase orders at issue contained “no range” to guide interpretation and merely referenced the party’s “needs” as a quantity term—closely resembling the deficiencies identified in Airboss and Higuchi. Accordingly, the court determined that the contract was a release-by-release contract and was unenforceable beyond the quantities stated in releases the seller already accepted. Id.

Another notable case is Detroit Diesel Corp. v. Martinrea Honsel Mexico SA de CV, No. 24-11557, 2025 WL 1859729 (March 25, 2025). There, a federal judge in the Eastern District of Michigan certified a question to the Michigan Supreme Court regarding whether a commitment to purchase “1 part to 100% of buyer’s needs” constitutes a valid quantity term. That was the same term as in Cadillac Rubber, which the Airboss court had explicitly declined to overturn because the issue was not before it. Airboss at 345, n. 4. The outcome could further clarify—or complicate—the enforceability of flexible quantity terms.

**The Potentially Far-Reaching Effects of Airboss and Its Progeny**

Though Airboss and the cases subsequently applying it have so far been concentrated in Michigan courts, they will likely have ripple effects nationwide. The Michigan-based auto manufacturers contracts with their suppliers typically have Michigan choice-of-law provisions regardless of whether the direct supplier is also in Michigan. And moving down the chain, many of the tier-1 suppliers are also based in Michigan and incorporate Michigan law into their supply contracts with their lower-tier suppliers who often are located outside of Michigan. And that’s only for the automotive industry. Michigan is also a leader in other areas of manufacturing and product distribution, creating even more contractual relationships involving parties from various states dependent on Michigan law. Finally, because of the relatively high number of requirements contracts cases decided by Michigan appellate and federal courts, and in particular, the recent in-depth analysis, it’s likely that courts in other jurisdictions will view Michigan decisions on these issues as persuasive authority and increasingly follow Michigan’s lead on requirements contracts.

**The Kamax Michigan Supreme Court Appeal: A Case to Watch**

The Kamax decision is currently the subject of a petition for appeal to the Michigan Supreme Court. Kamax has asked the Court to review whether the appellate court’s decision conflicts with AirBoss and whether the precedent in Cadillac Rubber & Plastics, Inc. v. Tubular Metal Systems, LLC remains viable.

This appeal along with the certified question from the federal court in Detroit Diesel, presents an opportunity for the Michigan Supreme Court to clarify the boundaries of enforceable quantity terms under the UCC and resolve the growing tension between state and federal interpretations. Litigators and in-house counsel should monitor this case closely, as its outcome may significantly impact contract enforceability and litigation strategy.

**Practical Implications for Litigators and In-House Counsel**

The implications of the AirBoss decision—and the evolving case law around requirements contracts—are significant, especially for those operating in supply chain-intensive industries. Here are the key takeaways:

1. Potential Increased Risk of Contract Invalidity

Businesses that rely on blanket purchase orders or informal supply arrangements may find that their contracts are unenforceable if they lack a clear and measurable quantity term. This could expose them to:

- Supply-chain disruptions if a supplier walks away and the buyer cannot enforce the agreement
- Litigation risk if a party attempts to enforce a vague contract and is met with a statute-of-frauds defense

2. Need for Contractual Precision

Companies should now revisit and, where needed, revise their standard terms and conditions, purchase orders, and long-term supply agreements to ensure:

- A specific quantity term is included (e.g., "100% of Buyer's requirements" or "all of Buyer's requirements" or depending on the Kamax outcome, "[X]% of Buyer's requirements")
- The agreement clearly states whether it is exclusive or non-exclusive
- The parties' intent to be bound is unambiguous

3. Strategic Use of Release-by-Release Contracts

Some businesses may opt for release-by-release contracts to preserve flexibility. But these arrangements:

- Do not guarantee supply or demand
- Require careful management of each release to avoid disputes
- May not be suitable for critical or high-volume supply relationships

4. Divergence Between State and Federal Decisions

The split between Michigan state courts (e.g., Kamax) and federal courts (e.g., MacLean-Fogg) creates legal uncertainty. Businesses operating across jurisdictions should:

- Be aware that identical contract language may be interpreted differently depending on the forum
- Consider forum-selection clauses and choice-of-law provisions to mitigate risk
- Monitor the pending appeal in Kamax and any future rulings by the Michigan Supreme Court or court decisions citing Michigan caselaw for further clarification

5. Greater Burden on In-House Counsel and Contract Managers

Legal and procurement teams should consider:

- Auditing existing contracts for compliance with AirBoss
- Train buying/purchasing teams on the importance of quantity terms and enforceability
- Implementing templates and checklists to ensure future agreements meet UCC requirements

6. Potential for Renegotiation and Disputes

Contracting parties on either side might seek to renegotiate or exit contracts that are now vulnerable under AirBoss. This could lead to:

- Commercial disputes over whether a contract is enforceable
- Leverage shifts in negotiations, especially where one party has more bargaining power or supply alternatives

**Conclusion**

The Michigan Supreme Court's AirBoss decision has reshaped the landscape of requirements contracts under the UCC. While it provides clarity on the necessity of precise quantity terms, it also introduces new complexities, especially as courts continue to interpret and apply its principles. For commercial litigators and in-house counsel, vigilance in contract drafting and strategic litigation planning is more critical than ever.


FROM COURTROOMS TO
CONTRACTS
MOHEEB MURRAY | BUSH SEYFERTH


REQUIREMENTS
CONTRACTS 101
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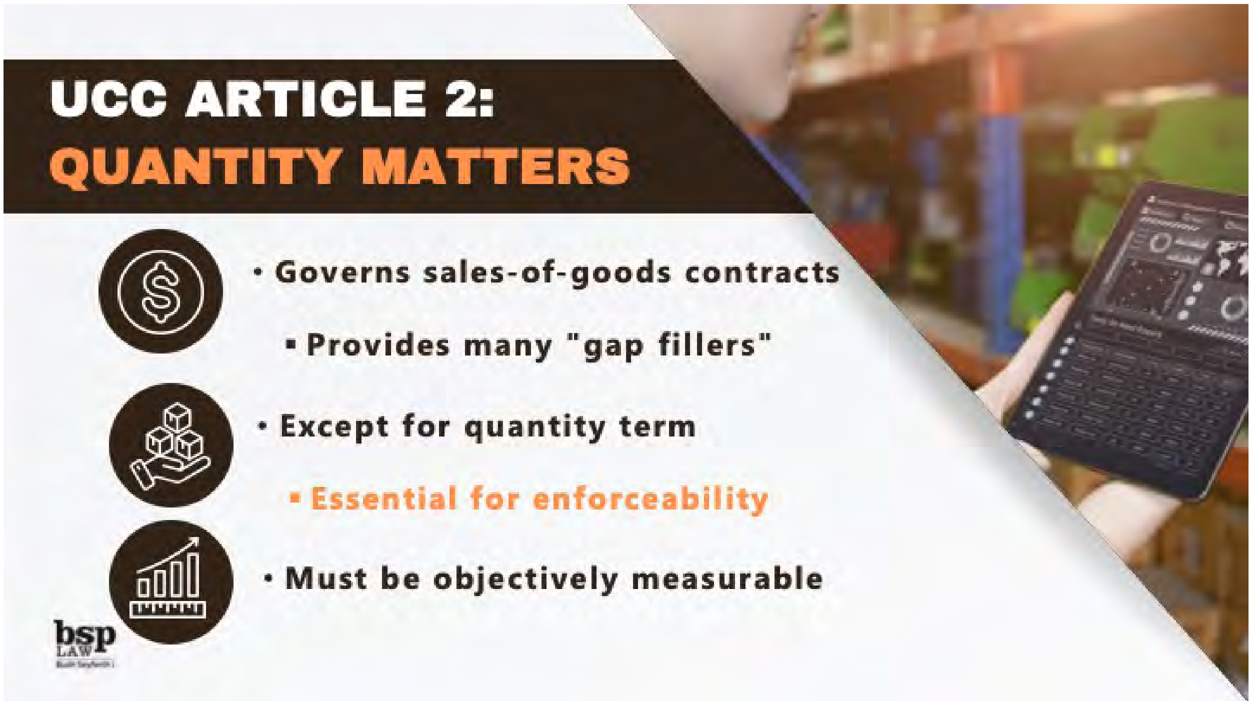
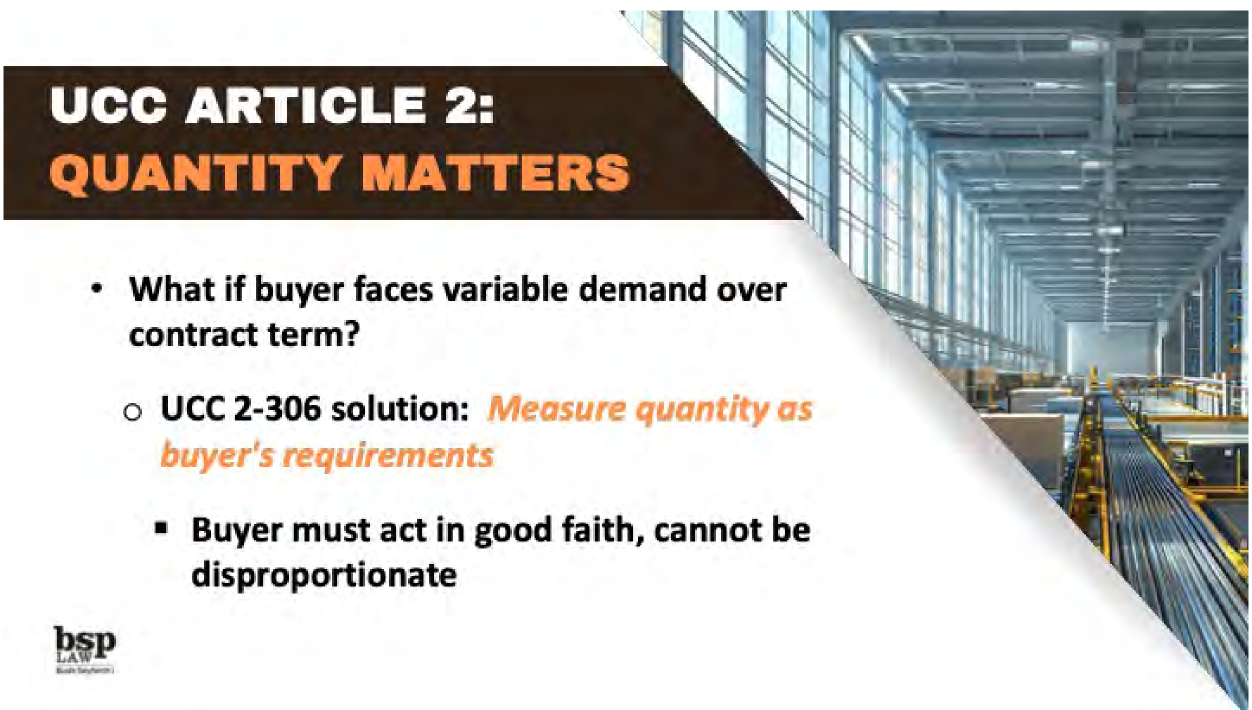
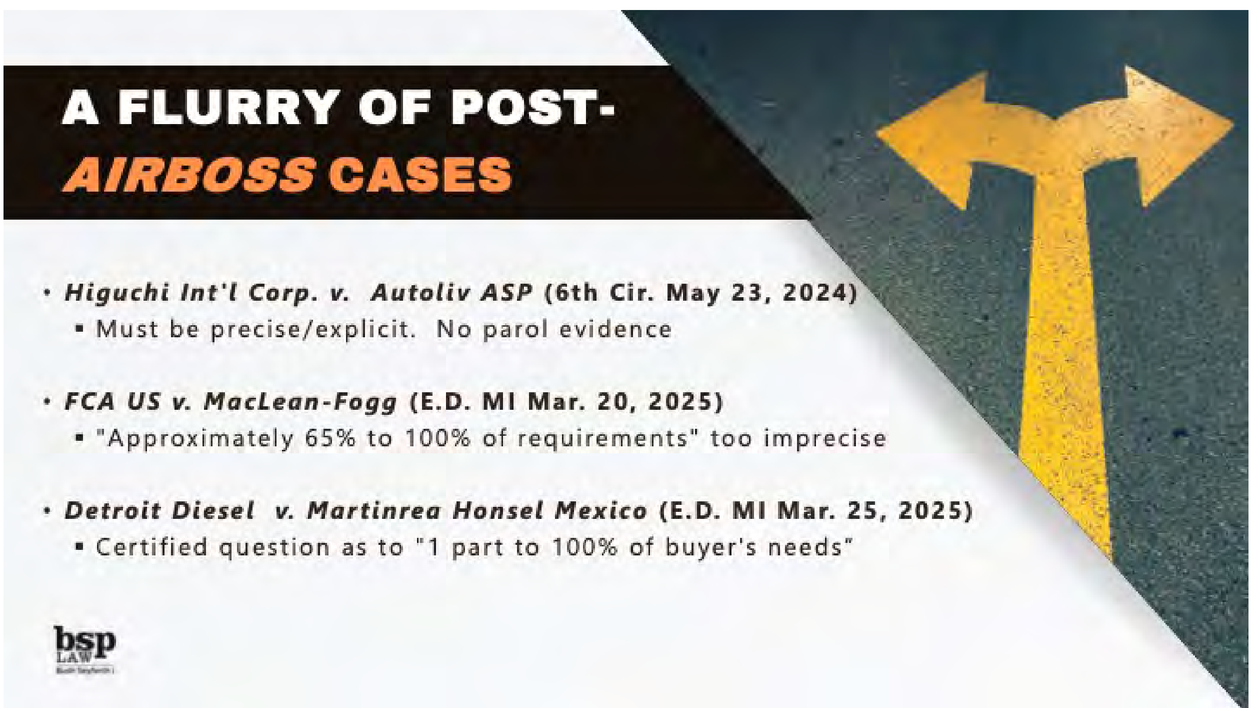

UCC ARTICLE 2:
QUANTITY MATTERS
• Governs sales-of-goods contracts
▪ Provides many "gap fillers"
• Except for quantity term
▪ Essential for enforceability
• Must be objectively measurable
bsp LAW


UCC ARTICLE 2:
QUANTITY MATTERS
• What if buyer faces variable demand over contract term?
o UCC 2-306 solution: Measure quantity as buyer's requirements
▪ Buyer must act in good faith, cannot be disproportionate
bsp LAW


UCC ARTICLE 2:
QUANTITY MATTERS
Benefits of Requirements Contracts
• More flexibility for buyers
• Long-term predictability for sellers
bsp LAW


THE *AIRBOSS* DECISION
Michigan Supreme Court (2023):
*"Blanket" or "as needed" terms do not create a requirements contract.*
QUANTITY MUST BE
OBJECTIVELY MEASURABLE.
bsp LAW


A NEW CONTRACT TYPE
Release-by-Release Agreement
• Binds parties only to accepted releases.
• Offers less predictability and greater risk for both sides.
bsp
LAW


A FLURRY OF POST-
AIRBOSS CASES
• Higuchi Int'l Corp. v. Autoliv ASP (6th Cir. May 23, 2024)
▪ Must be precise/explicit. No parol evidence
• FCA US v. MacLean-Fogg (E.D. MI Mar. 20, 2025)
▪ "Approximately 65% to 100% of requirements" too imprecise
• Detroit Diesel v. Martinrea Honsel Mexico (E.D. MI Mar. 25, 2025)
▪ Certified question as to "1 part to 100% of buyer's needs"
bsp
LAW

## A FLURRY OF POST-*AIRBOSS* CASES

- ***FCA US LLC v. Kamax*** **(Mich. Ct. App. May 14, 2025)**
  - "Approximately 65% to 100% of requirements" sufficient
- ***Kiekert de Mexico v. Brose Jefferson*** **(E.D. MI Jun. 12, 2025)**
  - "in accordance with [buyer's] needs" insufficient

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## MICHIGAN SUPREME COURT: *AIRBOSS* REDUX?

- **Application pending on *Kamax***
- **Certified question pending on *Detroit Diesel***

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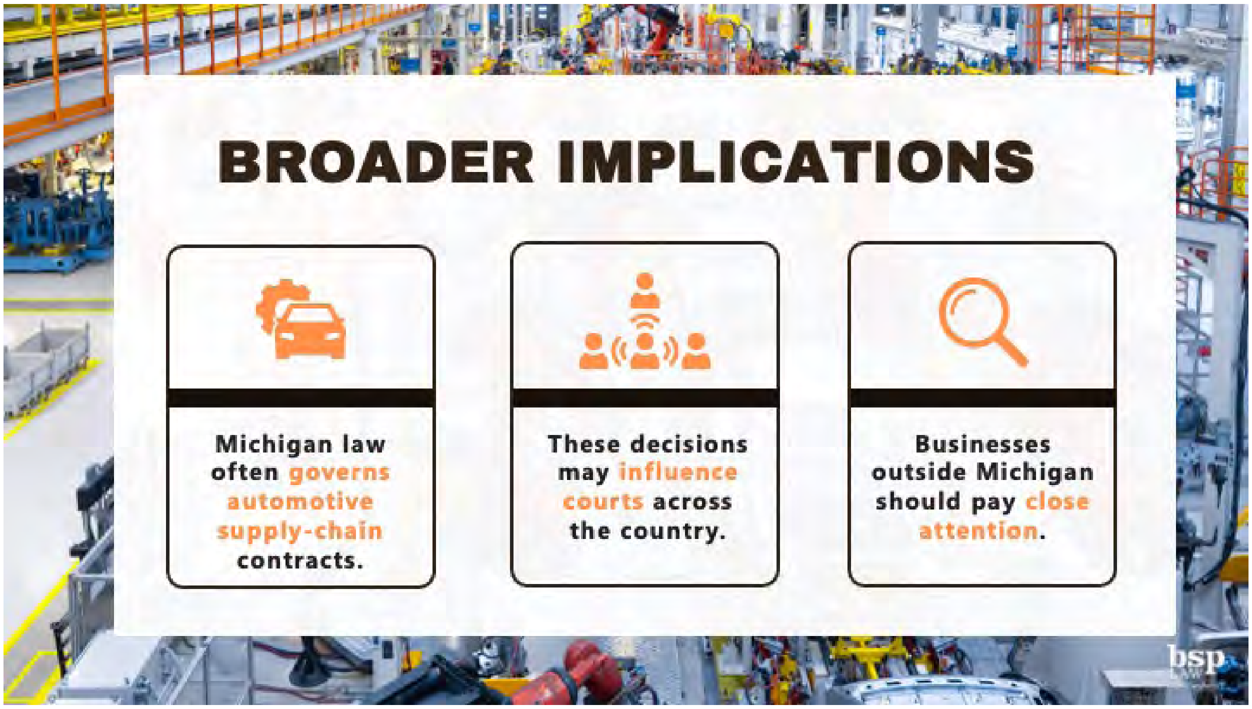
BROADER IMPLICATIONS
Michigan law often governs automotive supply-chain contracts.
These decisions may influence courts across the country.
Businesses outside Michigan should pay close attention.
bsp LAW


PRACTICAL TAKEAWAYS
01 No clear "requirements language" risks being deemed release-by-release contract.
02 Review and update supply agreements.
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## PRACTICAL TAKEAWAYS

01 No clear "requirements language" risks being deemed release-by-release contract.

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## PRACTICAL TAKEAWAYS

01 No clear "requirements language" risks being deemed release-by-release contract.

02 Review and update supply agreements.

03 Prepare for renegotiations and potential disputes.

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## Moheeb H. Murray

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Moheeb Murray represents clients in complex commercial disputes, tort defense cases, insurance coverage matters, and construction litigation. He leads BSP's insurance coverage and construction litigation practice groups. In commercial litigation matters, his extensive experience includes complex breach of contract and breach of warranty claims, shareholder actions, and cases involving misappropriation of trade secrets and covenants not to compete. In his insurance coverage practice, Moheeb represents leading insurers in life, health, disability, ERISA, long-term care, annuity, P&C, commercial general liability, and auto-insurance no-fault matters. He advises and represents clients from pre-litigation strategy through final verdict and on appeal. Moheeb has helped clients obtain favorable awards and outcomes at trial and in arbitrations involving claims of breach of contract, breach of warranty, construction, and design-professional malpractice. Moheeb is also a trained civil litigation mediator.

**Practice Areas**

- Business and Commercial
- Class Actions
- Insurance Litigation
- Product Liability
- Securities / Finance
- Construction Litigation & Counseling
- Fact Investigations
- Alternative Dispute Resolution

**Honors & Awards**

- Chambers USA Guide, Insurance (Michigan) Band 1 (2024)
- Michigan Lawyers Weekly, Go-To Lawyers Power List (2023)
- DBusiness Top Lawyers (2024 – present)
- Michigan Lawyers Weekly, Go-To Lawyers for Business Law (2023)
- Oakland County Bar Association Committee of the Year Award (2023)
- Best Lawyers® Lawyer of the Year, Insurance Law (Troy, MI: 2023)
- DRI Lifetime Community Service Award (2019)
- Inclusion in The Best Lawyers in America©: Insurance Law (2018 – present)
- Oakland County Bar Association Distinguished Service Award (2017)
- Oakland County Executive's Elite 40 Under 40 (2015)
- Michigan Super Lawyers, Rising Star (2011-2015)
- Michigan Super Lawyers, Top 100 (2023 – present)
- Michigan Super Lawyers (2018 – present)
- Michigan Lawyers Weekly, Leader in the Law (2014)
- American Arab Professional of the Year Award in the Legal Category (2013)
- Martindale Hubbel® AV Peer Review Rating

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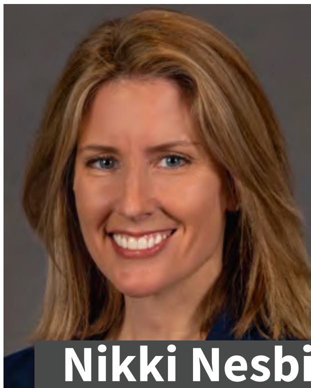
- University of Michigan Law School, J.D., cum laude, 2001
- University of Michigan Ross School of Business, B.B.A., with high distinction, 1997 - James B. Angell Scholar; William J. Branstrom Freshman Prize for academic excellence
- Harvard Professional Development Programs, Harvard Division of Continuing Education, Participant, Strategic Leadership, September 28-29, 2016



# Panel - Bridging the Generational Divide: Effective Trial Communication Across Age Groups


**Nikki Nesbitt**

Goodell DeVries Leech & Dann (Baltimore, MD)


**Bridging the Generational Divide: Effective Trial Communication Across Age Groups**

*Nikki Nesbitt and Kelly Theard*

Modern juries represent an unprecedented convergence of generational perspectives, spanning nearly a century of distinct worldviews and communication preferences. Today's jury pools include members from the Silent Generation through Generation Z, each bringing fundamentally different expectations about how information should be presented, processed, and evaluated. This generational diversity presents both challenges and opportunities for trial attorneys seeking to maximize their persuasive impact.

Recent empirical research demonstrates that strategies tailored to specific generational preferences—including customized visual aids, multimedia presentations, and interactive elements for younger jurors—consistently lead to higher engagement and improved information retention, which can mean more favorable outcomes in civil trials. This paper examines how understanding generational differences can provide attorneys with evidence-based tools for more effective jury communication.

**Generational Characteristics and Communication Strategies**

Each generation, much like individuals, possesses distinct characteristics shaped by unique historical and cultural experiences, influencing their values, attitudes, and interactions with the world, including within the legal system. See Larry Beemer et al., Your Jury Box in the 21st Century, The CLM (Mar. 31, 2017), https://www.theclm.org/Magazine/articles/your-jury-box-in-the-21st-century/1338. Contemporary juries can include members from five distinct generations, although the specific date ranges that define these groups vary slightly depending on the source: the Silent Generation (1925-1945), Baby Boomers (1946-1964), Generation X (1965-1980), Millennials (1981-1994), and Generation Z (1995-2012). See; Judicature, What Do Judges Need to Know About Generation Z? (2023). Before delving into the specific attributes of each generation, it is important to note that lawyers must avoid overgeneralizing, as relying on broad generational labels risks inaccurate stereotyping that overshadows individual attitudes, beliefs, and experiences, often leading to unreliable assumptions in jury selection. See Kimberly Carlton Bonner, What Do Judges Need to Know About Generation Z?, Judicature, Vol. 106 No. 3 (2023), https://judicature.duke.edu/articles/what-do-judges-need-to-know-about-generation-z/; Phillip Cohen, Forget the Generation Labels in Voir Dire, Persuasion Strategies (Apr. 25, 2022). Nonetheless, recognizing long-term generational trends can be valuable for understanding evolving persuasion dynamics – not to assess individuals, but to refine communication strategies for diverse generational lines. See Holland & Hart - Your Trial Message, Feed Your Millennials Visual Information, JD Supra, https://www.jdsupra.com/legalnews/feed-your-millennials-visual-information-65864/ (last visited Sept. 23, 2025).

**A. The Silent Generation**

The Silent Generation grew up during the Great Depression and World War II, a period marked by economic hardship, huge peacetime defense budgets, and a culture of conformity that emphasized rule-following over rule-breaking, shaping their view of work as a privilege earned through dedication. See Larry Beemer et al., Your Jury Box in the 21st Century, The CLM (Mar. 31, 2017), https://www.theclm.org/Magazine/articles/your-jury-box-in-the-21st-century/1338; Daniel Wolfe, The Age of the Millennial Juror – Generational Differences in Trying Product Liability Cases, Int'l Ass'n Def. Couns., https://www.iadclaw.org/assets/1/7/11.10-_Wolfe-_The_Age_of_the_Millennial_Juror.pdf. These jurors respect authority and value privacy, formality, and trust, often preferring written communications. Id. Their risk-averse nature makes them reliable, rule-abiding jurors who adhere to established courtroom processes. Id. However, their discomfort with modern technology can hinder engagement with digital evidence or complex visual aids. See Beemer et al., supra. Trial lawyers should use clear, formal, and structured communication, avoiding over-reliance on technology to engage and appeal to these jurors. See Douglas L. Keene & Rita R. Handrich, Values, Priorities, and Decision-Making: Intergenerational Law Offices, Intergenerational Juries, The Jury Expert (Jan. 2013), https://thejuryexpert.com/2013/01/values-priorities-and-decision-making-intergenerational-law-offices-intergenerational-juries/.

**B. Baby Boomers**

Baby Boomers grew up in periods of conflict and social change—Vietnam, the civil rights movement, and activism in favor of women's rights—shaping their idealistic yet competitive nature, though many now express anxiety about finances and a belief that life in the U.S. has worsened since the 1960s, often resenting efforts to change the world they redesigned. See Beemer, supra; Keene & Handrich, supra. These jurors are adept at single, extended interactions and were traditionally more attuned to "Matlock moments" where drama revolved around the attorney's spoken word rather than sophisticated visual presentations. See IMS Legal Strategies, New Media's Impact on Jurors, Part 1: Trial Graphics & Juror Generations (2024), https://imslegal.com/articles/trial-graphics-juror-generations. However, while their attention spans remain longer than younger jurors, Boomers now also have expectations of sophisticated multimedia presentations, particularly following increased technology adoption during the pandemic. Id.

Effective communication with Boomer jurors requires polished, substantive presentation styles that emphasize personal engagement and demonstrated expertise, as they value direct interpersonal communication and maintain high expectations for attorney competence and authenticity, often preferring face-to-face interactions over electronic ones. See Franklin Drake, How to Talk to a Boomer, Smith Debnam Attys L. (May 9, 2018), https://www.smithdebnamlaw.com/blog/how-to-talk-to-a-boomer/. Lawyers should craft clear, principle-driven narratives that appeal to Boomers' sense of duty and achievement, avoiding assumptions of uniformity, as diverse experiences like civil rights activism or economic challenges shape individual perspectives, and overgeneralizations—such as viewing them as controlling or grumpy—may misjudge their nuanced views. See Keene & Handrich, supra; Drake, supra.

**C. Generation X**

Generation X, often referred to as the "latchkey kid" generation based on having both parents in the workforce, is ethnically diverse and generally more educated than Boomers, with more than 60 percent having attended college. See Beemer, supra. These jurors are skeptical of authority and distrust institutions, making them unlikely to respond well to overly paternalistic or authoritarian questioning approaches. See Wolfe, supra; Plaintiff Magazine, Trial Strategy Tips for Generation X, Y, and Millennial Jurors (2024), https://plaintiffmagazine.com/recent-issues/item/trial-strategy-tips-for-generation-x-y-and-millennial-jurors. They show a preference for visual communication and learning and appreciate clear, concise presentations and documents that allow them to grasp how things work quickly, reflecting their pragmatic approach to problem-solving. See Berkeley Exec. Educ., Enhancing Intergenerational Communication (2024), https://executive.berkeley.edu/thought-leadership/blog/enhancing-intergenerational-communication.

When communicating with Generation X jurors, trial lawyers should present concise, evidence-based arguments that respect Generation X's time and skepticism, while avoiding assumptions that all are uniformly cynical, as individual experiences like economic instability or cultural shifts significantly influence their perspectives. See Bonner, supra. Effective communication with Generation X jurors requires streamlined presentations that demonstrate competence while providing sufficient substantive detail to support their independent evaluation, avoiding hierarchical appeals that may trigger their institutional skepticism.

**D. Millennials**

Millennials came of age during unprecedented economic growth with sunny idealism and confidence about the future, living through the transition to a new millennium while experiencing ever-increasing access to technology throughout their lifetime. See Wolfe, supra; Kristyn Pierfelice & Steven Kuper, The Millennial Invasion of Jury Pools, For The Def. (Feb. 2019), https://www.nelsonmullins.com/storage/HIL9gg7pag9D2FKTs4ptpKriTSrcCgA0fVsXhLga.pdf. These jurors are highly educated, but many face high debt with student loans, with many having their first attempts at gainful employment stifled by economic recession, creating complex attitudes toward corporate defendants that may lead to higher damage awards, such as in product liability cases. See Pierfelice & Kuper, supra. As a significant portion of today's jury pools, they expect respect in the courtroom and want to be treated as intelligent individuals, demanding clear organization and authentic presentations that avoid condescending approaches. See Wolfe, supra; Persuadius, 9 Tips for Handling a Majority Millennial Jury, https://persuadius.com/blog/9-tips-for-handling-a-majority-millennial-jury. They respond well to multimedia presentations, storytelling approaches, and interactive elements, expecting sophisticated graphics and technology integration while maintaining shorter attention spans that require concise, engaging delivery. See Persuadius, supra; Pierfelice & Kuper, supra; Holland & Hart - Your

Trial Message, supra.
When communicating with Millennial jurors, lawyers should integrate immersive visual aids and clear, value-driven narratives emphasizing themes of adherence to rules, cooperation, and respect, while avoiding stereotypes, especially those geared toward them (e.g., all Millennials are entitled), as individual economic or cultural experiences shape their views. See Bonner, supra. Engaging Millennials requires respect for their time and intelligence through dynamic, technology-driven presentations.

**E. Generation Z**
Generation Z, or Zoomers, represents the most diverse, socially conscious, and digitally driven generation to date, having experienced formative events including 9/11 and the Great Recession as children, and the COVID-19 pandemic during their coming of age. See Bonner, supra. According to recent research, Generation Z seeks safety above all other measured goals—more than fame, wealth, and even happiness—which could significantly influence how claims are evaluated in civil courtrooms. See Persuasion Strategies, Prioritize Safety for Your Gen-Z Jurors, JD Supra, https://www.jdsupra.com/legalnews/prioritize-safety-for-your-gen-z-jurors-3739441/ (last visited Sept. 23, 2025). These jurors expect regular, small bites of information that they can easily digest and that demonstrate heightened social consciousness, appealing to their social- and race-consciousness while maintaining pragmatic approaches to problem-solving. Bonner, supra.

As jurors, Generation Z favors interactive, digital communication and concise presentations due to reported shorter attention spans and anxiety, but their comfort with diversity makes them receptive to equity-focused arguments, though some may struggle with opposing viewpoints. Id. Trial lawyers should employ technology-driven, interactive evidence displays and inclusive narratives that utilize sophisticated technology seamlessly and address themes of safety, protection, and social responsibility, but take care not to assume all Zoomers are uniformly progressive. Presentations should be delivered through concise, digestible segments that accommodate their preference for processing information in manageable increments. Extended presentations are not effective with this group. Id. Effective communication with Gen Z jurors hinges on leveraging technology and addressing their unique values while recognizing their individuality.

**Empirical Evidence on Age and Verdicts**

**A. Damage Award Patterns**
Quantitative analysis reveals striking differences in verdict patterns across generational lines. In an analysis of mock trial results involving 700 jurors, the Millennial jurors awarded a median of $6 million in damages compared to $3.5 million for non-millennial jurors. See Kendrick, T.A., The Millennial Juror: Seeing What is Really There (2019). This dramatic disparity reflects not merely individual case variations but consistent patterns observed across multiple studies and jurisdictions, suggesting fundamental differences in how generational cohorts evaluate corporate accountability and appropriate compensation levels. Controlled studies of personal injury cases demonstrate that 46% of Millennial and Gen Z mock jurors voted for so-called nuclear verdicts (generally, those in excess of $10 million), compared to only 35% of jurors over age 39. See Sound Jury Consulting, Are Millennial and Gen Z Jurors More Likely to Go Nuclear? (2024). This pattern has contributed to a documented surge in high-value awards, which increased 116% to $31.3 billion in 2024, correlating directly with the increased presence of younger jurors in jury pools. See Marathon Strategies, Nuclear Verdicts Report (2025).

**B. Direct Insights from Jury Behavior**
The most compelling evidence comes from the Vanderbilt Law Review's comprehensive study of 50 civil trials, in which researchers obtained permission to videotape jury deliberations and conducted recorded post-trial interviews. See Vanderbilt Law Review, Juror Questions During Trial: A Window into Juror Thinking (2006). This unprecedented access to actual jury thinking revealed distinct problem-solving approaches across generations and provided concrete evidence of how different age groups process information during trials.

The videotaped deliberations demonstrated that older jurors, particularly Baby Boomers, consistently approached complex issues through structured comparisons and appreciated clear, narrative-driven explanations of evidence. These jurors demonstrated systematic problem-solving methods, building their understanding through sequential analysis of testimony and evidence. In marked contrast, younger jurors favored interactive elements and demonstrated strong preferences for transparency, actively cross-checking information for credibility rather than accepting arguments based on authority alone. See Daily Journal, The Next Generation of Jurors (2021); Judicature, What Do Judges Need to Know About Generation Z? (2023).

The study's analysis of juror questioning behavior provided particularly valuable insights into generational information processing patterns. Juror questions focused 92.2% on content rather than credentials, with younger jurors consistently seeking to verify plausibility through cross-referencing rather than relying on source authority. See Vanderbilt Law Review, Juror Questions During Trial: A Window into Juror Thinking (2006). This pattern suggests that younger generations' emphasis on verification and transparency reflects broader cognitive approaches to information evaluation developed through digital media consumption.

Importantly, the research demonstrated that side-by-side comparisons of generational approaches revealed consistent preferences for authenticity and visual engagement among younger groups, while older jurors responded more favorably to structured presentations that respected traditional courtroom hierarchies. Importantly, all age groups engaged in active efforts to resolve ambiguities where they felt it was important to their decision-making. See Vanderbilt Law Review, Juror Questions During Trial: A Window into Juror Thinking (2006). This establishes the importance of presenting a framework for the jurors to collaboratively answer questions that come up in deliberations, lest they resort to speculation to fit whatever narrative appeals to them.

**Technology Evolution and Jury Expectations**

Recent developments in generative artificial intelligence are transforming trial preparation and presentation capabilities. Given younger jurors' preference for technological displays, AI can provide a means of engaging jurors who expect sophisticated, entertainment-level presentation quality. See EDRM, The Future Is Now: Why Trial Lawyers and Judges Should Embrace Generative AI Now and How to Do it Safely and Productively (2025). AI-powered trial presentation software can automatically organize and categorize evidence, create dynamic timelines and exhibits, and generate persuasive visuals that simplify complex information for jury comprehension. See American Bar Association, Using Artificial Intelligence for Your Trial Presentation (2024).

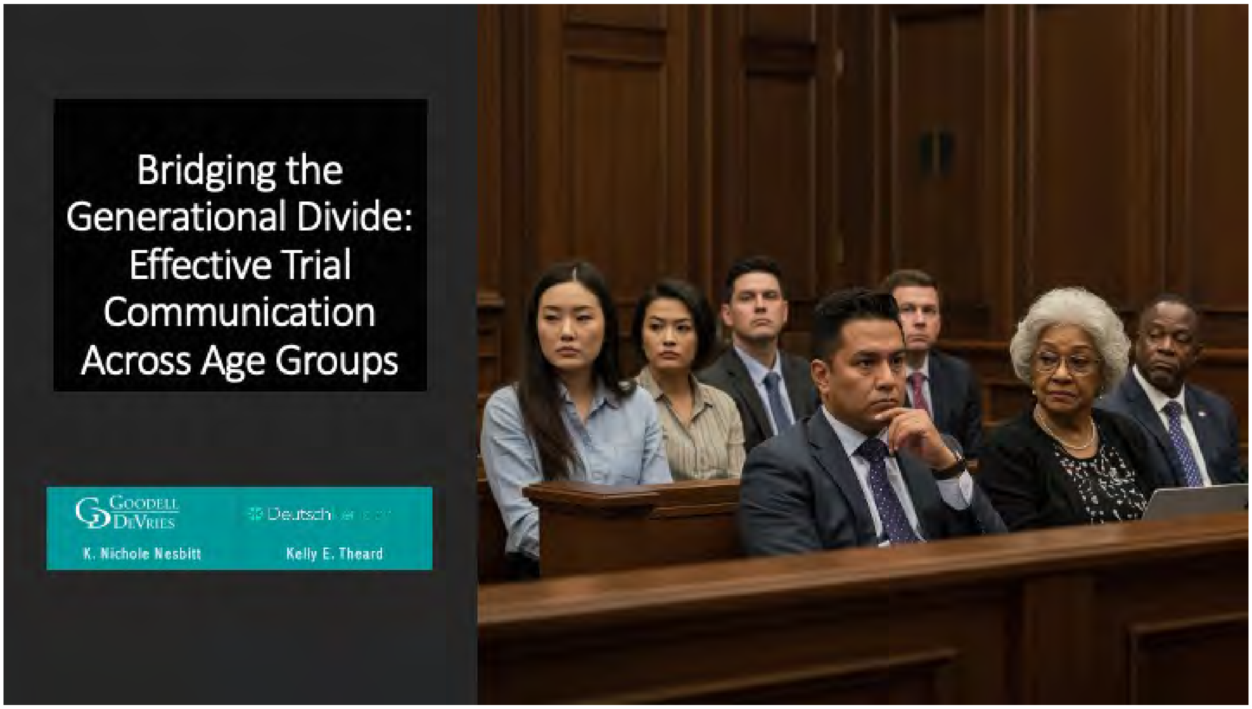
More and more, AI vendors are offering systems that they say can analyze case facts and generate multiple presentation formats simultaneously—creating structured, narrative-driven exhibits for older jurors while developing interactive, visually dynamic presentations for younger demographics. See NexLaw, Trial Tech Essentials: AI for Courtroom Presentations (2024). Advanced applications purportedly include real-time contradiction identification during cross-examination, with systems instantly displaying relevant impeachment material, and predictive analytics integrated into trial strategy development reporting accuracy rates of up to 90% in litigation prediction. See NexLaw, Trial Tech Essentials: AI for Courtroom Presentations (2024); NexLaw, Top Trends of Legal AI in 2024 (2025).

**Conclusion**

The empirical evidence reveals a clear imperative: successful trial advocacy in the modern era requires attorneys to master multiple communication languages. Where older jurors respond to institutional authority and narrative coherence, younger jurors demand transparency and interactive engagement. Rather than abandoning proven techniques, attorneys should layer generational approaches—combining traditional narrative strength with modern visual engagement, institutional respect with transparent acknowledgment of case complexities. The striking verdict differentials—younger jurors trending toward nuclear verdicts more quickly than older ones—underscore the financial stakes of understanding these communication preferences.

As Generation Z becomes the dominant jury demographic, technology integration will shift from advantage to necessity. The integration of artificial intelligence and advanced presentation technologies provides an opportunity to serve diverse generational expectations simultaneously with visual presentations that satisfy younger jurors while maintaining the structured approaches that resonate with older generations.

The evidence demonstrates that understanding generational communication preferences enhances rather than replaces traditional trial skills, providing attorneys with powerful tools to create more engaging, persuasive, and ultimately successful trial presentations that serve increasingly diverse jury pools.


Bridging the Generational Divide: Effective Trial Communication Across Age Groups
Goodell DeVries
Deutsch
K. Nichole Nesbitt
Kelly E. Theard

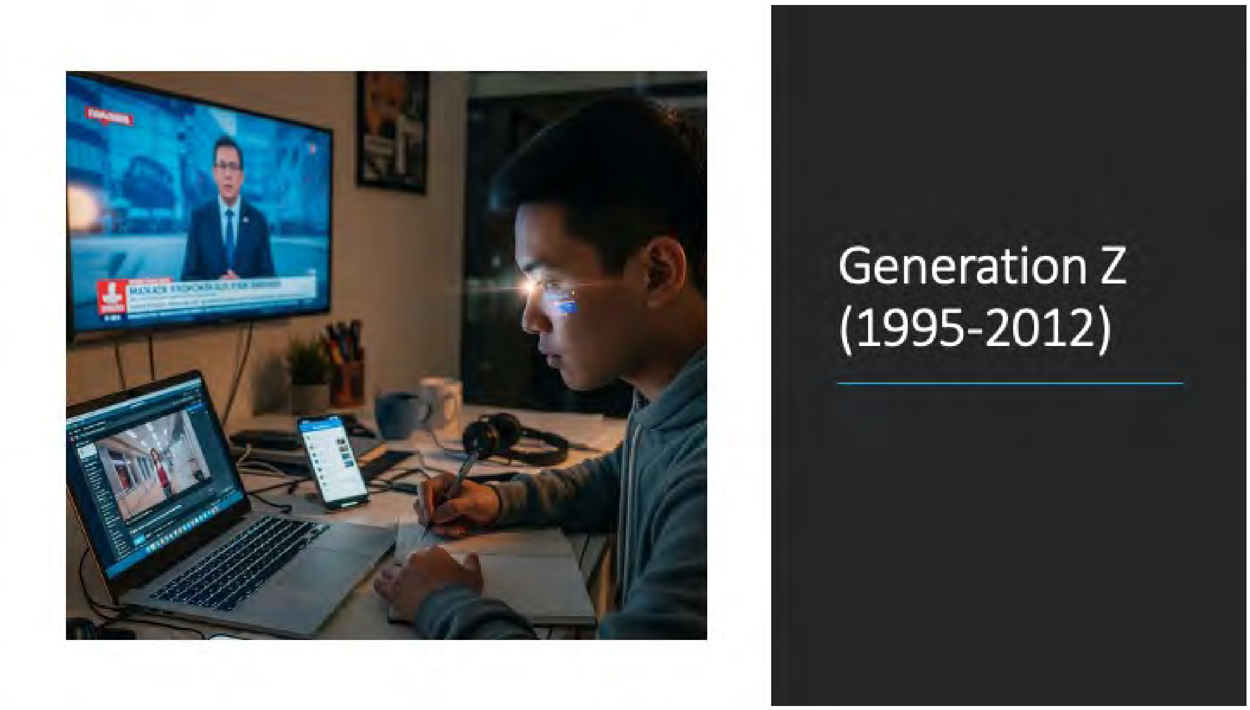

Which generation do you belong to?

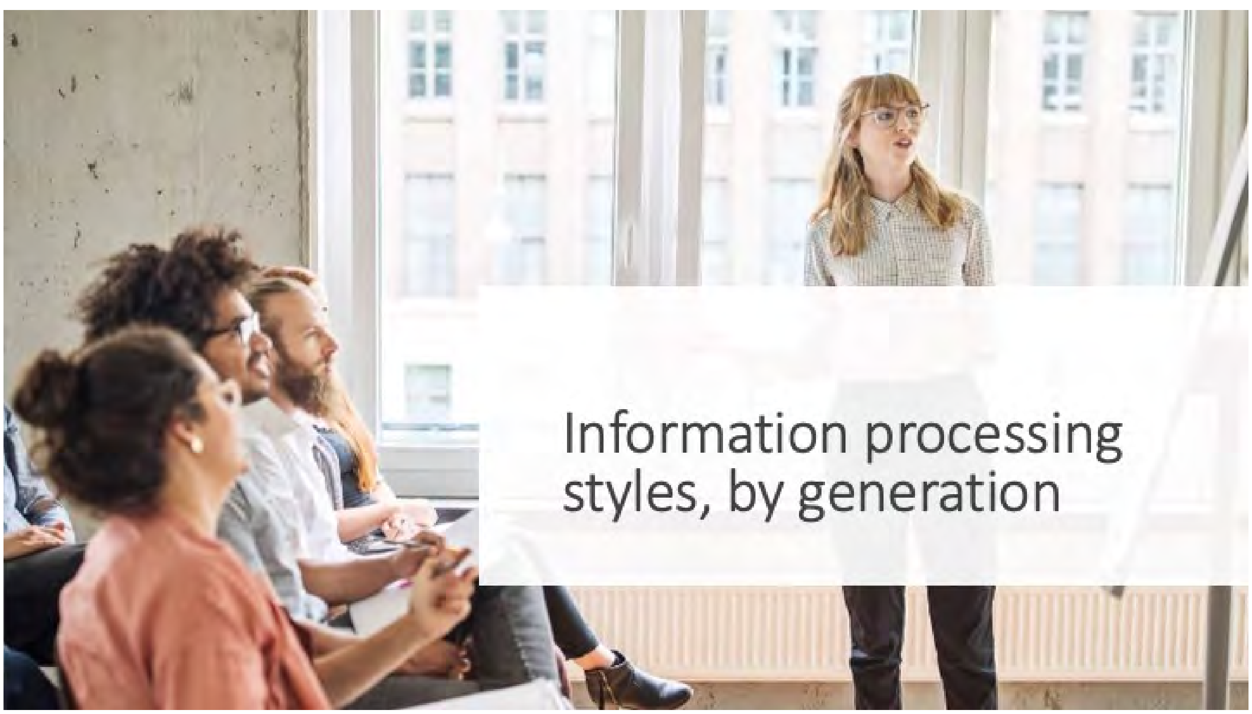

The Silent
Generation
(1925-1945)


Baby
Boomers
(1946-1964)

Generation X
(1965-1980)

Millennials
(1981-1994)


Generation Z
(1995-2012)

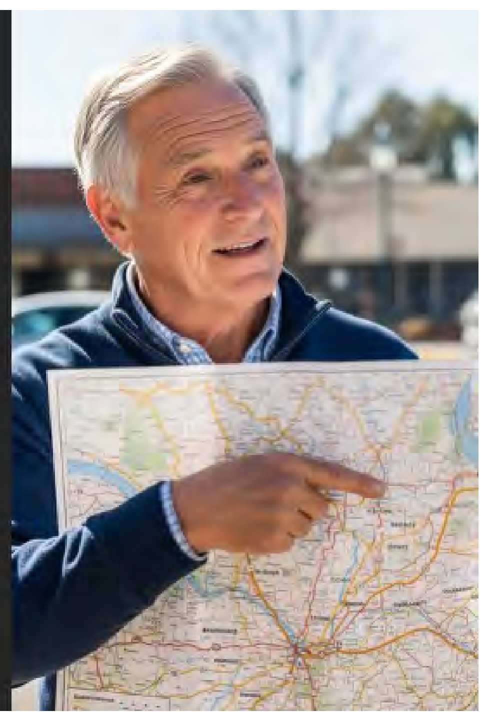

Information processing
styles, by generation

## Silent Generation

- Compliant with rules
- Respectful of authority
- Appreciative of formality
- Tip: give them tangible exhibits

## Baby Boomers

- Wary of overgeneralizations
- Impressed by sophistication
- Swayed by personal engagement
- Tip: tell them a story



## Gen X

- Skeptical
- Pragmatic
- Favor visual communication
- Tip: streamline the presentation

## Millennials

- Educated but compassionate
- Intolerant of condescension
- Proficient with technology
- Tip: use immersive visual aids

## Gen Z

- Safety-oriented
- Socially conscious
- Bored easily
- Tip: use interactive evidence

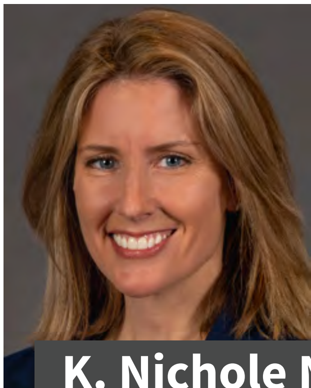
## Verdict Trends

- Younger jurors award more money
- Millennial jurors more likely to get into nuclear territory
- Higher verdicts trending up

## Lessons from deliberations

- **Older jurors:** clear, narrative-driven explanations resonate
- **Younger jurors:** transparency and credibility resonate
- **All jurors:** give a framework for filling in gaps, or they will do it themselves

## Know your audience



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# K. Nichole Nesbitt

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

Nikki Nesbitt is a partner of the firm and currently serves as its Managing Partner. Nikki's current practice concentrates on litigation in the healthcare field, most especially in the defense of medical malpractice cases but also cases involving civil rights disputes brought by employees, patients, guests, or other claimants. She represents clients before tribunals ranging from administrative agencies (including human relations offices and offices of administrative hearings) to trial-level courts (state and federal) to appellate courts. Nikki also handles employment matters outside of the healthcare context for employers in this region and beyond. Nikki's experience as a litigator provides her with insight to counsel her healthcare clients on preventing claims and crafting meaningful guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation or administrative review.

For the entirety of her 25 years at the bar, Nikki has worked for Goodell DeVries and has moved through the ranks from summer associate to managing partner. She has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, the Trial Network, and in non-legal organizations such as JDRF.

**Practice Areas**

- Medical Malpractice
- Medical Institutions Law
- Employer Liability
- Commercial and Business Tort Litigation
- Risk Management, Investigations, & Compliance

**Representative Matters**

- District of Columbia Superior Court (2023): Obtained summary judgment on behalf of hospital client in birth injury case based on plaintiff's failure to establish vicarious liability.
- District of Columbia Superior Court (2023): Obtained summary judgment on behalf of hospital in premises liability matter.
- District of Columbia Superior Court (2022): Obtained voluntary dismissal of hospital client in medical malpractice case alleging mismanagement of post-appendectomy medications by establishing that all decisions were made by independent surgeon.
- District of Columbia Superior Court (2022): Obtained summary judgment in favor of behavioral health facility in assault and false imprisonment claim based on Plaintiff's failure to name appropriate experts.
- D.C. Office of Human Rights (2020): Obtained order of "no probable cause" in discrimination action brought against hospital by patient who claimed she received inferior medical treatment and was discharged too soon as a result of her race.

**Honors and Awards**

- Best Lawyers in America - Commercial Litigation (2016-Present)
- Chambers USA - Litigation: Medical Malpractice Defense, Maryland, Band 3 (2023-2024); Band 2 (2025); Healthcare, Maryland (2017)
- The Daily Record — Leading Women Award (2011)
- Maryland Super Lawyers - Civil Litigation: Defense (2021-2025); Rising Stars (2009-2014)

**Education**

- University of Maryland, School of Law - (J.D., Order of the Coif, 1999); Maryland Law Review – Editor
- University of Maryland - (B.A., cum laude, 1996)

# GenAI: Separating Hype from Reality


**Joshua Metcalf**

Forman Watkins & Krutz (Jackson, MS)


**GenAI May Be the Future – But Be Careful Today!**
*Joshua Metcalf*

It can hardly be disputed that Generative AI (GenAI) is the most talked-about tool in the legal profession in 2025. Although still emerging, GenAI use cases for lawyers present transformative opportunities to increase efficiency across the profession. GenAI may one day help attorneys devote greater focus to higher-value analysis and strategy, producing work that is deeper, more precise, and more resonant with clients and courts. However, many vendors of legal GenAI tools are promising an idealized version of the legal industry by suggesting that most legal tasks can now be automated without much human involvement. But has GenAI really reached a point of sophistication that replaces an attorney's judgment? The answer is a resounding no, as evidenced by the increasingly common headlines about AI-hallucinated content in court filings.

That leaves us with important questions to consider: How are law firms and corporate legal departments using GenAI in their practice? Where is the technology effective? Where is it lacking? How do law firms and legal departments integrate GenAI responsibly?

As with all AI-related questions, the answers are not as concrete as we would like. The technology is still new, and the use cases are still developing. However, law firms and legal departments must adopt a framework to responsibly grow their integration of GenAI so that as AI develops, firms are proactive in their response.

**Responsible Integration: Every Law Firm Needs an AI Policy**

When lawyers get into trouble with AI, it is often because they either lack the time or willingness to conduct due diligence into the propositions that their GenAI platform has produced. Every firm and legal department, regardless of the level of its AI integration, must have an AI policy so that attorneys know about and are held to an established standard.

American Bar Association Formal Opinion 512[1] offers guidance for attorneys using GenAI tools. This guidance forms a helpful foundation for firms and legal departments that wish to build a policy that empowers their attorneys to ethically and effectively leverage GenAI tools:

- Competence and Supervision –Understanding what GenAI can do today might not be sufficient in two months. This might be the most challenging aspect of adopting a policy, since AI as a technology is constantly evolving, improving, and expanding. GenAI policies should provide regular training and updated use cases so all users can be informed of the current capabilities and limitations of GenAI tools. This requires an executive-level group who not only writes the initial policy, but remains up to date on GenAI products, regulations, and best practices.
- Confidentiality – Not all GenAI tools are built equally, and as such, the risk of disclosing confidential client information can vary depending on the tool. Some products, like Thomson Reuters' CoCounsel, have their own security policies and practices in place to segregate and protect confidential information entered by users. Other tools do not have such a robust security environment, and many systems utilize user data to train their models, raising serious confidentiality concerns. From a policy perspective, the best practice is to have attorneys refrain from entering any confidential or sensitive information into any GenAI tool unless that tool has met internal security standards and been approved for use.
- Communication – It is imperative that attorneys are clear with their clients about how they intend to use GenAI tools. Many clients will likely expect their attorneys to be using AI; some might even find it problematic if their attorneys don't use it. Regardless, erring on the side of informed consent prevents any issues from arising later if attorneys are questioned on their use of GenAI.
- Fees – GenAI tools are often praised for their ability to save time and reduce costs, but viewing them solely

1 ABA Standing Committee on Ethics & Professional Responsibility, Formal Opinion 512: Generative Artificial Intelligence Tools (July 29, 2024).

through this lens risks creating a "race to the bottom." Anyone who has used these tools knows that GenAI tools sometimes, but certainly not always, help users save time. However, no large language model (LLM) is immune from hallucinations. This requires an attorney to confirm that any information provided by a GenAI tool exists and that it stands for the proposition asserted. Even when GenAI saves an attorney time, attorneys' ethical obligations around billing remain unchanged: the advent of AI does not absolve the duty to accurately record the time spent on legal tasks. Moreover, efficiency should not be mistaken for diminished value. In practice, the time saved by eliminating repetitive drafting or streamlining early research enables attorneys to redirect their focus toward complex analysis, nuanced strategy, and higher-order advocacy. The result is not only greater efficiency, but also deeper, more precise, and more resonant work – work that delivers increased value to the client and supports more sustainable fee structures for firms.

In addition to the guidance provided by the American Bar Association, nearly every state's bar association or supreme court has provided guidance to attorneys on the ethical use of GenAI in their state. Every practicing attorney should be familiar with their state's specific guidance on the use of GenAI. The following link is a helpful resource for tracking state-specific GenAI guidance:https://www.justia.com/trials-litigation/ai-and-attorney-ethics-rules-50-state-survey/

**How to Vet AI Vendors**

As law firms and legal departments explore GenAI solutions, one of the most critical decisions they face is choosing the right vendor. The market is saturated with platforms making ambitious claims – some warranted and others aspirational. Careful vetting of vendors is essential to ensure the tool is secure, practical, and properly supported.

- Evaluating Security - Legal work is built on confidentiality. Any AI tool interacting with privileged documents, client data, or internal communications must meet stringent security standards. Look for vendors who can demonstrate compliance with industry-recognized frameworks like SOC 2, ISO 27001, or GDPR. Multi-factor authentication, end-to-end encryption, and clear data retention policies are also table stakes. It's also critical to ask how the vendor's model handles data. Is the firm or legal department's data being used to train the GenAI models? Can the firm or legal department opt out? Will the data be stored permanently on their servers? These questions aren't just technical; they relate directly to client trust and professional responsibility.
- Trial Periods and Pilot Programs - A GenAI demo might be impressive, but real-world use often exposes limitations in accuracy, formatting, or applicability to jurisdiction-specific laws. Conducting a short pilot program with real, though redacted, or specially selected test documents, offers a practical way to evaluate whether the tool truly meets the firm or legal department's needs. Use the trial to evaluate not only output quality but also the user experience, integration with existing systems (like document management or e-discovery platforms), and how the system handles edge cases. Involve attorneys and staff who would use the tool regularly and solicit their feedback directly.
- Implementation Support - Even the most sophisticated AI won't deliver value without thoughtful onboarding. Ask vendors what support they offer during rollout: do they provide training, integration assistance, or custom workflows? Is there a dedicated account manager or support team? A good vendor should act more like a partner than a product seller. They should help you establish clear use cases, success metrics, and training protocols. If they're promising "plug-and-play," that's often a red flag, especially in the legal context, where workflows are nuanced and stakes are high.

**How Law Firms Are Actually Using AI Today**

The conversation about using GenAI tools in the legal context does not always match the implementation. While it is fair to be optimistic about the prospect of AI transforming the legal industry, the current state of how firms use AI is more akin to augmentation rather than automation. The following are some of the current uses of AI in law firms:

- Document Review - Document review might be currently the most effective use case of GenAI in law firms. A 2025 report from Thomson Reuters indicates that 77 percent of the over 500 firms surveyed use GenAI for document review.[2] Given how tedious and time-consuming discovery can become in complex litigation, it is no wonder that firms are getting the most use out of GenAI tools through classification, summarization, and even translation of large numbers of documents at scale.
- Legal Research - Legal research is second only to document review as a top use case in law firms. Thomson Reuters' data indicates that 74 percent of firms surveyed say they use GenAI in legal research. With popular legal research platforms like Westlaw and Lexis both promoting AI-assisted research tools, this is not a surprise. But even the most advanced

2 "2025 Generative AI in Professional Services Report" at p. 15, Thomson Reuters Institute.

AI-assisted research tools fail to replace human judgment in discerning critical components of legal research. As the Boston Bar Journal notes, GenAI has a reliability and perspective problem.[3] That is, GenAI sometimes fails to have the same level of contextual understanding of nuanced issues that an attorney is trained to recognize. This causes certain research outputs from GenAI to incorrectly state the law or completely miss important case law that might be authoritative on an issue. Inconsistencies like this mean that diligent attorneys use GenAI to supplement, but not replace, traditional research methods. Further, attorneys must cite-check and review everything that is produced by GenAI systems to ensure that the final product complies with the attorney's ethical duties.

- Brainstorming - GenAI is proficient in idea productivity. Whether it suggests additional claims or affirmative defenses, or works hypothetical scenarios to evaluate risk, GenAI tools can help lawyers be creative in solving potential and ongoing legal issues.
- Drafting - A study from the Harvard Center on the Legal Profession found in one instance that using GenAI to implement a complaint response system in high-volume litigation matters "reduced associate time from 16 hours down to 3-4 minutes."[4] By using GenAI tools to create an initial draft of a complaint, firms are seeing increased productivity and accuracy. The emphasis here is that these are initial drafts, not final drafts. As the warnings and sanctions section below indicates, lawyers who blindly accept and pass on the work product of GenAI platforms are playing with fire.
- Future Use Cases - The future of Gen AI in the practice of law is unknown and unpredictable. Credible and well-respected attorneys have suggested[5] that using GenAI could be a more effective oral advocate than most attorneys. Implicitly, this also extends to GenAI being a more effective judge of oral arguments, evoking questions of how court systems will use these tools. What is clear is that GenAI, while undoubtedly impressive, is more likely to eliminate or reduce the more time-consuming and mundane legal tasks that attorneys perform. This may free up lawyers who take advantage of these tools to spend more time tackling complex and impactful aspects of their work. The debate about the future of the billable hour warrants its own article, but the true benefit of increased efficiency is not simply taking on more work, but in freeing attorneys to devote greater attention to higher-value analysis and strategy.
- Reducing Lawyer Burnout - One study suggests that using AI to automate mundane and time-consuming tasks can help reduce burnout in legal professionals.[6] In a demanding career filled with deadlines, law firms, legal departments, and their employees may benefit from GenAI alleviating the job dissatisfaction that has been a persistent industry-wide issue for decades.
- Optimism vs Reality - According to a recent article in Bloomberg Law,[7] in 2024, lawyers were highly optimistic that generative AI would revolutionize the practice of law by boosting efficiency, reducing mundane tasks, and even reshaping billing practices. However, by 2025, the reality has not matched those early expectations. While most attorneys have experimented with AI tools, they now report only modest or limited effects on workflows, automation, and billing. For example, three-quarters of lawyers in 2024 predicted an increase in automated workflows, but only 37 percent actually observed such improvements a year later. Similarly, 39 percent expected AI to accelerate adoption of alternative fee arrangements, yet just 9 percent saw that prediction materialize. The survey's findings are reported below:


The article posits that the gap between expectation and reality is driven by several factors. First, it may simply be too early to judge the true effects. Second, the complexity of legal work and the profession's natural risk aversion slow down adoption, particularly when ethical obligations, reputational risks, and the potential for AI "hallucinations" are considered. And third, a fragmented regulatory environment creates uncertainty and makes compliance difficult. These hurdles, combined with concerns over data security, client confidentiality, intellectual property,

3 Dyane O'Leary, "With Responsible Use and Advanced Tools, Generative AI Will Change the Way We Litigate," Boston Bar Association, Published August 7, 2024.

4 Robert J. Couture, "The Impact of Artificial Intelligence on Law Firms' Business Models," Harvard Center on the Legal Profession, Published February 25, 2025.

5 Adam Unikowsky, "Automating oral argument," Published July 7, 2025.

6 "2025 State of AI in Legal," Ironclad.

7 Linda Masina, "ANALYSIS: AI in Law Firms: 2024 Predictions; 2025 Perceptions," Published August 15, 2025.

and algorithmic bias, mean that many firms are adopting AI cautiously.

### Warnings and Sanctions: When GenAI Use Goes Wrong

Stories of hallucinations and other AI-related blunders have become all too common among the legal community. These instances of misusing or over-relying on GenAI underscore how important it is for attorneys to understand the current limitations of GenAI technology and the need to integrate GenAI tools responsibly.

- Law Firms Sanctioned for Hallucinated Cases - Although the use of hallucinated cases and related information initially seemed to be limited to over-eager and under-prepared plaintiff's firms, prominent defense firms have been caught in hallucination scandals this year as well. In one example, attorneys from regional defense firm Butler Snow were sanctioned for submitting incorrect, AI-generated citations to the Northern District Court of Alabama using cases ChatGPT completely fabricated.[8] The offending attorneys were reprimanded, disqualified from the case, referred to the Alabama Bar, and ordered to provide a copy of the sanctions to their clients and every presiding judge in every pending matter (state or federal) where they were counsel of record.[9] The opinion is worth reading because of the very high duty the judge placed on every attorney whose name appears on a signature block – regardless of whether the attorney signed the pleading or drafted any portion of the pleading. The firm, which had a robust AI policy in place, escaped sanction, but spent countless time and dollars defending the matter – even engaging a team of 28 attorneys at Morgan, Lewis & Bockius LLP to conduct an independent review to verify more than 2,400 separate legal citations across 330 firm filings in Alabama federal courts and the Eleventh Circuit. The mistake could have been avoided by verifying that the cases ChatGPT cited existed and stood for the stated proposition.
- Expert Witness Uses Hallucinated Articles - In Kohls v. Ellison, No. 0:24cv03754 (D. Minn. Jan. 10, 2025), a federal judge rebuked an attorney general after his misinformation expert used ChatGPT4-o to draft testimony, citing entirely fabricated sources. The judge described it as "ironic" that an AImisinformation expert became a victim of AI hallucinations. The court found that this mistake had "shattered his credibility" and struck the testimony. The court also emphasized lawyers' ethical duty under Rule 11 to verify AIproduced content before filing.
- Judges are not Immune to GenAI Hallucinations - Even the Courts are not immune to the dangers of incorporating hallucinated information into their opinions. In Shahid v. Esaam, No. A25A0196, 2025 WL 1792657, at *1 (Ga. Ct. App. June 30, 2025), a Georgia divorce case, a trial judge issued an order relying on two AI-fabricated cases. It wasn't until the matter went up on appeal that the hallucinated cases were discovered, prompting the appellate court to vacate the decision and impose a $2,500 fine on the attorney. This incident highlights a serious limitation of GenAI in legal practice: its potential to mislead even courts. It does not take a great leap in logic to believe that there is a danger of completely non-existent cases invertedly becoming part of binding precedent within certain jurisdictions. Hallucinations have also been incorporated into opinions if federal court. This past summer, a federal judge in New Jersey withdrew a ruling on a motion to dismiss after both parties noted that the court had cited hallucinated cases and misstated other cases.[10] Both the courts and litigants must remain vigilant against the incorporation of hallucinated cases, facts, and other information into the legal record.

### Conclusion

Generative AI represents a transformative tool for law firms and legal departments, offering the potential to significantly enhance efficiency. Yet, this efficiency is not an end in itself; rather, it creates an opportunity for attorneys to focus on higher-value tasks, including complex analysis, strategic planning, and persuasive advocacy. The technology is not infallible. Like human attorneys, it makes errors and requires careful oversight. Just as lawyers supervise the work of junior associates, any work product generated by GenAI demands review and critical evaluation to ensure accuracy, ethical compliance, and alignment with client objectives.

Firms that proactively develop clear policies, stay informed about technological advancements, and thoughtfully integrate GenAI into their workflows will not only maintain professional standards, but also deliver work that is deeper, more precise, and overall, a more excellent product. By contrast, those who remain uninformed or underestimate the complexity of the tool risk missteps, diminished quality, and reputational harm. The promise of GenAI lies not in replacing legal judgment, but in enhancing it, allowing the profession to deliver greater value to clients while maintaining the highest standards of accuracy, ethics, and professional judgment.

8 Ralph Chapoco, "Law firm says attorney's use of AI was 'isolated event'," Alabama Reflector, Published June 24, 2025.

9 https://fingfx.thomsonreuters.com/gfx/legaldocs/egpbqonmgvq/Butler%20Snow%20Lawyers%20Sanctions%20Order.pdf

10 Eugene Volokh, "Federal Judge Withdraws Opinion 'After Lawyers Complained That [It] Contained … Made-Up Quotes and Misstated Case Outcomes'" Reason Magazine, Published July 23, 2025.


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Devoted and driven, Joshua Metcalf never slows down. Always giving 100% of his effort to his work, Joshua has been organizing the defense of complex cases nationwide for more than 20 years, building a respected reputation in that time. Having learned the need for attention to detail during his tenure at the Virginia Military Institute, Joshua uses his strong desire to serve and his relentless work ethic to offer his clients a detail-focused but efficient representation, which emphasizes creative strategies and a thorough deconstruction of his opponent's case. Vowing never to be outworked or out-prepared, Joshua offers clients a strong legal voice and an organized defense to help them identify the issues that really matter to them and to their cases, and to implement appropriate plans to ensure success from both a legal and business perspective. With an insatiable intellectual curiosity, Joshua loves digging into complex medical and scientific issues, and enjoys collaborating with the talented members of his team to produce a consistently excellent product for his clients. For Joshua, business is personal and, as his clients can attest, a close working relationship and regular communication is at the heart of any engagement with Joshua and his team. Joshua carries this same focused intensity with him away from work, which is reflected in his commitment to his community and his dedication to his wife and four children. If he is not in his office or on the road for a client, chances are you will find him with his wife and kids - at a gymnastics meet or baseball game, on a campout, or doing tractor therapy at the family's tree farm.

**Practice Areas**
- Appellate
- Asbestos
- Chemical & Mold Exposure
- Commercial Litigation
- Construction
- Environmental Litigation
- Hearing Loss
- Personal Injury
- Product Liability
- Cryptocurrency
- Pesticide

**Professional Recognition**
- Martindale-Hubbell® AV Preeminent® Peer Review Rating
- The Best Lawyers in America® (2019-2026): Litigation – Environmental, Mass Tort Litigation/Class Actions – Defendants, Product Liability Litigation – Defendants
- Selected to Mid-South Super Lawyers (2019-2023)
- Selected to Mid-South Rising Stars (2010-2016)
- Selected as one of Mississippi Business Journal's Leaders in Law (2013)

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- University of Virginia School of Law, J.D.
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# State Law Challenges: Play Chess, Not Checkers


**Katie Reilly**

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**Key Areas of State Legislative & Regulatory Focus in 2025–2026 - State Law Challenges: Play Chess, Not Checkers**
*Katie Reilly and Natalie West*

State legislatures throughout the nation have become increasingly aggressive in their attempts to fill the regulatory void left by the absence of comprehensive federal legislation or regulatory enforcement, with state legislative and regulatory activity in 2025 prioritizing such areas as consumer data privacy, artificial intelligence (AI), and consumer financial protection. This trend is likely to continue in the wake of the new administration's deregulatory efforts. This article provides a high-level overview of key legislative developments in these areas, and strategies for monitoring and challenging adverse legislation.

**Consumer Data Privacy**

Consumers share personal information through websites and online portals with increasing frequency in the modern world, leading to the collection of vast amounts of data by a wide range of companies. While there are sector-specific privacy regulations at the federal level, there is no comprehensive federal data privacy law that governs the collection, use, sale, and protection of such data. States have moved to fill that void. Since 2018, 20 states have enacted comprehensive data privacy laws, with many taking effect in 2025 and 2026. Another six states have enacted targeted data privacy laws. Multiple states are considering additional privacy legislation in 2026, either for the first time or to amend or supplement existing law.

Data privacy laws vary from state to state but generally include two types of provisions—those relating to consumer rights and those imposing obligations on businesses that collect consumer data. All privacy laws give consumers the right to access and correct data, while most states grant some assortment of additional rights, such as the right to delete data, to limit or opt out of sharing or selling sensitive personal information, and/or to enforce data protection measures and security standards. Data privacy laws have various notice requirements to which businesses must adhere, and generally require that businesses conduct a data privacy impact assessment and that they establish and maintain reasonable standards to protect consumers' confidentiality.

In addition to these commonly shared components, recent and emerging legislation is increasingly focused on AI accountability and expanded definitions of sensitive information. Several states have established consumer opt-out rights for or otherwise restricted the use of data for profiling, particularly with respect to automated decision-making that has legal or similarly significant effects, such as decisions regarding the denial and/or provision of financial and lending services, housing, insurance, or employment opportunities. Various states have also targeted the collection and use of various types of information, such as geolocation data, biometric data, and neural and biological data, and established heightened protections for minors. Another emerging trend could be stricter data minimization requirements, as provided in the new Maryland privacy law that takes effect in October 2025.

**Artificial Intelligence**

States are also working to fill the regulatory gap left by the lack of comprehensive federal legislation on AI. According to the National Conference of State Legislatures, every state, Puerto Rico, the Virgin Islands, and the District of Columbia have introduced AI-related legislation in 2025, and 38 states have enacted some kind of AI-related law so far this year. States may also seek to regulate AI through new or existing privacy laws.

State regulation of AI remains fluid, and both proposed and enacted AI legislation varies considerably, ranging from the comprehensive legal framework enacted by Colorado to the more tailored, industry- or use-specific laws passed in other states. The following list highlights emerging trends across the AI-related laws states have considered or enacted:

- Anti-bias measures aimed at high-risk AI systems. Lawmakers in multiple states have proposed or enacted anti-discrimination measures targeting "high-risk" AI systems used for algorithmic or automated decision-making in a range of areas, such as healthcare, insurance, housing, employment, financial services, and/or others that are deemed to have a consequential impact on consumers. These laws typically obligate AI developers to proactively assess discriminatory risks and undertake measures to mitigate algorithmic bias and impose consumer-disclosure requirements related to the use of automated decision-making and/or state-reporting requirements concerning instances of discrimination and related risks.
- Chatbots. Several state legislative proposals have targeted the use of chatbots, seeking to ensure transparency and protect consumers against deceptive practices. These laws typically require prominent disclosures to inform consumers they are interacting with AI and may establish liability for misleading or deceptive chatbot communications.
- AI-generated content. State lawmakers have also considered and/or enacted legislation that regulates providers of generative AI systems and platforms that host synthetic content. While these laws vary, they are generally focused on informing consumers that content is AI-generated through disclosure requirements and, in some cases, requiring that AI-generated content be identified through watermarks.
- Data centers and energy use. State legislatures nationwide are considering new laws to address the growing energy demands of AI development and related environmental concerns, while also seeking to ensure that data centers do not cause rate spikes for consumers. These proposals vary widely, from those that would regulate the sources of power for data centers to those mandating reporting requirements for anticipated and ongoing energy use and environmental impacts to those focused solely on ways to regulate and/or mitigate against high energy prices.

**Consumer Financial Protection**

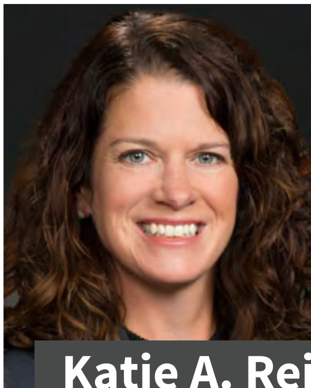
State consumer financial protection laws are becoming more robust as states step in to fill the gap left by decreased federal enforcement, particularly given the stark shift in the federal Consumer Financial Protection Bureau's (CFPB) enforcement approach. Key areas of state legislation and regulatory focus include the following:

- Earned Wage Access. Several states have recently enacted or are considering laws targeting regulation of earned wage access ("EWA") products and services, which allow employees to access a portion of their already-earned wages before their scheduled payday. Though variations exist across states, these laws generally seek to create new licensing and/or disclosure requirements for EWA providers and prohibit certain practices, such as requiring a credit report to determine consumer eligibility or charging a late fee or other penalty for failure to repay funds promptly. These laws typically define EWA providers to exclude employers that advance wages directly to employees or independent contractors and/or provide exemptions for entities that are subject to other regulatory schemes governing financial services providers.
- Medical Debt Reporting. Although the federal CFPB's rule on medical debt reporting has been abandoned by the new administration and vacated by a federal court, states are once again stepping in to fill the void. According to the National Consumer Law Center, 15 states have already enacted legislation prohibiting certain practices relating to medical debt reporting, with nine going into effect in 2025 or on January 1, 2026. These laws generally prohibit or restrict the use of medical debt information in consumer credit reports and in credit evaluations. Some laws may also prohibit or restrict entities from furnishing medical debt to credit reporting agencies.
- "Junk" Fees. In addition to the Federal Trade Commission's rule on junk fees, which went into effect earlier this year, state regulators have also sought to create pricing transparency through mandatory disclosure practices. Some states have enacted targeted laws addressing practices in specific markets or industries (e.g., live-event ticket sales, hospitality, ride-share apps), while other states have imposed disclosure requirements concerning mandatory fees and surcharges in consumer goods and services advertising generally. State laws vary with respect to how and when such disclosures must be made.

In 2025, state lawmakers dedicated substantial attention to implementing additional protections for consumer data privacy and financial protection and to regulating AI. Absent further federal legislation and regulatory enforcement on these issues, state legislative and regulatory activity is likely to continue in these areas, as well as others, in 2026.

The rise in state oversight and regulatory activity presents significant challenges to companies that face a patchwork of increasingly aggressive laws across jurisdictions. In this environment, companies should develop a proactive strategy for shaping and potentially challenging legislative and regulatory developments as they emerge. Key components of such a strategy may include:

- Robust monitoring. Monitor state legislative activity and regulatory developments that affect your business, including the introduction of legislative bills and new agency rules, as well as proposed changes to existing regulations.
- Early engagement. Use available state regulatory comment periods, legislative lobbying, and other channels to provide feedback on new proposals.
- Proactive legal challenges. Be prepared to litigate adverse legislation and regulations by filing affirmative lawsuits when valid legal challenges exist.
- Use available leverage. When targeted by state enforcers, consider strategically sequencing settlements and potential litigation for purposes of creating leverage to counter investigations brought by state agencies.



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# Katie A. Reilly

**Firm President | Wheeler Trigg O'Donnell (Denver,CO)**

The President of Wheeler Trigg O'Donnell, Katie Reilly is an experienced trial lawyer whose practice focuses on antitrust, class action, and commercial litigation matters. Katie represents corporate and individual clients, both as plaintiffs and defendants, in a wide spectrum of complex litigation and arbitrations at the trial and appellate levels. For four straight years, BTI Consulting has named Katie a nationwide Client Service All-Star MVP based exclusively on input from corporate counsel. Chambers USA ranks her for commercial litigation in Colorado.

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
- Securities Litigation & Enforcement Defense

**Honors**
- Chambers USA - Band 2, General Commercial Litigation - Colorado, 2021-2025; 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
- The Best Lawyers in America - Litigation - Antitrust Lawyer of the Year, Denver, 2021, 2023, 2025; Bet-the-Company Litigation, 2024-2026; Commercial Litigation, 2018-2026; Antitrust Litigation, 2018-2026; Mass Tort Litigation / Class Actions - Defendants, 2022-2026
- Benchmark Litigation - Top 250 Women in Litigation, 2025; Under 40 Hot List, 2016-2017; Future Star, 2021-2024
- 5280 Magazine Top Lawyers - Antitrust, 2020-2021, 2023-2025; Civil Litigation, 2021, 2023-2024
- Law Week Colorado - Top Women Lawyers, 2016; "People's Choice" Antitrust Lawyer, 2016-2018, 2020, 2023; "Barrister's Best" Antitrust Lawyer, 2019
- Denver Business Journal - "Forty Under 40," 2012
- Colorado Super Lawyers - Antitrust Litigation, 2017-2025; Top 100, 2018-2025; Top 50 Women, 2018-2025
- Colorado Rising Stars - Business Litigation, 2009-2016

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

# Driving Change: Current Issues in the Automotive Industry

**Adam Stephens**
Miller Thomson (Canada)

**Driving Change: Navigating Shocks in the Automotive Industry**
*Adam Stephens*

- From tariffs to technology, old contracts are colliding with new realities -

**The Industry Under Stress**
For decades, the automotive industry operated on the assumption of relative stability. Original equipment manufacturers, suppliers, and dealers anticipated steady demand, gradual technological change, and regulatory regimes that evolved at a manageable pace. Those assumptions have eroded.

In rapid succession, the industry has faced supply chain instability, the uncertain pace of electric vehicle adoption, tariffs on parts and materials and the emergence of driverless technology. Each of these developments has disrupted long-standing supply arrangements and exposed contractual and regulatory gaps. Legal doctrines that once seemed well-settled are now being tested in ways that affect participants across the sector.

**Supply Chain Instability Beyond Tariffs**
The pandemic exposed the fragility of just-in-time supply chains, as factory shutdowns, clogged shipping routes, and semiconductor shortages disrupted global production. Even modest contractual delays rippled through assembly plants, forcing temporary closures and lost output. These disruptions tested doctrines of impossibility and commercial frustration, and in many cases left parties without clear contractual remedies. The experience has led many companies to reconsider their reliance on single-source or offshore suppliers, with some moving toward near-shoring, dual-sourcing, or building strategic inventory reserves. For legal counsel, this shift creates new issues: how to allocate scarce components among customers, how to define priority rights in contracts, and how to manage remedies when delivery obligations cannot be met in full.

**EVs and the Reality Gap**
The promise of rapid electric vehicle adoption has given way to a more complicated reality. Governments have (with considerable vacillation) promoted the transition with incentives and mandates, OEMs have unveiled ambitious conversion plans, and suppliers have invested heavily in expanded capacity. Yet consumer uptake has been slower than expected, constrained by price, infrastructure, and hesitancy over range and performance.

The consequences for suppliers are significant. Investments premised on high volumes have not been justified by actual orders. OEMs point to contractual provisions allowing their requirements to decline, while suppliers argue that such reductions are inconsistent with the duty of good faith. These disputes are further complicated by regulatory volatility, as jurisdictions alternately accelerate or relax zero-emission requirements. The result is a moving target that makes long-term forecasting difficult.

The challenges of EV adoption are magnified by global regulatory divergence. The European Union has committed to phasing out new internal combustion engine vehicles by 2035, creating strong pressure for rapid EV deployment. In contrast, U.S. federal policy has shifted with changes in administration, while the Canadian government has retreated from (it says "paused") its mandate on EV adoption. China, meanwhile, has accelerated deployment through aggressive state support, piloting large-scale EV adoption in designated zones. For multinational manufacturers, these differences complicate forecasting and product design. A vehicle compliant in one market may not meet standards in another, and regulatory volatility makes long-term investment decisions fraught. The absence of harmonization creates compliance costs and legal uncertainty, while also laying the groundwork for contractual disputes when projected demand tied to government mandates fails to materialize.

**Tariffs and Trade Disruptions**
The imposition of U.S. tariffs on auto parts has shaken traditional supply relationships. Many contracts never contemplated sudden government-imposed costs of

this nature. Predictably, disputes have arisen over responsibility. Buyers argue that tariffs are a form of tax to be borne downstream, while suppliers contend that they cannot shoulder such unexpected costs and remain viable.

Even where liability is defined, the indirect effects are profound. Suppliers unable to manage increased costs may seek early termination or demand renegotiation, only to face claims of breach. OEMs, meanwhile, are recalibrating sourcing strategies in light of global uncertainty. To manage these risks prospectively, companies are experimenting with more precise drafting around tariff allocation, introducing renegotiation mechanisms, and clarifying the reach of force majeure. Courts, for their part, are examining whether parties invoking contractual flexibility are acting in good faith or attempting to escape obligations. The evolving treatment of requirements contracts illustrates the tension between flexibility and enforceability in the current environment.

**Driverless Cars and Liability in Motion**

Autonomous and driverless vehicles raise still more complex questions. Traditional tort law presumes driver fault, but that model falters when a software system makes the decisions. Liability could fall on the manufacturer, the software developer, the fleet operator, or even the nominal "driver." The lack of clarity leaves all parties exposed.

Insurance structures built on driver responsibility are similarly strained. Product liability doctrines may need to evolve, or new compensation systems may emerge. Regulators are not providing uniform answers: some jurisdictions are embracing testing and deployment while others impose tight restrictions, leaving manufacturers and suppliers to navigate a patchwork of obligations. Data adds yet another dimension, as autonomous vehicles produce massive volumes of information and present cybersecurity risks. Issues of privacy, intellectual property, and cross-border compliance are now integral to assessing liability exposure.

**Common Threads and Emerging Lessons**

Although supply chain shocks, EVs, tariffs and driverless vehicles present distinct challenges, they share unifying themes. Each represents an external shock that supply arrangements were never designed to withstand. Each forces a confrontation over who bears the costs when circumstances change. And each underscores the tension between the need for certainty in commercial relationships and the imperative of flexibility in a volatile market.

The lessons are emerging. Counsel are turning to clearer allocation of risk in contracts, more robust renegotiation mechanisms, and litigation strategies that test the boundaries of doctrines like good faith, force majeure, and frustration of purpose. Courts and regulators are being asked to balance stability with fairness, while companies must design agreements that protect against today's risks without locking them into untenable obligations tomorrow.

**Conclusion**

The automotive industry is navigating disruption on multiple fronts. Supply chain shocks, uneven EV adoption, tariffs and autonomous technology are reshaping expectations and forcing new approaches to contract drafting, dispute resolution, and risk management. These shocks are unlikely to be the last. The challenge for legal practitioners is to help clients adapt frameworks built for stability to an era defined by rapid change, ensuring resilience in a sector where uncertainty is the only constant.

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# Adam Stephens

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Adam Stephens, currently Chair of Disputes and on the firm's Executive Committee, brings to clients a wealth of experience as a commercial litigator. He expertly handles cases in various areas, including shareholders' rights, contract disputes and real property law. As a trusted advisor, Adam is recognized for providing practical and strategic advice to his clients.

Adam actively engages with the legal community through publications and lectures. He presents on litigation skills training and on areas of the law, such as contractual obligations, leasing duties and procurement matters.

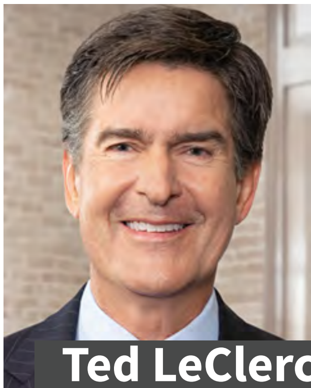
Adam is a member of the Advocates' Society, the Ontario Bar Association, and the Canadian Bar Association. Additionally, he has been named a Fellow of the Litigation Counsel of America. He has been recognized by Lexpert, Best Lawyers in Canada and Benchmark Canada.

**Expertise**
- Arbitration & Mediation
- Commercial Litigation
- Contractual Disputes
- Shareholders Disputes
- Lloyd's of London and international insurance

**Industries**
- Automotive
- Charity & Not-For-Profit
- Life Sciences
- Real Estate
- Municipal, Planning & Land Development
- Insurance and Risk Management

**Recognition**
- Fellow, Litigation Counsel of America
- The Best Lawyers in Canada –Corporate and Commercial Litigation, 2021-2026
- The Canadian Legal Lexpert Directory – Litigation – Corporate Commercial, 2023, 2025
- Benchmark Canada, Litigation Star: General Commercial, 2019 – 2025

**Education**
- LL.B., Dalhousie University, 2001
- B.A., McGill University



# Neither Divided nor Conquered: A Unified Approach to Nuclear and Thermonuclear Verdicts

**Ted LeClercq**
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**Diffusing the "Bomb on the Bus": Using a Unified Approach to Time-Limiting Demands, With an Eye to Avoiding Both Excess and, of Course, Nuclear Verdicts**
*Frederic Theodore ("Ted") Le Clercq*

Time-limited demands are everywhere these days. These demands are often a bit like the bomb on the bus in the 1994 Keanu Reeves movie, Speed, since they are set to explode unless carefully diffused by collaborative and careful efforts.

These types of demands represent an effort by plaintiffs' attorneys to pinch both the insured and insurer and drive a wedge of dispute between them. Each state may have different rules for time-limited demands.

To stimulate discussion based on the experiences of our group leaders and attendees, we examine the rules for these demands in four (4) major jurisdictions: New York; California; Florida; and Texas. What do these major jurisdictions teach us about diffusing the bomb on the bus? What can you tell the group about your experiences from your state?

The pressure to settle a big case, with an early time-limited demand, is also magnified because we live in an age of both excess verdict exposure and, at the far extreme, nuclear and thermonuclear verdicts. We will examine some strategies to avoid those extreme verdicts. We will also discuss some of those runaway jury verdicts to get the views of our group about how these verdicts impact our practices, how to guard against them, and what our group sees as a result of them.

**Time-limited Demands and Excess Exposure Across Four (4) State Rules: New York; California; Florida; and Texas.**
As a foundational matter, each state may impose a duty of good faith on insurance companies. This duty is derived from the insurance carrier's discretion and exclusive right to control an insured's defense. In the event that a claim or suit arises, each state may impose a duty to settle on the insurer. Where an insurer unreasonably fails to do so, Courts may hold them liable for bad-faith failure to settle. This can be costly to insurers as courts can hold them liable for the verdict in excess of the policy limits.

While many of the same principles are found across the country, we outline the nuance with which four (4) major jurisdictions treat time-limited demands and excess verdict exposure: New York; California; Florida; and Texas.

A. New York: the "gross disregard" standard.

An insurer risks being charged with bad faith where it is presented with a settlement demand within policy limits and advances only its own interests. New York law requires insurers to balance their own interests in minimizing payments with the insured's interest in avoiding liability beyond policy limits. Pavia v. State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 452 (N.Y. Ct. App. 1993) (citing Brown v. United States Fid. & Guar. Co., 314 F.2d 675,678 (2d Cir. 1963).). New York courts, however, require something more than ordinary negligence for bad faith failure to settle. Id. at 453.

New York courts apply a "gross disregard" legal standard for bad faith failure to settle. That is, "a deliberate or reckless failure to place on equal footing the interests of its insured with its own interest when considering a settlement offer." Id. The "gross disregard" standard may also be described as "a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted." Id. at 453-54.

First, to establish a bad-faith action for failure to settle a plaintiff must prove that a demand for settlement was made. Pavia, 82 N.Y.2d at 454. Yet, evidence that a settlement offer was made and not accepted is not dispositive of a bad faith claim. Id. Indeed, an insurer "cannot be compelled to concede liability and settle a questionable claim", St. Paul Fire & Mar. Ins. Co. v. United States Fid. & Guar. Co., 43 N.Y. 2d 977, 978, simply "because an opportunity to do so is presented." Knobloch v. Royal Globe Ins. Co., 38 N.Y.2d 471, 479. "Rather, the plaintiff in a bad-faith action must show that the insured lost an actual opportunity to settle the claim at a time when all serious doubts about the insured's liability were removed." Pavia, 82 N.Y.2d at 454.

I. Time-limited Demands Under New York Rules.

To establish a bad-faith action, courts first require that a settlement offer be made. Id. at 454. Simply because a settlement offer is made and subsequently rejected does not mean that the rejection was in bad faith. Id. This is true, even when the "injury is severe and the policy limits are significantly lower than a potential recovery[.]" Id. Instead, New York courts are to "include consideration of all of the facts and circumstances relating to whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement. Id.

Thus, courts are to consider the following:

- the plaintiff's likelihood of success on the liability issue;
- the potential magnitude of damages and the financial burden each party may be exposed to;
- the insurer's failure to properly investigate the claim and any potential defenses;
- the information available to the insurer at the time the demand for settlement is made;
- the insured's fault in delaying or ceasing settlement negotiations by misrepresenting the facts; and
- any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle." Id. at 454-55.

In Pavia, the court held that the plaintiff had failed to establish a prima facie case of bad faith. Specifically, "[p]laintiff's allegations of bad faith stem principally from defendant State Farm's failure to abide by a settlement deadline unilaterally established by plaintiff Pavia's counsel and its delay in ultimately offering the policy limits in settlement." Id. at 455. Further, the court says: "permitting an injured plaintiff's chosen timetable for settlement to govern the bad-faith inquiry would promote the customary manufacturing of bad-faith claims." Id. The court took in all the facts and circumstances at the time the insurer received the settlement demand, stating "[P]laintiff's time-limited settlement offer came at a relatively early point in the litigation . . . at the time the 30-day settlement demand was made, there remained several significant questions about the insured's liability, which defendant was entitled to investigate and explore." Id. Thus, the defendant's failure to abide by the claimant's arbitrarily set time-limit was not dispositive of the bad faith claim.

II. Excess Verdict Exposure Under the New York System.

Whether there is excess verdict exposure to the insured likewise factors into the bad faith equation. Excess verdict exposure is an important factor because the damages recoverable in bad faith actions are generally measured by the amount for which the insured becomes liable in excess of the policy coverage. Soto v. State Farm Ins. Co. 83, N.Y.2d 718, 723 (1994) (citing Gordon v. Nationwide Mut. Ins. Co. 30 N.Y.2d 427, 436-7). Thus, the standard remains that an insurer is liable for bad faith where "all serious doubts about the insured's liability were removed" and insurer acts in "gross disregard" of the insured's interest. Id. (citing Pavia 82 N.Y.2d at 453).

Notably, the Soto decision outlines New Yorks public policy precluding the indemnification for punitive damages. Id. at 724. Where the excess civil judgment is attributable to punitive damages, an insured may not collect on a bad faith claim. Specifically,

> We conclude that a rule permitting recovery for excess civil judgments attributable to punitive damage awards would be unsound public policy. We have previously endorsed the fundamental principle that no one shall be permitted to take advantage of his own wrong. This principle is not vitiated by the existence of an entirely separate and analytically distinct wrong on the part of the insurer.
> Id.

B. California: "reasonable" under circumstances?

California law implies a covenant of good faith and fair dealing that obligates an insurance company "to make reasonable efforts to settle a third party's lawsuit against the insured." This standard looks to the "reasonableness" of the insurer's conduct such that the insurer must have acted unreasonably. Further, California law requires global settlement, meaning neither the insurer nor the insured can settle separately. Merritt v. Reserve Ins. Co., 34 CA3d 858, 871 (1973).

As a threshold requirement for an action for bad faith failure to settle, a policy must actually cover the claim. Marie Y v. General Star Indem. Co. 110 CA4th 928, 958 (2003). Further, a plaintiff must prove each of the following to establish an insurer's liability for bad faith failure to settle: (1) claimant made a reasonable settlement offer within policy limits, (2) insurer had an opportunity to settle within policy limits and failed to do so, (3) the insurer's conduct in failing to accept the demand was unreasonable, (4) a judgment was entered against the insured for an amount in excess of policy limits, and (5) the claimant substantially complied with Cal Civ. Proc. §§ 999, 999.1-5 (2023). See Bad Faith Refusal to Settle, California Practice Guide: Insurance Litigation Ch. 12B-B.

I. Time-limited Demands Under California Rules.

The effect of a time-limited demand on an insurer's future liability depends on the reasonableness of the insurer's conduct at the time the demand was received. The standard is "whether the insurer's conduct was unreasonable under all of the circumstances." Graciano v Mercury General Corp., 231 CA4d 414, 427 (2014). Thus, "a claim for 'wrongful refusal to settle' requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance." Id. at 434. The reasonableness of the time limit is to be judged under the totality of the circumstances and, further, the reasonableness of the insurer's rejection "must be measured in the light of the time limitation which plaintiff had placed on her." Id. (citing Martin v. Hartford Acc. & Indem. Co. 228 CA2d 178, 185 (1964)).

In Graciano, the court found the following:

In the three weeks after it first learned Graciano was alleging someone insured by CAIC had injured her, CAIC was able to (1) determine that the policy identified by Graciano (Jose's policy) could not provide a source of compensation for her, (2) identify that a person (Saul) different from the one identified by Graciano ("Saulay Ala") was responsible for Graciano's injuries, (3) determine Saul did have a policy available as a source of compensation, and (4) tender CAIC's "full policy limits" in an attempt to effectuate a settlement of Saul's liability.

The Court held that although "substantial evidence" indicated that the insurer could have been able to resolve the confusion earlier, and to offer to settle earlier than it did, "perfection is not required." The evidence showed, "at most, that CAIC could have resolved the confusion more promptly." Further, by offering to tender the full policy limits in an attempt to settle the claim, the insurer acted in good faith as a matter of law. Id. at 435.

The California Code of Civil Procedure, Cal Civ. Proc §§ 999, 999.1-5 provides additional statutory requirements for time-limited demands. Time-limited demands must be in writing, labeled as a time-limited-demand (or reference Cal Civ. Proc. § 999) and contain the following:

- The demand must include the time for acceptance; this period may not be less than 30 days if demand is transmitted by email, fax, or certified mail, and not less than 33 days if transmitted by regular mail;
- The demand must contain a clear and unequivocal offer to settle all claims within policy limits;
- The demand must include a complete release from the claimant for the liability insurer's insureds from all present and future liability for the occurrence;
- The demand must include the date and location of the lost, and claim number, if known;
- The demand must include a description of all known injuries sustained by the claimant; and
- The demand should include reasonable proof in support of the claim.

Similarly, acceptance requires a written acceptance of the demand in its entirety. Written requests for clarification, additional information, or an extension of time made during the time for acceptance of such demand do not constitute a counter-offer or a rejection.

II. Excess Verdict Exposure Under the California System.

The focus for the reasonableness of a claimant's demand is "whether, in light of the victim's injuries and the probable liability of the insured, [the] ultimate judgment is likely to exceed the amount of the settlement offer." Johansen v. California State Auto. Assn. Inter-Ins. Bureau, 15 C3d 9, 16 (1975). Some cases require the insurer to settle where there is a "substantial likelihood" or "great risk" of excess verdict exposure. See Murphy v. Allstate Ins. Co., 17 C3d 937, 941 (1976) ("substantial likelihood"); Comunale v. Traders & Gen. Ins. Co., 50 C2d 654, 659 (1958) ("great risk"). If an insurer fails to settle under such circumstances, it may be held liable for the entire amount of the judgement against the insured, including the portion exceeding policy limits. Courts state that "[c]onduct by the insurer which exposes the insured to [risk of excess verdict exposure], and which may be financially catastrophic for the insured, will not be rewarded." Hedayati v. Interinsurance Exchange of the Automobile Club, 67 CA5th 833, 844 (2021). To minimize this risk, insurers are required "to consider in good faith the interests of the [insured] equally with its own and evaluate settlement offers within policy limits as though it alone carried the entire risk of loss." Id. (citing Merritt, 34 CA3d at 871.).

C. Florida: the "good faith" duty.

Florida imposes the same duty of good-faith in handling claims regarding its insured. Specifically,

> This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement off that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.
>
> Boston Old Colony Ins. Co v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980).

I. Time-limited Demands Under Florida Rules.

In Florida, the critical question in bad faith is whether an insurer worked diligently and quickly to investigate claims. Harvey v. GEICO Ins. Co., 259 So.3d 1, 7 (Fla. 2018). Thus, "offering to tender, or even tendering the policy limits does not automatically insulate an insurer from a bad-faith claim, such as where the insurer unreasonably fails to comply with a time-limited offer or where the insured does not begin settlement negotiations in a reasonable time." Safeco Ins. Co. of Illinois v. Heikka, 402 So.3d 1013, 1021 (2024); see Berges v. Infinity Ins. Co., 896 So.2d 665, 676-77 (Fla. 2004) (holding that insurer's agreement to tender policy limits before offer expired did not insulate insurer from bad faith, where insurer had not actually tendered policy limits within that time; Powell, 584 So.2d at 14 (holding that a bad-faith claim was not precluded where insurer tendered policy limits, because insurer had not responded to settlement offer for over sixty days and after lawsuit had been filed, which a jury could find unreasonable.) Instead, the analysis once again hinges on the reasonableness of the insurer's failure to comply with the demand.

2. Excess Verdict Exposure Under the Florida System.

Florida courts have held that where a judgment in excess of policy limits is likely, "an insurer has an affirmative duty to initiate settlement negotiations." Powell v. Prudential Prop. & Cas. Ins. Co., 584 So.2d 12, 14 (Fla. 3d DCA 1991). This duty is derived from the insurer's obligation to put the interest of the insured on equal footing as their own. If an insurer fails to initiate settlement negotiations it risks being exposed to a bad faith claim. Even where no settlement offer, time-limited or otherwise, is made, insurer can be liable for bad faith failure to settle where there is a risk of excess verdict exposure to the insured.

D. Texas: a balancing test looking to a "prudent insurer."

Texas courts adhere to the Stowers doctrine. This doctrine triggers an insurer's duty to settle when a settlement demand meets four criteria: (1) the claim against the insured falls within the scope of the coverage; (2) the demand is within the policy limits; (3) the terms of the demand are such that an ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment; and (4) the demand must offer to release fully the insured in exchange for a sum equal to or less than the policy limits. American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994). The effect of time-limited demands and excess verdict exposure falls under the third element, the reasonableness of the offer.

I. Time-limited Demands Under Texas Rules.

The timing of a demand is an important factor in determining its reasonableness. While a demand for policy limits made pre-suit may be unreasonable because a carrier has not had the opportunity or time to investigate the liability and damages, demands made just before or during trial, may be found to be reasonable because of the insurer's obligations to be prudent in evaluating and investigating claims. See, e.g., American Guarantee & Liability Ins. Co. v. Ace American Ins. Co., 413 F.Supp.3d 583 (S.D. Tex. 2019); Westport Ins. Corp. v. Penn. Nat'l Mutual Cas. Ins. Co., 2018 WL 6313478 (S.D. Tex. 2018) (given defense counsel's investigation prior to mediation, the forty-five minute deadline for settlement demand was not unreasonable as a matter of law). At its core, each demand is evaluated on a case-by-case basis, considering not only the specific facts and dynamics of the litigation but the thoroughness of the insurer's investigation.

II. Excess Verdict Exposure Under the Texas System.

Similarly, excess verdict exposure must be viewed in light of the Stowers factors. Where an insurer refuses to settle a claim within policy limits when the Stowers duty is triggered, it can be held liable for the excess judgment resulting from the insured's exposure. Necessarily, the insured's excess verdict exposure is a fact intensive scenario and must ultimately be decided based on what an "ordinarily prudent insurer would accept." In re Farmers Texas County Mutual Insurance Company, 621 S.W.3d 261, 267 (Tex. 2021)

**Nuclear Verdicts, Thermonuclear Verdicts, Strategies to Avoid Them, and Takeaways.**

Sometimes the bomb on the bus blows up. People are killed, a lot of money gets paid, and no one is happy on our side. What strategies can we employ to make sure that never happens to us? For our discussion of these massive jury verdict awards, a nuclear verdict is less than 100 million, and a thermonuclear verdict exceeds 100 million and can reach 1 billion or more. There may be tower coverage for a nuclear verdict but, if sustained, the thermonuclear verdict is financially catastrophic, potentially bankrupting even large companies and putting immense pressure on insurers, calling into question the business model.

A. Factors in Nuclear and Thermonuclear Awards.

What factors are at the forefront of these exceptionally large verdicts? Factors driving these awards include "social inflation;" tactics like the "reptile theory;" egregious facts supporting punitive damages; third-party litigation funding; and catastrophic injuries. "Social inflation" involves growing public distrust for corporations and a concomitant increase in sympathy for plaintiffs. The "reptile theory" uses emotional "safety" arguments to cast the defendant corporation as a threat to the community. It goads the jury to protect the community and punish the corporate disregard for our safety. "Third party litigation funding" plays a role here as external investors fund expensive lawsuits for a percentage of the jury award, making claims materially harder to resolve.

There are a number of strategies we can employ to reduce the risk of nuclear and thermonuclear awards. They all start with hiring an experienced trial team. Here are some of those strategies:

1. Strong Team: Claims, Trial Lawyers and Collaboration to Push for Resolution;
2. A Realistic and Practical Defense Budget;
3. Early and Aggressive Settlement Efforts and Offers of Judgment;
4. An Aggressive Defense and Aggressive Discovery;
5. Pre-Trial Motions Directed at the Reptile Theory and Anchors;
6. Pre-Trial Prep and Mock Trials;
7. Witness Prep (Cases are won by Witnesses – Not the Law);
8. Effective Voir Dire and Jury Selection;
9. Use Reptile Theory Against Plaintiff Where Possible; and
10. Reverse Jury Anchoring.

B. The Reptile Theory is Driving Some of These Outsized Jury Verdicts.

Plaintiffs' attorneys use the Reptile Theory to circumvent the "Golden Rule." "When a reptile senses danger, even a small one, she will act to protect the genes." Strategies to activate the Reptilian Brain include:

- Getting jurors to adopt the principle that Safety is always First.
- Testimony and Evidence that Defendant Allowed Unsafe Practices.
- Convincing Jurors they are the Guardians of Community Safety.
- Suggesting that Only Massive Damage Awards will Ensure Future Safety and Decrease Danger.
- Indicating to Jury that When you hear "safety," or "danger" it's coming.

Be prepared to counter The Reptile narrative during Discovery and Trial: The Best Defense is a Good Offense. For Damages, the jury's job is simple: Follow the law and if you find that Defendant is liable, remember you can only compensate for what is reasonable and appropriate. Nothing more.

C. Jury Anchoring by Plaintiff's Counsel to Advance Reptile Theory

Plaintiffs' attorneys employ anchoring to influence the jury early. These messages to the jury include:

- This is a matter of great gravity involving practices that devastated the Plaintiff and has ruined his life.
- Plaintiff Will be asking substantial award – maybe tens, or even hundreds, of millions of dollars.

After this anchoring, a slightly smaller award requested at closing seems more reasonable in comparison. Even if the original, "anchoring" number is cut it in half, it is still an extremely high award.

D. So, What Should Defendants Do?

Flip the script on damages and COUNTER OFFER. Conventional wisdom is to focus only on liability and defense counsel often ignore defenses to Plaintiff's claimed damages. Don't ignore damages! Offer a counter anchor to suggest low damages and counter Plaintiff's Counsel!

Set a counter figure based on something real:, like the real cost of lost wages and/or medical treatment. Don't base damages on something frivolous or unnecessary.

E. Taking a look at the massive jury verdict awards recently, what are the verdict sizes and what can we learn from these staggering numbers.

I. Thermonuclear Verdicts

Jogani v. Jogani et al.
Court: Los Angeles Superior Court, CA, 2024.
Amount: $5.5 billion
Number of Plaintiffs: Single Plaintiff
Summary: In 2003, Shashi Jogani, filed this action against his brothers and other family members alleging causes of action for breach of contract, breach of fiduciary duty, fraud, conspiracy, dissolution of partnership, quantum meruit, unjust enrichment, and constructive trust. 21 years later, after 18 appeals, five judges, and a five-month jury trial, the jury concluded the Shashi owns 50 percent of the real estate partnership. The jury further awarded him $1.8 billion in damages

In re Nat'l Football League's 'Sunday Ticket' Antitrust Litigation,
Court: U.S. District Court C.D. California, 2024.
Amount: $4.707 billion
Number of Plaintiffs: Class Action
Summary: Defendants, the 32 teams of the National Football League (NFL), agreed to pool their individual television broadcast rights rather than compete in the football broadcasting market. Plaintiffs brought a class action asserting Defendants conspired to restrain trade in violation of the Sherman Act and conspired to engage in anticompetitive conduct with the intent that one of the parties to the agreement would obtain monopoly power in the market. Further, Plaintiffs said the agreement allowed Defendants to charge supracompetitive prices and amounted to a horizontal supply restriction. From this, a commercial and a residential class were formed, being awarded $96,928,273 and $4,610,331,672 in damages, respectively.

Sexual Abuse Victim v. Church of Jesus Christ of Latter-Day Saints
Court: Riverside Superior Court, CA, 2023.
Amount: $2.28 billion
Number of Plaintiffs: Single Plaintiff
Summary: A woman who was repeatedly molested by her stepfather was awarded $2.28 billion. This case also implicated her mother and the local Church of Jesus Christ of Latter-day Saints. The woman repeatedly told church officials of the abuse, but they failed to report it to law enforcement. This violated the church's policies and amounted to intimidation or shaming tactics to keep her from going public with the allegations.

McKivison v. Nouryon (Monsanto)
Court: Philadelphia Court of Common Pleas, PA, 2024.
Amount: $2.2 billion
Number of Plaintiffs: Single Plaintiff
Summary: On January 26, 2024, jurors in a Philadelphia state court ordered Bayer AG's Monsanto division to pay Plaintiff John McKivision $250 million for compensatory damages, with an additional $2 billion dollars for punitive damages. The Plaintiff said defendant represented Roundup as safe to humans and the environment and knew or should have known of the risks of harm associated with the use of and/or exposure to Roundup. The plaintiff was diagnosed with non-Hodgkin's lymphoma and claimed Roundup contributed to and caused his cancer. On June 4, 2024, Judge Susan Schulman in the Philadelphia Court of Common Pleas decided on the company's post-trial motion, reducing the verdict to $400 million.

Jimmy Draeger et al. v. Monsanto Co.
Court: 19th Judicial Circuit, Cole County, MO, 2023.
Amount: $1.56 billion
Number of Plaintiffs: Four Plaintiffs
Summary: A Missouri jury awarded damages to three people who claimed their cancer had been caused by Monsanto's Roundup weedkiller. The jury found Monsanto liable for design defects and failure to warn claims. The plaintiffs claimed that Monsanto knew that the primary ingredient in the weedkiller was a carcinogen. Each of the plaintiffs sprayed the products in their yards and gardens.

Burnett et al v. National Ass'n of Realtors et al.
Court: U.S. District Court for the W.D. MO, 2023.
Amount: $1.785 billion
Number of Plaintiffs: Class Action
Summary: Plaintiff Rhonda Burnett sold her home, which was listed on a multiple listing service controlled by a local association of Defendant National Association of Realtors. Defendant conditioned real estate brokers' access to the MLS on the brokers agreement to follow NAR's rules, including its cooperative compensation rule which provided that buyer brokers receive their compensation from the total commission paid by the seller. Plaintiffs brought a class action against NAR, asserting that defendants violated the Sherman Act by entering into a conspiracy to restrain trade by following and enforcing the cooperating compensation rule.

Soomi Amagasu et al. v. Mitsubishi Motors North America, Inc.
Court: Philadelphia Court of Common Pleas, PA, 2023.
Amount: $977 million
Number of Plaintiffs: Single Plaintiff
Summary: Plaintiff was injured in a 2017 accident while wearing "rip-stitch" seatbelt and driving a 1992 Mitsubishi 3000GT. Plaintiffs argued that Mitsubishi's seatbelt design was defective as it allowed the release of four inches of slack during a collision. Plaintiff further argued that due to the four inches of slack Plaintiff's

head struck the roof of the car. As a result of the accident, Plaintiff is now a 58-year-old quadriplegic.

Jane Doe v. Alkiviades David, et al.
Court: Los Angeles Superior Court, 2024.
Amount: $900 million
Number of Plaintiffs: Single Plaintiff
Summary: A unanimous jury awarded $900 million to Plaintiff Jane Doe against Alkiviades David for sexual battery and intentional infliction of emotional distress. Plaintiff worked for David's companies from February 2016 to April 2019 where she was subject to sexual harassment, sexual assault, and rape. David is the heir to the Coca-Cola bottling company fortune. This trial marks the 5th jury to award compensatory and punitive damages against David and his companies in the last 5 years for sexual assault in the workplace.

Gill v. ExxonMobil Corporation
Court: Philadelphia Court of Common Pleas, PA, 2024.
Amount: $816 million
Number of Plaintiffs: Single Plaintiff
Summary: This case stems from Plaintiff's exposure to benzene contained in Mobil Oil gasoline while he worked as a mechanic and gas station attendant between 1974 and 1979. Plaintiff alleged that his exposure to the compound caused him to develop Acute Myeloid Leukemia. The Philadelphia jury originally awarded Plaintiff $725.5 million, but the Philadephia Court of common Pleas has since added over $90 million in delay damages.

Estate of J.B. v. Moash Enter. Co. Ltd.
Court: U.S. District Court for the S.D. OH, 2022.
Amount: $787 million
Number of Plaintiffs: Single Plaintiff
Summary: Federal Jury awarded damages to the family of a 23-month-old boy who died when he became wedged in a bunk-bed ladder. The case came against a Vietnamese manufacturing company, Moash Enterprise Co. Ltd. the bed that was sold allegedly violated a number of US consumer safety standards. The bed was allegedly recalled at some point, but Wayfair, Longwood, and Moash continued to sell essentially the same bed and ladder design on its website under a different name.

Propel Fuels Inc. v. Phillips 66 Co.
Court: Alameda County Superior Court, CA, 2024.
Amount: $604.9 million
Number of Plaintiffs: Single Plaintiff
Summary: A jury found that Phillips 66 renewable fuels business was developed via the misappropriation of Propel Fuels trade secrets. Plaintiff's alleged that Defendant stole trade secrets over 13 years under the guise of a proposed acquisition of Propel by Phillips 66. Propel had disclosed proprietary strategies, data and was working on developing a new integrated business with Phillips when Phiillips abruptly and without explanation ended the deal.

Netlist Inc. v. Micron Tech. Inc., et al.
Court: U.S. District Court for the E.D. TX, 2024.
Amount: $445 million
Number of Plaintiffs: Single Plaintiff
Summary: The Texas jury found that the Plaintiff had proved that Defendant infringed its '912 patent. Further, the jury found that the '417 Patent had been infringed. The patents related to a memory module communicating data with a memory control.

Estate of T.S. v. Funtime Handelsgesellschaft mbH
Court: Florida Circuit Court, 2024.
Amount: $310 million
Number of Plaintiffs: Single Plaintiff
Summary: The deceased was riding the Free Fall Drop Tower when he was ejected from his seat and fell approx. 100 feet out of the air. This ride was owned, built, designed, and managed by defendant Funtime Handelsgelsellschaft mbH at an amusement park. Following this incident, the deceased's estate brought a wrongful death claim against defendant, asserting it was negligent in its administration of the ride and failing to provide adequate warnings, amongst other failures.

Morris v. Harley Davidson Motor Co. Grp. LLC, et al.
Court: Livingston County Court, NY, 2024.
Amount: $287 million
Number of Plaintiffs: Single Plaintiff
Summary: Plaintiff was operating a Harley-Davison trike with his partner. During their ride, the trike unexpectedly experienced braking issues, leading to a sever crash that resulted in Plaintiff's partner's death and serious injuries for the plaintiff. Plaintiff brought suit against the manufacturer, Harley-Davidson, alleging that a defect in the traction control software caused unintended braking. Plaintiff contended that despite a prior recall to address this specific issue, the company had failed to adequately rectify the problem.

Benavides v. Tesla, Inc.
Court: U.S. District Court for the S.D. FL, 2025.
Amount: $243 million
Number of Plaintiffs: Two Plaintiffs
Summary: A Florida jury found that Tesla's autopilot software was partly to blame for a crash that killed a 22-year-old woman and severely injured her boyfriend in 2019. The jury found that Tesla was 33% responsible for the crash. Notably, the deceased and her boyfriend were not in the Tesla. Instead, they were in a parked Tahoe when the Tesla, while being driven on autopilot, slammed

into them and launched the deceased 75ft through the air.

Hagans v. Hospital of the University of Pennsylvania
Court: Court of Common Pleas of Philadelphia County, PA, 2019.
Amount: $182 million
Number of Plaintiffs: Single Plaintiff
Summary: This case represents the largest medical malpractice verdict in Pennsylvania history. Plaintiff brought a med mal claim against Penn Medicine, claiming that Penn failed to perform a timely C-section despite indications that the procedure was necessary. Plaintiff asserted that the hospital's failure to maintain the proper standard of care resulted in an infant's cerebral palsy. The hospital argued that the standard of care was met in treating both mother and child and that the infant had suffered a brain injury before the mother arrived at the hospital.

Caranci v. Monsanto
Court: Court of Common Pleas of Philadelphia County, PA, 2023.
Amount: $175 million
Number of Plaintiffs: Single Plaintiff
Summary: The jury in this case awarded $175 million in damages to Ernie Caranci, an 83-year-old restaurant owner. Plaintiff alleged he developed non-hodgkin's lymphoma after he used Roundup Products for a number of years. The trial looked at the carcinogenic potential of glyphosate, the main ingredient in Roundup. The jury concluded that Plaintiff was exposed to glyphosate for more than 400 hours while using the product unprotected in his garden.

II. Nuclear Verdicts

Triad Hunter LLC v. Eagle Natrium LLC et al.
Court: Ohio Court of Common Pleas, OH, 2022.
Amount: $70 million
Number of Plaintiffs: Single Plaintiff
Summary: Plaintiff Triad Hunger LLC operated a natural gas fracking operation in Monroe County, Ohio. Adjacent to Plaintiff's operation and across the Ohio River, Defendants operated a mineral and salt mine in West Virigina. Plaintiff claimed that Defendants caused damage to its wells by "solution mining," interfering with its mineral rights. Defendants were found solely liable for Plaintiff's damages.

Walker v. Becton, Dickinson and Co. et al.
Court: Georgia State Court, GA, 2025.
Amount: $70 million
Number of Plaintiffs: Single Plaintiff
Summary: Truck driver Plaintiff, Gary Walker alleged he was exposed daily to ethylene oxide, a compound used by Defendants to sterilize medical equipment at a facility in Covington, GA. Plaintiff transported this material and lived within a 5-mile radius of the facility for 26 years. As a result, Plaintiff developed double hit diffuse large B-cell lymphoma.

Marhunova v. Fitler Construction Group
Court: Court of Common Pleas for Philadelphia County, PA, 2024.
Amount: $68.5 million
Number of Plaintiffs: Single Plaintiff
Summary: The jury in this case awarded $68.5 million in damages to the family of a construction worker who died after falling off a balcony at a construction development. The jury found the general contractor liable for the worker's death due to negligence and safety violations. The death of the 38-year-old construction worker left his widow and his young son. The court found that there were multiple safety breaches and OSHA requirements for fall protection.

**Conclusion**

In an age of corporate distrust and billboard advertising for "over 1 billion recovered," both insureds and insurers face dangerous exposure to massive jury awards. That "bus ride" often begins with a time-limited demand and then an effort by plaintiffs to create excess exposure. Only by employing careful strategies, with the right trial team, can the bomb on the bus be defused in time.

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# Frederic Theodore “Ted” Le Clercq

**Partner | Deutsch Kerrigan (New Orleans, LA)**

Frederic Theodore ‘Ted’ Le Clercq is a Chambers rated 35-year litigation problem-solver across two states, consistently achieving good results and also matching clients with the right Deutsch Kerrigan attorney for the nature of that fight. Ted serves as the point person for multiple carriers across Louisiana and Mississippi. Understanding that each client and business is unique, Ted listens carefully to what is driving a particular case and then focuses on delivering an efficient legal solution.

While Ted’s practice focuses on commercial litigation, he has extensive experience representing clients in all areas of employment litigation. Additionally, he is active in professional liability litigation, civil rights litigation, and constitutional law matters. Ted is well-versed in coverage issues and oversees a team of lawyers managing those cases. His experience also includes developing a national coordinating counsel program for a Fortune 200 national retailer, where he has handled high-value personal injury claims.

**Practices**

- Admiralty & Maritime
- Appellate Litigation
- Alternative Dispute Resolution
- Aviation
- Corporate Transactions and Litigation
- Education
- Employment Litigation
- Energy and Environmental
- Healthcare and Medical Malpractice
- Insurance Defense, Coverage, Disputes and Bad Faith
- Intellectual Property
- Products Liability
- Professional Liability
- Toxic Tort Litigation

**Accolades**

- Chambers rated for Employment Litigation
- Louisiana Super Lawyers®, 2007-present
- The Best Lawyers in America®, 2007-present
- Inside New Orleans Readers’ Favorite Elite Lawyer, 2021
- Arbor Day Foundation National Award, 2011
- New Orleans Community Quarterback Award, 2011 (Given by New Orleans Saints)
- Leadership in Law: Top 50 Lawyers in New Orleans, 2010, 2012, 2015 - Leadership in Law Hall of Fame, 2015
- New Orleans Magazine’s “Best in New Orleans: Lawyers”
- AV Preeminent Martindale-Hubbell® Peer Review Rating™

**Education**

- University of Tennessee, Knoxville (J.D., 1989) - Tennessee Law Review; National Moot Court Team; Labor Law Moot Court Team, Best Oral Advocacy Award
- Washington and Lee University (B.A., cum laude, 1986) - Special Honors in Philosophy for Senior Thesis
- Federal Judicial Law Clerk, D.S.C., the Honorable Falcon B. Hawkins Jr., U.S. District Court Judge, 1989-1991

# RICO Liability for Manufacturers?


## Steve Finley

Gibbons (Philadelphia, PA)


**RICO Liability for Manufacturers?**
*Steve Finley*

The Racketeer Influenced and Corrupt Organizations Act (RICO) creates a private cause of action for "[a]ny person injured in his business or property" and authorizes recovery of "threefold the damages he sustains." 18 U.S.C. § 1964(c). RICO, however, indisputably precludes recovery under the statute for personal injuries regardless of the theory advanced. Accordingly, until the United States Supreme Court's decision in Medical Marijuana, Inc. v. Horn, the common view was that, since a plaintiff could not recover under RICO for personal injuries, the statute also precluded recovery for business losses or property damage stemming from injuries to a person. Claims for damages allegedly due to a plaintiff's personal injuries, the majority of courts held, were not cognizable under RICO and needed to be brought as state-law tort claims.

In a 5-4 ruling issued on April 2, 2025, The United Supreme Court held that RICO provides "a remedy for business and property loss that derives from a personal injury." 145 S. Ct. 931, 936 (2025). In Medical Marijuana, Inc. v. Horn, the plaintiff ingested a cannabidiol that was labeled as free of the substance tetrahydrocannabinol (THC). However, the plaintiff tested positive for THC after a routine employee drug screening and was fired from his position. Plaintiff sued the seller of the cannabidiol and alleged that the product's seller operated an enterprise whose false and misleading advertising were fraudulent and constituted a "pattern of racketeering" under RICO. Furthermore, plaintiff claimed that the termination of his employment was a loss of business or property compensable under RICO, even though the underlying harm was an injury to his person.

Before the Supreme Court ruled, the lower courts had reached mixed results. The District Court granted summary judgment in favor of the seller, holding that plaintiff's lost employment was derivative of an alleged personal injury and therefore not within the scope of RICO. The Second Circuit Court of Appeals reversed the trial court and held that RICO does not per se preclude recovery for business losses and property damage that derive from a plaintiff's injury.

Now, before analyzing the Supreme Court's holding, we should consider why a plaintiff would seek to bring a RICO claim. After all, most plaintiffs who claim personal injuries and allege harm from the use of a product have viable state-law product liability causes of action and a state-court forum to bring those claims. RICO claims, by contrast, are heard in Federal Court – typically a less favorable forum for product liability plaintiffs. However, RICO permits a plaintiff to bring a claim in any district where a defendant "resides, is found, has an agent, or transacts his affairs," and it provides for permissive joinder of other defendants in that district. While Federal Court may be a less adventurous forum for the typical personal injury plaintiff, the opportunity to bring a case in a Federal Court largely of the plaintiff's choosing and join defendants who might otherwise not be subject to suit in a single forum may outweigh a plaintiff's typical preference for state court. Perhaps most importantly, RICO provides for treble damages, a strong incentive to bring the claim.

The Supreme Court affirmed the Second Circuit's decision and explained that RICO's requirement that a plaintiff sustain injury to "business or property" only precludes recovery for certain types of harm, i.e. personal injury, not the cause of the harm to business or property. In reaching this holding, the Supreme Court rejected the seller's argument that the word "injury" as used in the statute meant "an invasion of a business or property right," and no other harm. The Court explained that the language of the RICO statute does not limit recovery to those who have experienced a tort injury directly to their business or property. Rather, the Court interpreted the word "injured" to mean harm without regard to how the business or property harm arose or the underlying theory advanced.

Although the Supreme Court affirmed the Court of Appeals, the High Court did not remove any of the other barriers a plaintiff faces when seeking to bring a RICO claim – in the product liability context or otherwise. A plaintiff must still establish a predicate act to meet the requirements of a RICO claim. Not all run-of-the-mill product liability claims involve fraudulent statements made through interstate commerce. The Supreme Court also did not address the question of "whether [plaintiff] suffered an injury to property when he lost his job." Therefore, while the holding in Medical Marijuana permits a plaintiff to recover for losses to business or property that stem from a personal injury, the court expressly did not hold that loss of employment constitutes the type of business or property harm contemplated under RICO.

Medical Marijuana should not be read to provide every product liability plaintiff a claim under RICO. Both the majority and dissenting opinions cautioned against reading the Court's decision as creating a new, broad cause of action under RICO. The Court also left open several questions not raised on appeal, including whether loss of employment meets the requirement for a business loss under the statute. Furthermore, the majority and dissenting opinions noted that the decision was not an invitation to flood the Federal Courts with RICO claims and cautioned that the statutes requires establishing "some direct relationship between the injury asserted and the injurious conduct alleged." Simply alleging "foreseeability does not cut it." To that end, the Court cautioned that pleading a case under RICO is not simple matter. "A plaintiff must first establish a pattern of racketeering activity" which under the statute "requires identifying two or more predicate crimes" that are part of a single undertaking. Accordingly, alleging a product defect or insufficient warnings may not give rise to a cognizable RICO claim, even if the plaintiff can establish a loss to property or business that results from a personal injury. Nor does Medical Marijuana provide an avenue for plaintiffs to recast ordinary state law tort claims into RICO claims.

Product manufacturers and distributors need to be prepared to defend against RICO claims that were previously disallowed in most Federal Courts. To do so, product liability defendants should consider defenses specific to RICO while also pleading and proving traditional product liability defenses. For example, a federally preempted state-law failure-to-warn claim does not provide the basis for a RICO claim, nor does the Medical Marijuana decision undo the claims-limiting effect of federal preemption law. Many states, particularly those with a product liability act or analogous statute, strictly limit what claims can be brought in a product liability case, which may also operate to deprive a plaintiff of the necessary predicate act to maintain a RICO claim. In addition to taking advantage of defenses under RICO and product liability defenses under state law, defendants should also highlight the cautionary note from the Supreme Court that the narrow issues of statutory interpretation the Court resolved in Medical Marijuana did not create a new cause of action and did not invite plaintiffs to convert traditional state-law tort claims into federal causes of action.

# RICO Liability for Manufacturers?

Steve Finley

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RICO Liability
for Manufacturers?

# RICO Liability for Manufacturers?

## RICO Liability for Manufacturers?

**Racketeer Influenced and Corrupt Organizations Act**

- Passed to fight organized crime
- Criminal Liability
- Attorney General Action
- Civil Penalties
- Injunction Relief

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## RICO Liability for Manufacturers?

**Racketeer Influenced and Corrupt Organizations Act**

- Private Cause of Action for Plaintiff "damaged in his business or property", but not personal injury
- Majority view – no cause of action for damage to business or property stemming from a personal injury

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# RICO Liability for Manufacturers?

## *Medical Marijuana v. Horn*

- Plaintiff ingested a cannabidiol marketed as THC free
- Plaintiff tested positive for THC on drug screening
- Plaintiff's employment was terminated
- Plaintiff sued under RICO

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# RICO Liability for Manufacturers?

## *Medical Marijuana v. Horn – Plaintiff's Claims*

- Seller was an "enterprise" within meaning of RICO
- False and misleading statements were "pattern of racketeering"
- Loss of employment was "damage to business or property"
- RICO claim allowed even where damage to business (i.e. loss of employment) stemmed from a personal injury

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# RICO Liability for Manufacturers?

## *Medical Marijuana v. Horn*

- District Court: Loss of employment is derivative of personal injury and personal injury claims not permitted under RICO.
- Court of Appeals: RICO does not *per se* preclude recovery for business losses and property damage that derive from personal injury.

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# RICO Liability for Manufacturers?

## *Why Bring Product Liability Claim Under RICO?*

- Treble Damages
- Broad venue rules and permissive joinder of defendants
- Settlement leverage
- Liberal discovery
- Fear of RICO claim

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# RICO Liability for Manufacturers?

***Why Bring Product Liability Claim Under RICO?***

- Plaintiff efforts to expand statutory causes of action
- Plaintiff efforts to expand product liability claims

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# RICO Liability for Manufacturers?



**SCOTUS considered narrow question:**

*Whether Plaintiff can pursue a claim under RICO where damage to business or property is derivative of a personal injury?*

**Holding**: *Yes.*

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## RICO Liability for Manufacturers?

**SCOTUS Held:**

- Statute limits types of harms, not causes of harm
- Loss to business or property can be pursued even where cause of loss is personal injury
- Personal injuries still not recoverable under RICO

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## RICO Liability for Manufacturers?

**SCOTUS did NOT:**

- Lower pleading threshold for RICO
- Create a new cause of action
- Resolve question whether loss of employment is loss to business or property
- Invite flood of product liability-RICO claims

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## RICO Liability for Manufacturers?

**RICO Defenses:**

- No predicate act
- No direct relationship between injury and conduct
- No enterprise / pattern of racketeering activity

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## RICO Liability for Manufacturers?

**Product Liability Defenses:**

- Preemption
- Product Liability Act / Subsumption
- Economic Loss Rule

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# RICO Liability for Manufacturers?

**Policy Arguments weigh against:**

- Converting common law tort claims into federal cause of action where plaintiff has a state law remedy.
- Permitting product liability claims under a statute passed to pursue mobsters and fraudsters.

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Mr. Finley is a litigator who dedicates his practice to the defense of cases involving wrongful death, catastrophic personal injury, and major property loss. He defends companies involved in complex litigation, including multidistrict litigation, mass tort litigation, class action lawsuits, and serial lawsuits. A frequent author on emerging issues in products liability law, he has represented defendants facing novel products liability claims, such as publishers and patent holders.

In addition to his product liability practice, Mr. Finley handles the prosecution and defense of commercial matters, including breach of contract disputes and business tort claims.

While in law school, Mr. Finley was an intern in the Chambers of the Honorable Jacob P. Hart, United States Magistrate Judge for the Eastern District of Pennsylvania. He also served as Co-Editor-in-Chief of the Villanova Journal of Catholic Social Thought and was President of the St. Thomas More Society. As an undergraduate, Mr. Finley served as a staff intern in the White House Office of Faith-Based and Community Initiatives during the Bush Administration.

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- Pharmaceutical & Medical Device
- Products Liability

**Products Liability Experience**
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- Representation of a leading manufacturer of safety equipment in wrongful death and catastrophic personal injury claims. Mr. Finley has obtained summary judgment or favorable settlements in each of these cases.
- Defense of the nation’s largest propane distributor in multiple matters around the country, including wrongful death, personal injuries, and major property damage claims.
- Representation of various manufacturers, owners, and operators of cranes in numerous wrongful death and toxic tort claims.
- Representation, with broader Gibbons team, of leading manufacturers of consumer products in a variety of product liability cases in Pennsylvania and New Jersey.
- Representation of a manufacturer of agricultural and construction equipment in cases involving wrongful death and catastrophic personal injury in Pennsylvania’s state and federal courts.
- Defense of members of the petrochemical industry in toxic tort cases claiming wrongful death and personal injury stemming from exposure to benzene and other chemicals.

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- Included on the Benchmark Litigation list, “Future Stars,” Products Liability
- Included on the Pennsylvania Super Lawyers Rising Stars list, Personal Injury Products: Defense, 2020

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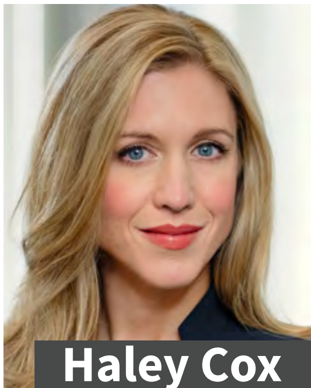

# Beyond PowerPoint: Trial Graphics That Win

**Haley Cox**
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**Modern Trials Need Modern Graphics: Why Wordy Slide Decks Fail—and What Persuades Today's Juries**
*Haley Cox*

Jurors today sit at the intersection of information overload, digital fluency, and deep skepticism. They carry smartphones, stream video, and expect to see and understand. Yet the majority of courtroom communication remains verbal, dense, and slide-bound—bullet points presented as persuasion. A growing body of legal and cognitive-science research shows that modern trials require a fresh approach to trial graphics—visuals that are clear, attention-grabbing, memorable, and meaningfully integrated with the story—rather than traditional, wordy slide presentations. Sharper visuals increase comprehension, reduce cognitive load, support jurors' story building, and improve recall in deliberations; conversely, "slideuments" and dense narration squander attention and obscure key points.[1] This paper synthesizes why and how to pivot away from wordy PowerPoints toward strategic demonstratives that teach, persuade, and endure in deliberations.

**The Modern Juror: Skeptical, Visual, and Story-Driven**
Today's jurors expect to see and understand evidence visually, a shift driven by the ubiquity of smartphones and digital media. As trial consultant Dr. Maithilee Pathak observes, "every juror expects to SEE and UNDERSTAND evidence in trial," yet most courtroom communication remains verbal rather than visual. Their recognition-memory study, which found 96% accuracy after exposure to 1,100 images, highlights the remarkable encoding power of pictures—truly, "a picture is worth a thousand—actually—1,100 words." [2]

In addition to being visually oriented, modern jurors are increasingly skeptical and self-reliant. The prevalence of "fake news" rhetoric and the influence of social media have eroded trust in institutions, experts, and even statistics. Jurors often believe that "both sides just have their hired guns," but at the same time, they feel empowered by the information access of the digital age to "figure it out" themselves.[3] In this environment, clear and concrete visuals that demystify complex issues and show rather than tell are essential for building credibility and aligning with jurors' sense of agency.

Furthermore, research demonstrates that jurors begin constructing a narrative scaffold early in the trial process, often during voir dire or opening statements, and then selectively fit subsequent evidence to that story (Fuentes et al. 2016).[4] Visuals that establish the right storyline and themes from the outset—rather than relying on text-heavy slides—are more likely to be internalized and repeated verbatim during deliberations (Fuentes et al. 2016).[5]

**Why Traditional, Wordy PowerPoints Fail in Court**
Traditional, wordy PowerPoint presentations are ill-suited for the realities of jury trials. First, they work against human attention and working memory. Jurors, who are often involuntary and passive listeners, have a limited capacity to absorb information through hearing alone. The monotony of dense language and lengthy proceedings leads to boredom and inattention.[6] Cognitive load theory further demonstrates that working memory is easily overwhelmed by complex, text-heavy presentations; extraneous load from poor format and timing can crowd out actual learning.[7]

Moreover, these presentations tend to repel audiences, rather than persuade them. Dr. John Sase finds that survey data reveal a deep aversion to standard slideware:

1 Pathak, M.K. & Wyland, J. The Power of Visuals in Litigation; Gordon, S. What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking, Tennessee Law Review 81:751 (2014); Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury: How to Captivate Jurors like a Hollywood Movie Director, For The Defense (DRI, July 2016); Sase, J.F. et al. The Use of Multimedia in the Courtroom (Part I), Legal News (Sept. 21, 2022).

2 Pathak & Wyland, The Power of Visuals in Litigation (Show-Me State Jurors).

3 Pathak, M.K. Litigation in the Era of Fake News and Rampant Suspicion (R&D Strategic Solutions, 2019).

4 Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

5 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

6 Schutz, J.S. The Expert Witness and Jury Comprehension: An Expert's Perspective, Cornell Journal of Law & Public Policy (excerpt provided).

7 Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

many professionals would "rather do their taxes," visit the dentist, or even forgo sex than endure another typical PowerPoint presentation.[8]

Finally, traditional PowerPoints fail to align with how jurors actually make decisions. Jurors "listen deductively," forming a coherent story early on rather than inductively adding up disjointed facts for a dramatic conclusion.[9] When synthesis is postponed until closing arguments, as is common with bullet-point decks, the presentation appears disconnected and is often forgotten by the time jurors deliberate and vote.[10]

**Why Visuals Work: Cognitive and Empirical Foundations**

Visuals are effective in the courtroom for several cognitive and empirical reasons. First, visual memory is both high-capacity and durable, as demonstrated by the recognition study cited by Dr. Pathak, which found 96% accuracy after exposure to 1,100 images. This underscores the power of visual encoding. When visuals are combined with concise audio in a "dual-mode" approach with audio and visuals, extraneous cognitive load is reduced and learning is improved.[11]

The timing and format of visual information also matter. Presenting the law and key frameworks visually—using flowcharts, timelines, or animated exemplars—before introducing evidence helps keep jurors in a "deliberative" mindset. This approach frees up cognitive resources and delays premature closure, leading to better comprehension, more accurate paraphrasing, and improved ability to transfer knowledge to new facts compared to verbal instructions alone.[12] [13]

For technical or complex evidence, 3D imaging can be especially valuable. In mock-trial studies, 3D visualizations and printed models have been shown to increase jurors' understanding of technical language compared to standard photographs. Clearer visuals are correlated with higher comprehension of expert terminology, suggesting that upgraded visuals can improve understanding even if they do not directly change verdicts.[14]

Finally, visuals support story scaffolding and engage both hemispheres of the brain—emotion and structure—helping jurors connect the dots and internalize the case.[15] [16] Themes that are simple, repeatable, and visual, such as "victim of its own success," are more likely to be echoed back by jurors after the verdict.[17]

**The Power—and Risk—of Graphic Evidence**

Visuals persuade. But persuasion must be ethical. Studies show graphic content (e.g., gruesome photographs or intense audio) increases guilty verdicts and perceived evidentiary sufficiency even when probative value is minimal.[18] Courts should favor clear, explanatory visuals over gratuitously graphic ones and calibrate for the risk of undue prejudice under Rule 403.

**What Works Instead of Words and Bullets: Design Principles for Persuasive Trial Graphics**

To create persuasive trial graphics, it is essential to start with the case story and build visuals that teach and reinforce it. The narrative should be framed early with a clean, visual opening—such as a timeline, map, or a few thematic graphics—that quickly answers "what really happened."[19] Jurors should be guided to focus on knowledge and control, understanding who knew what, when, and who could have prevented the harm, as this is central to how they apportion responsibility.[20] Ethically using the availability heuristic means foregrounding salient, defense-helpful facts—such as evidence of misuse or alternative causes—through crisp visuals before addressing company conduct.[21]

Reducing cognitive load and increasing clarity are also critical. Dense text should be replaced with flowcharts of legal standards and decision trees that fit on a single screen, as these have been shown to improve comprehension in experimental studies.[22] [23] Dual-mode presentations, which combine brief narration with clean visuals, leverage multiple channels and free up working memory.[24] Pre-instructing jurors with visuals—such as a visual map of the law before evidence is presented—helps maintain a deliberative mindset and improves

8 Sase, J.F., Senick, G.J. & Sase, J.G. The Use of Multimedia in the Courtroom (Part I), Legal News (2022); Godin, S. Really Bad PowerPoint (and How to Avoid It).

9 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

10 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

11 [6] Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

12 [6] Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

13 [8] Brewer, N., et al. Improving Comprehension of Jury Instructions with Audio-Visual Presentation, Applied Cognitive Psychology 18:765–776 (2004), summarized in Gordon (2014).

14 [9] Errickson, D., Fawcett, H., Thompson, T.J.U. & Campbell, A. The Effect of Different Imaging Techniques for the Visualisation of Evidence in Court on Jury Comprehension, International Journal of Legal Medicine 134:1451–1455 (2019).

15 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

16 [7] Sase, J.F., Senick, G.J. & Sase, J.G. The Use of Multimedia in the Courtroom (Part I), Legal News (2022); Godin, S. Really Bad PowerPoint (and How to Avoid It).

17 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

18 [10] Hitchcock-Smith, O.K. Jury Decision Making & Graphic Evidence: The Effects of Auditory vs. Visual Presentation, Master's Thesis, Arkansas State University (2018); Bright, D. & Goodman-Delahunty, J. Gruesome Evidence and Emotion, summarized in Hitchcock-Smith (2018); Douglas, K., Lyon, D. & Ogloff, J. The

19 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

20 [3] Pathak, M.K. Litigation in the Era of Fake News and Rampant Suspicion (R&D Strategic Solutions, 2019).

21 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

22 [6] Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

23 [11] Semmler, C. & Brewer, N. Using a Flow-Chart to Improve Comprehension of Jury Instructions, summarized in Gordon (2014).

24 [6] Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

evidence filtering.[25]

Effective visuals are those that jurors can easily repeat and use during deliberations. Graphics should distill the case into "three or four key messages."[26] If a visual can be sketched on a whiteboard by a juror, it is likely to be memorable and persuasive. Simple diagrams are often preferable to ornate artwork; for example, a line drawing on an easel can be more effective than a complex 3D rendering if it clarifies the point.[27]

Choosing the right medium for complex evidence is also important. When anatomy, mechanisms, or spatial relationships are at issue, 3D animations or models can significantly enhance comprehension of technical language.[28] For processes that unfold over time—such as product development, warnings, or quality controls—timelines, swim lanes, and layered Gantt-style visuals provide context and demonstrate diligence far more effectively than bullet points.

Design discipline is key: use color, contrast, and restraint purposefully. Develop a consistent and intentional color palette, using contrast to highlight causal links and thresholds rather than for mere decoration.[29] Avoid clip art and stock decorations; every element of a visual should serve a teaching purpose.[30]

Rather than relying on "slideuments," provide leave-behinds and physical boards. Slides should support oral advocacy, not serve as documents. If a record is needed, create a separate, readable memorandum and provide high-resolution demonstratives for the jury book.[31] Physical boards can serve as anchor visuals, remaining visible throughout the trial, reducing mode switching, and, where permitted, accompanying jurors into deliberations. Finally, equip experts to teach rather than simply recite transcripts. Select experts who are skilled communicators and can use visuals effectively. Plan exhibits with them and encourage them to step down from the stand to draw, manipulate models, or use overlays—tactics that sustain juror attention and comprehension.[32] Prepare visuals that can withstand cross-examination and provide clear, visual explanations even under pressure.[33]

**A Case in Point: VIOXX in Texas—Story and Visuals vs. Bullets and Graphs**

In the Texas VIOXX trial, plaintiff's counsel Mark Lanier used a choreographed visual presentation that integrated color, images, and sparse words to deliver an "absorbing media experience," while the defense relied on a "normal" PowerPoint of bullet points and dense graphs. The visually rich story won the day.[34] [35] The lesson is not that images guarantee victory, but that form matters: visuals aligned to a persuasive narrative engage jurors' emotions and cognition in ways text-heavy decks cannot.

**Responding to Today's Jury Climate**

The current era, marked by widespread skepticism and concerns about "fake news," both increases the necessity for and the effectiveness of strong visuals in the courtroom. To combat distrust, transparency is essential. Visuals that clearly show processes—such as testing steps, decision trees, or audit trails—can effectively counteract narratives that a company put "profit over safety" by making diligence visible and verifiable.[36] [37]

It is also important to respect jurors' sense of agency. Providing visual tools like element checklists or special-verdict roadmaps helps jurors apply the law and articulate their reasoning, supporting metacognitive processes that have been shown to increase accuracy.[38]

Finally, advocates should avoid overclaiming. Visual simplicity should not be mistaken for oversimplification; rather, it is a means of achieving clarity. When uncertainty exists, it should be depicted honestly—using ranges or sensitivity analyses—to build credibility with jurors who are empowered and informed by the internet age.[39]

**Guardrails: Power Without Prejudice**

While visuals are powerful, they must be used responsibly to avoid unfair prejudice. Gratuitous or graphic content can strongly influence jurors but also risks causing unfair prejudice and even reversible error. It is better to use explanatory visuals that clarify mechanisms rather than

25 [6] Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

26 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

27 [5] Schutz, J.S. The Expert Witness and Jury Comprehension: An Expert's Perspective, Cornell Journal of Law & Public Policy (excerpt provided).

28 [9] Errickson, D., Fawcett, H., Thompson, T.J.U. & Campbell, A. The Effect of Different Imaging Techniques for the Visualisation of Evidence in Court on Jury Comprehension, International Journal of Legal Medicine 134:1451–1455 (2019).

29 [7] Sase, J.F., Senick, G.J. & Sase, J.G. The Use of Multimedia in the Courtroom (Part I), Legal News (2022); Godin, S. Really Bad PowerPoint (and How to Avoid It).

30 [7] Sase, J.F., Senick, G.J. & Sase, J.G. The Use of Multimedia in the Courtroom (Part I), Legal News (2022); Godin, S. Really Bad PowerPoint (and How to Avoid It).

31 [7] Sase, J.F., Senick, G.J. & Sase, J.G. The Use of Multimedia in the Courtroom (Part I), Legal News (2022); Godin, S. Really Bad PowerPoint (and How to Avoid It).

32 [5] Schutz, J.S. The Expert Witness and Jury Comprehension: An Expert's Perspective, Cornell Journal of Law & Public Policy (excerpt provided).

33 [5] Schutz, J.S. The Expert Witness and Jury Comprehension: An Expert's Perspective, Cornell Journal of Law & Public Policy (excerpt provided).

34 [7] Sase, J.F., Senick, G.J. & Sase, J.G. The Use of Multimedia in the Courtroom (Part I), Legal News (2022); Godin, S. Really Bad PowerPoint (and How to Avoid It).

35 [12] Atkinson, C. Beyond Bullet Points: Using Microsoft Office PowerPoint 2007 (Microsoft Press, 2008), cited in Sase (2022).

36 [3] Pathak, M.K. Litigation in the Era of Fake News and Rampant Suspicion (R&D Strategic Solutions, 2019).

37 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

38 [6] Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

39 [3] Pathak, M.K. Litigation in the Era of Fake News and Rampant Suspicion (R&D Strategic Solutions, 2019).

those that simply evoke emotion.[40]

Visuals should be pilot tested with mock jurors to identify potential confusion, distraction (such as with some 3D prints), or unintended inferences before trial.[41] [42] Additionally, it is important to ensure that demonstratives are closely aligned with jury instructions, mirroring the elements and definitions that jurors must apply. Dual-mode instruction that incorporates visuals has been shown to improve both compliance and comprehension.[43]

**Conclusion**

Modern jurors are visual, skeptical, and eager to make sense of complex cases. Traditional, wordy slide decks—built to be read rather than to teach—squander limited attention, overload working memory, and fail to support the story jurors will carry into deliberations. The alternative is not mere "prettier slides," but a wholesale shift to strategic, research-grounded trial graphics: early, theme-driven visuals; dual-mode instruction; clean flowcharts and timelines; 3D where it clarifies; and expert-led teaching aids that jurors can repeat. Done well, such visuals increase comprehension of technical language, reduce extraneous cognitive load, and imprint the defense's (or plaintiff's) story so jurors can "remember and repeat" it when it matters most (Pathak & Wyland; Errickson et al. 2019; Gordon 2014). In an era of shortened attention and heightened suspicion, clear, memorable graphics are not window dressing—they are core advocacy.

40 [10] Hitchcock-Smith, O.K. Jury Decision Making & Graphic Evidence: The Effects of Auditory vs. Visual Presentation, Master's Thesis, Arkansas State University (2018); Bright, D. & Goodman-Delahunty, J. Gruesome Evidence and Emotion, summarized in Hitchcock-Smith (2018); Douglas, K., Lyon, D. & Ogloff, J. The Impact of Graphic Photographic Evidence, summarized in Hitchcock-Smith (2018).

41 [9] Errickson, D., Fawcett, H., Thompson, T.J.U. & Campbell, A. The Effect of Different Imaging Techniques for the Visualisation of Evidence in Court on Jury Comprehension, International Journal of Legal Medicine 134:1451–1455 (2019).

42 [4] Fuentes, R., Jehle, A. & Jetmundsen, N. The Verdict of the Jury, For The Defense (2016).

43 [6] Gordon, S. What Jurors Want to Know, Tennessee Law Review 81:751 (2014).

# BEYOND POWERPOINT

## Trial Graphics That Win

Haley Cox

Lightfoot

TRIAL TOUGH. SOLUTION SAVVY.


11 ALABAMA
3RD & GOAL
15 LSU
6-2
(3-2)
7
9:10
1ST
14
0
6-2
(3-1)
LSU
TOP NEWS
(4)Miami upset at Georgia Tech for 1st loss of season

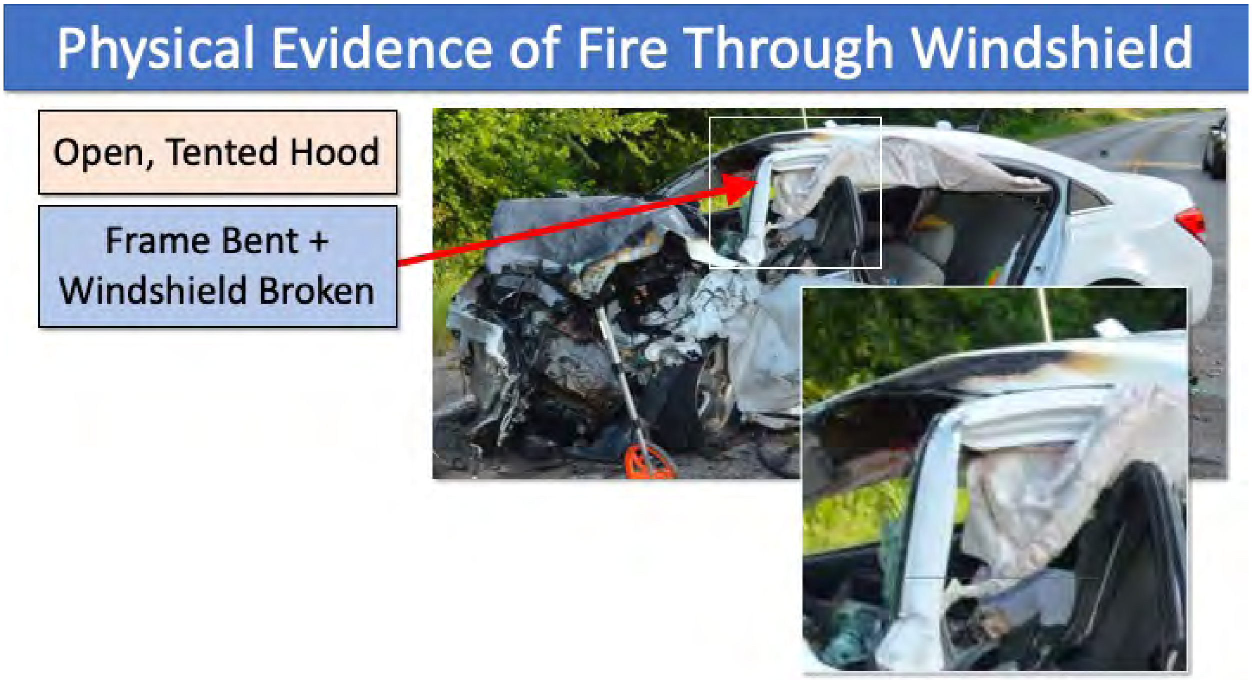
## Physical Evidence of Fire Through Windshield

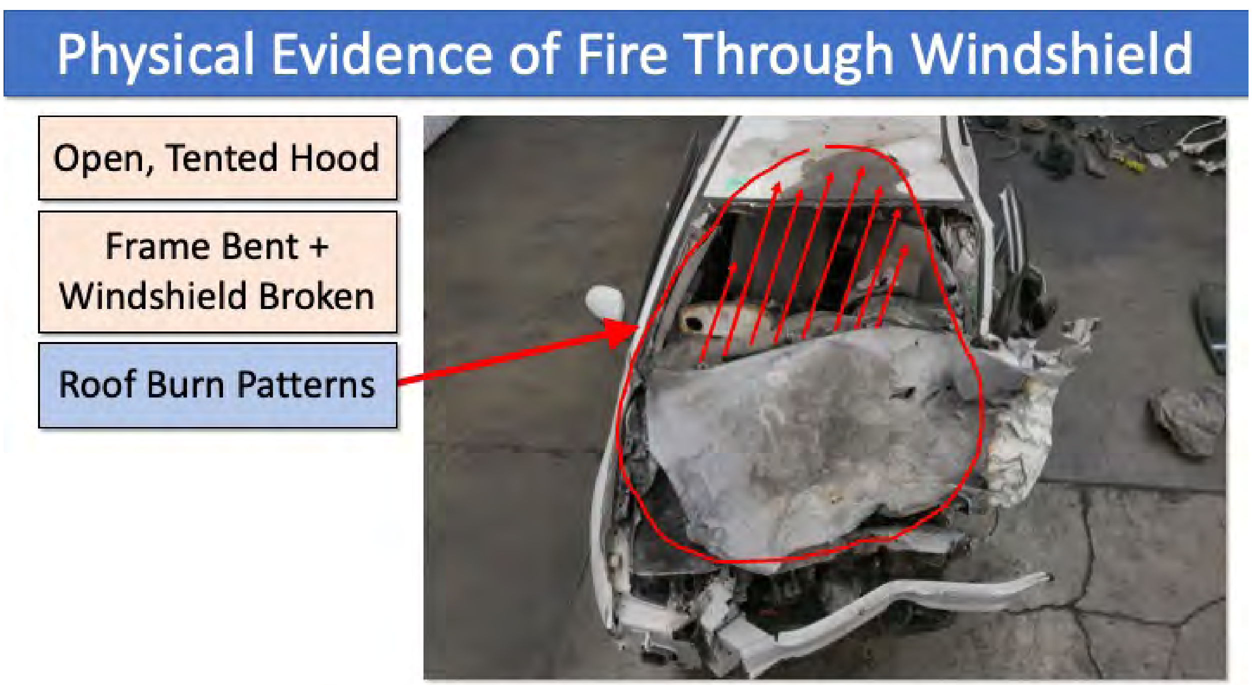
- Hood of the vehicle was bent open during the accident and "tented"
- Frame of the vehicle was broken which shattered the windshield
- Burn patterns on the roof indicate fire was coming out of the engine compartment
- Broken and melt chunks of glass found in the vehicle
- Paper and other miscellaneous items not burned inside the vehicle

## Physical Evidence of Fire Through Windshield

## Physical Evidence of Fire Through Windshield

Open, Tented Hood


Physical Evidence of Fire Through Windshield
Open, Tented Hood
Frame Bent + Windshield Broken

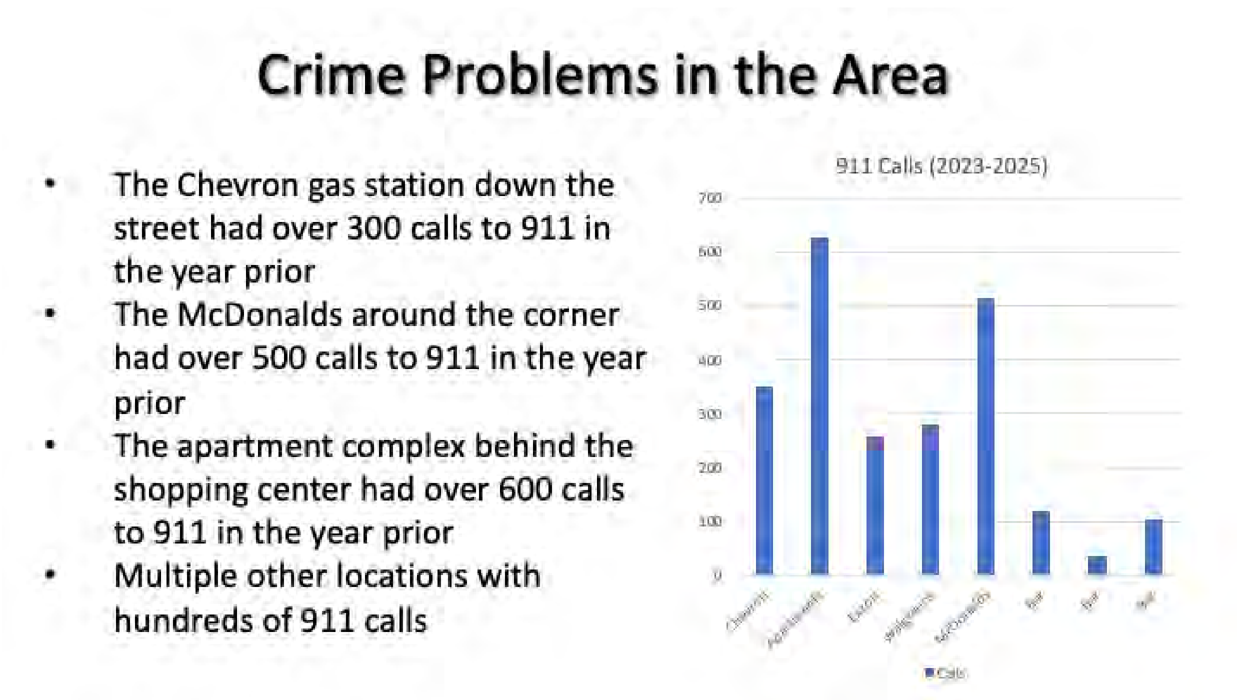

Physical Evidence of Fire Through Windshield
Open, Tented Hood
Frame Bent + Windshield Broken
Roof Burn Patterns

## Physical Evidence of Fire Through Windshield

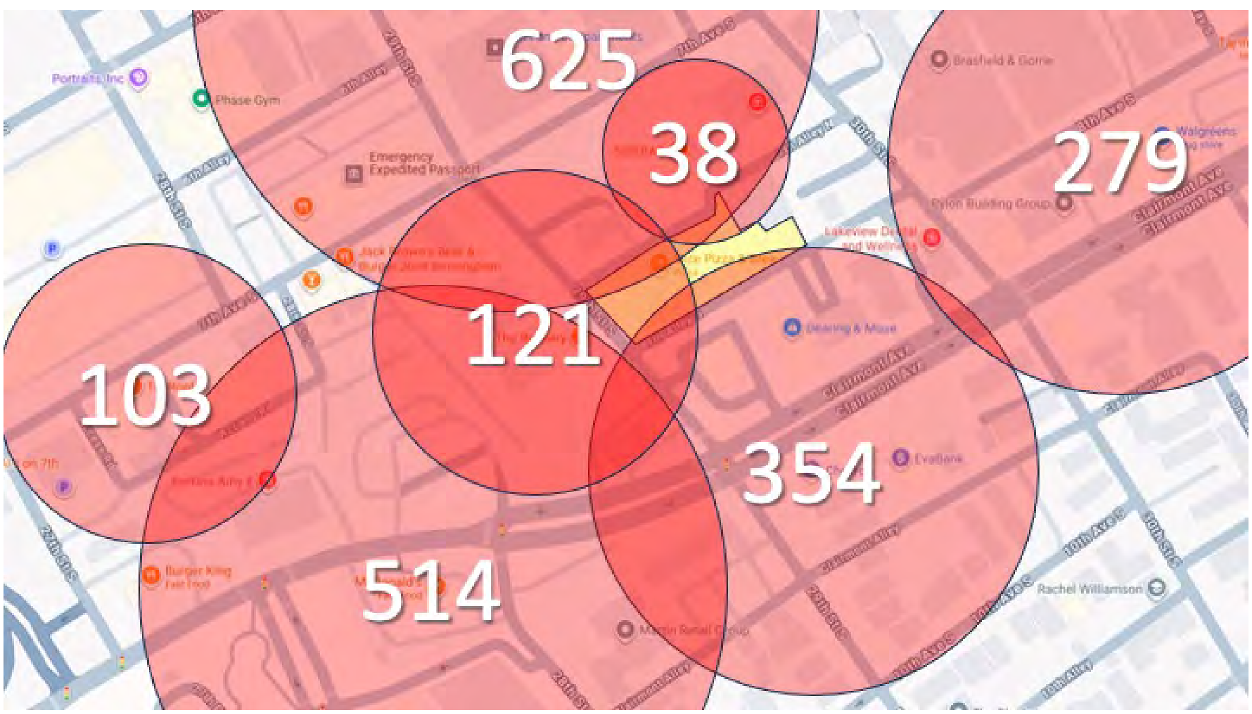
- Open, Tented Hood
- Frame Bent + Windshield Broken
- Roof Burn Patterns
- Broken, Melted Windshield Chunks

## Physical Evidence of Fire Through Windshield

- Open, Tented Hood
- Frame Bent + Windshield Broken
- Roof Burn Patterns
- Broken, Melted Windshield Chunks
- Isolated Burn Evidence in Car


Crime Problems in the Area
• The Chevron gas station down the street had over 300 calls to 911 in the year prior
• The McDonalds around the corner had over 500 calls to 911 in the year prior
• The apartment complex behind the shopping center had over 600 calls to 911 in the year prior
• Multiple other locations with hundreds of 911 calls
911 Calls (2023-2025)
700
600
500
400
300
200
100
0
Calls


Met on 7th Apartments
7th Ave S
Brasfield & Gorrie
Portraits, Inc
Phase Gym
Walgreens
Drug store
Emergency
Expedited Passport
SIDEBAR
Pylon Building Group
Lakeview Dental
and Wellness
Jack Brown's Beer &
Burger Joint Birmingham
Slice Pizza & Brew
Pizza
Dearing & Muse
The Refinery
Claremont Ave
Tin Roof
Chevron
EvaBank
Perkins Amy E
Burger King
Fast Food
McDonald's
Fast Food
Martin Retail Group
Rachel Williamson


625
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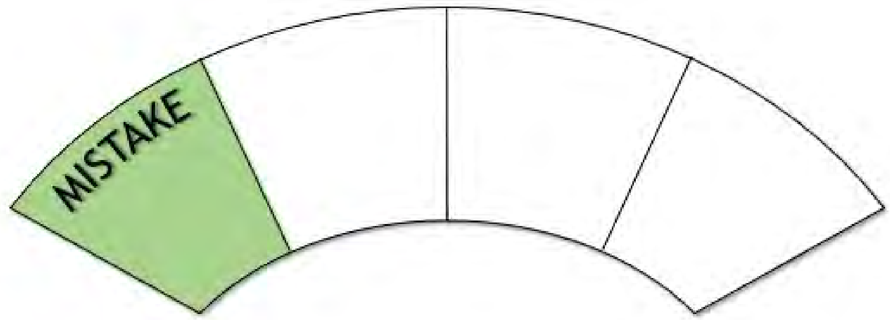
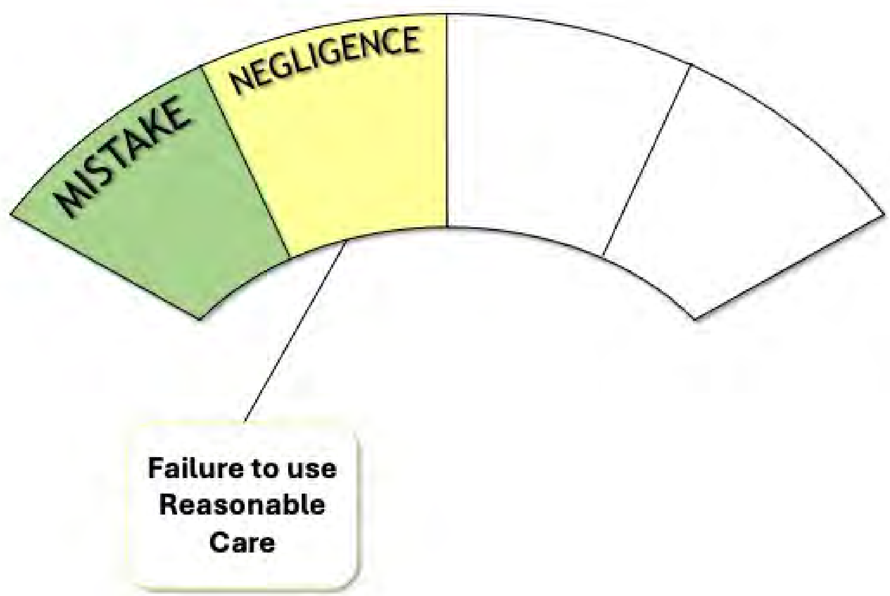
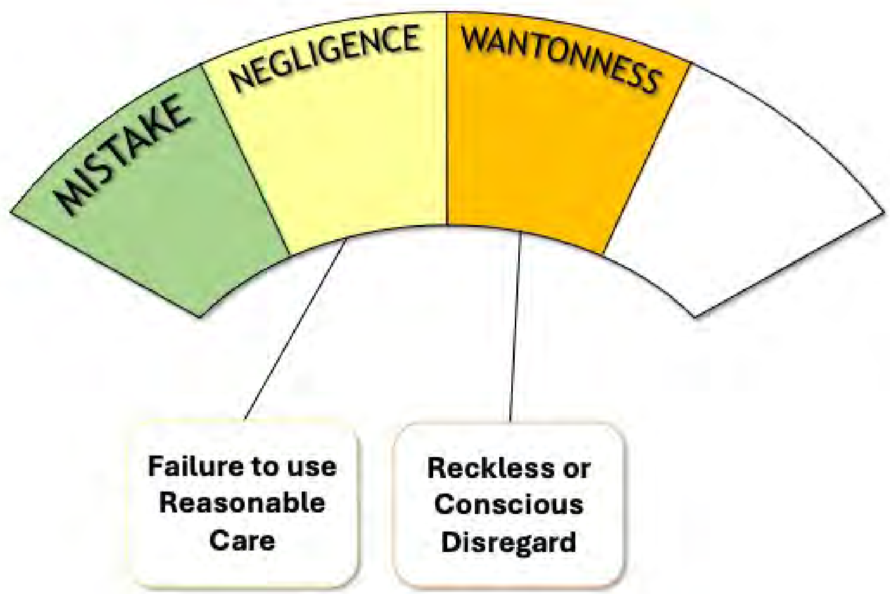
Portraits, Inc
Phase Gym
Emergency
Expedited Passport
Brasfield & Gorrie
Pylon Building Group
Lakeview Dental
Dearing & Muse
EvaBank
Burger King
Fast Food
Martin Retail Group
Rachel Williamson

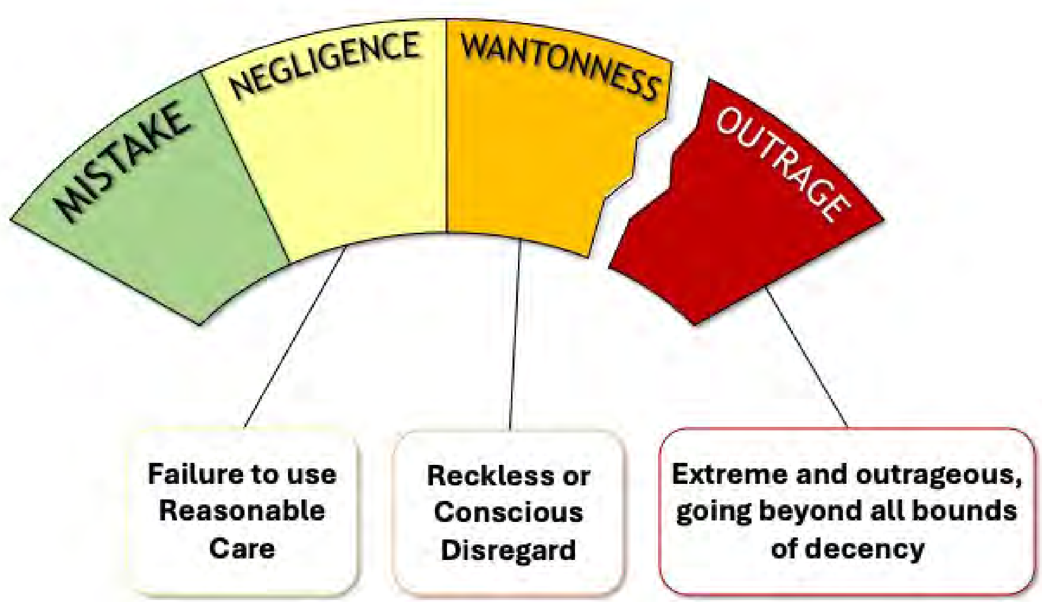
## Outrage

- This Court held that to present a jury question the [employee] must present sufficient evidence that the [employer's] conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it. The Court defined the second element of the tort of outrage as follows: `By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.' The Court has consistently held that the tort of outrage is a very limited cause of action that is available only in the most egregious circumstances


MISTAKE

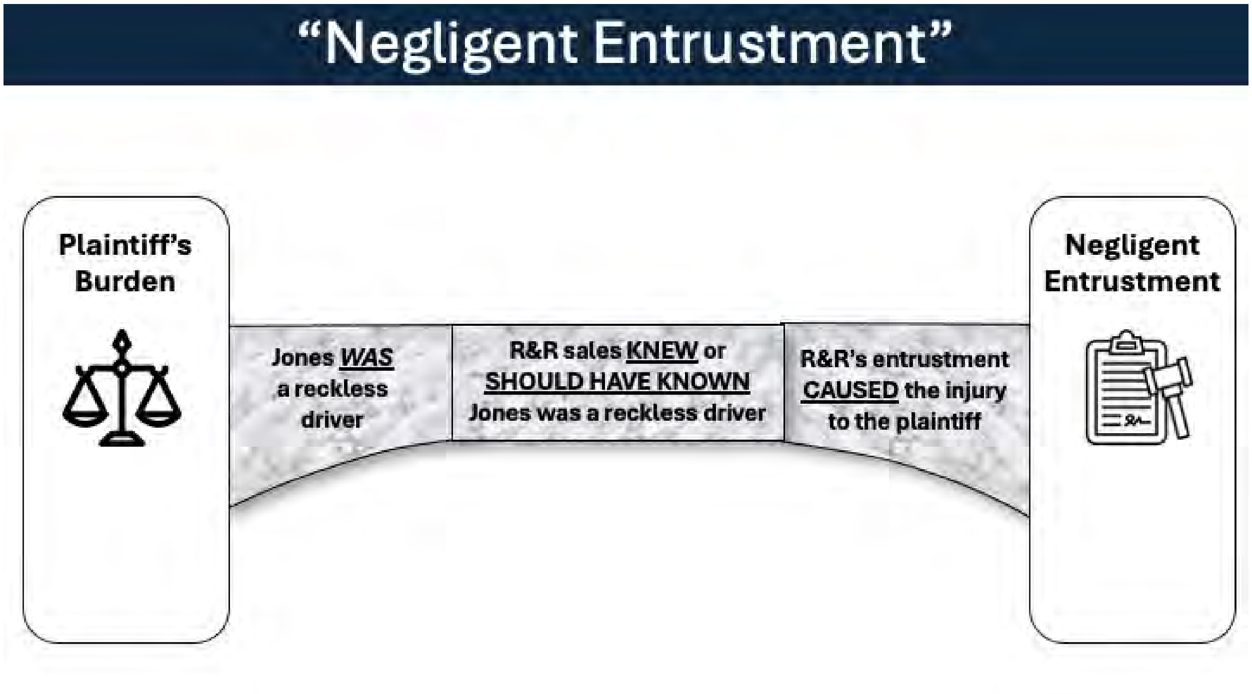

MISTAKE
NEGLIGENCE
Failure to use Reasonable Care

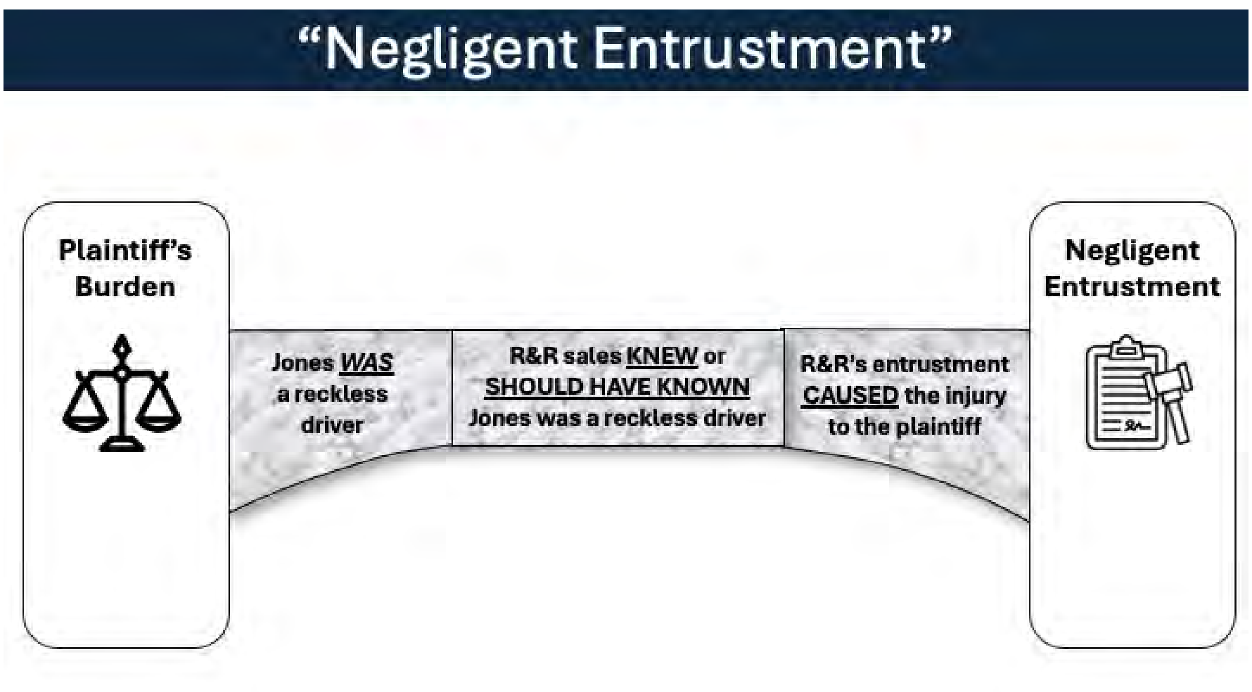

MISTAKE
NEGLIGENCE
WANTONNESS
Failure to use Reasonable Care
Reckless or Conscious Disregard


MISTAKE
NEGLIGENCE
WANTONNESS
OUTRAGE
Failure to use Reasonable Care
Reckless or Conscious Disregard
Extreme and outrageous, going beyond all bounds of decency

# Negligent Entrustment

- A plaintiff who invokes that doctrine must prove the owner knew, or had reasonable cause to know, that he was entrusting his car to an unfit driver likely to cause injury to others. Furthermore, in order to impose liability upon the owner, the plaintiff must prove that the negligent entrustment of the motor vehicle to the tortfeasor was a proximate cause of the accident.


"Negligent Entrustment"
Plaintiff's Burden
Jones WAS a reckless driver
R&R sales KNEW or SHOULD HAVE KNOWN Jones was a reckless driver
R&R's entrustment CAUSED the injury to the plaintiff
Negligent Entrustment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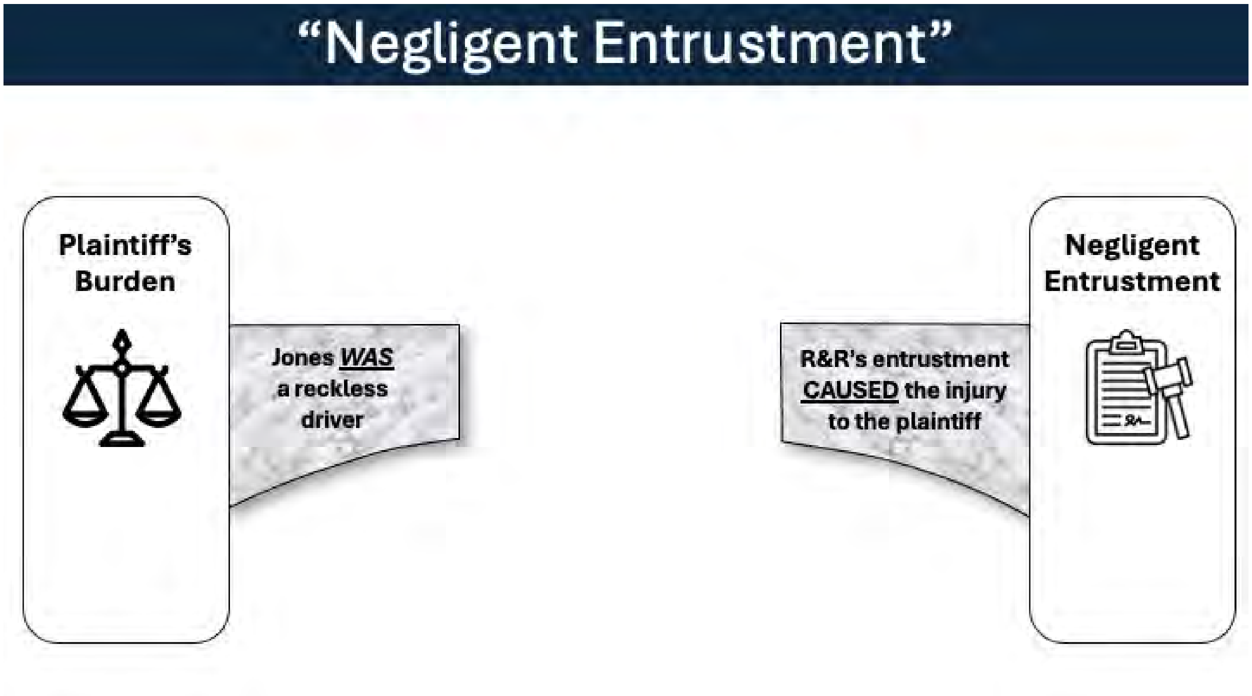
Negligent Entrustment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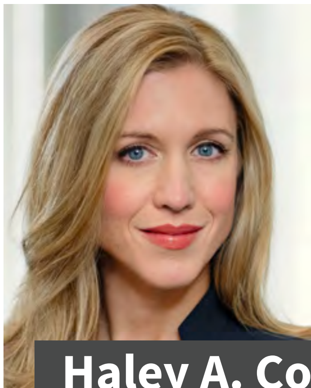


205.581.1519
hcox@lightfootlaw.com

# Haley A. Cox

**Partner | Lightfoot Franklin & White (Birmingham, AL)**

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

Haley understands what it takes to win: the truth, hard work and delivering the client's story so it resonates with judges and juries. She also understands that winning is different to every client and in every case. Whether a win is fighting all the way to a verdict or achieving a fair and swift resolution, Haley has the experience and drive to take the case as far as it needs to go.

For almost 20 years, Haley has been instrumental in recruiting the next generation of Lightfoot lawyers to serve the firm's clients. She is committed to carrying out Lightfoot's mission of hiring only the most talented and motivated lawyers, and then training them the right way.

**Practice Areas**

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

**Awards**

- Alabama State Bar Leadership Forum (Class 11)
- Benchmark Litigation, "Top 250 Women in Litigation" (2020-24)
- Benchmark Litigation, "Litigation Star" (2022-24)
- Benchmark Litigation, "Local Litigation Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability (2021)
- Benchmark Litigation, "Future Star" — Consumer Litigation, Medical Malpractice, Product Liability, Professional Liability (2018-20)
- The Best Lawyers in America© by BL Rankings — Personal Injury Litigation, Product Liability Litigation, Medical Malpractice Law (2022-26)
- Birmingham Business Journal, "Leader in Diversity" (2022)
- Birmingham Business Journal, "Best of the Bar" (2021)
- Birmingham Business Journal, "Top 40 Under 40" (2020)
- Birmingham Business Journal, "Rising Star of Law" (2018)
- B-Metro magazine, "Top Women Attorneys" (2020)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Litigation Defense (2014-21)

**Education**

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

# So, You've Been Cyber-Attacked. Now What?

**Greg Marshall**
Snell & Wilmer (Phoenix, AZ)

**So, You've Been Cyber-Attacked. Now What?**
*Greg Marshall*

Cybersecurity attacks are epidemic, more sophisticated than ever, and on the rise. Just a single click by one person in your organization can trigger a cybersecurity nightmare—and class action litigation is sure to follow. Even entities employing the most robust security measures with strong privacy protections are not immune. But there are steps to be taken to minimize the risk and exposure, and its incumbent upon general counsels and their teams to guard the gates.

**Things to do before a cyber security incident**
If your business has not yet faced a major cyber security incident, congratulations! But your time will come, and there are many things to be done to shore up your protections against the eventual cyber-attack now.

Many of these items fall squarely in the province of your IT professionals, but that does not mean in-house counsel should not be generally aware of them. Is your business encrypting Personally Identifiable Information ("PII") and other sensitive information (employee / consumer or otherwise) that you do not want in the public domain? Where does such data live on your systems and does it need to be in all of those places? Does your business maintain online backups to minimize disruption in response to a catastrophic attack? Are you using multifactor authentication for remote systems access? Every in-house should know the answers to these questions.

Two items are worthy of calling out. First, does your business monitor log activity? Doing so is critical to understanding how and when a threat actor accessed your systems, what data was exposed, and what data was exfiltrated. Knowing the who, what, why, when, where, and how are key to making your case to regulators and government authorities when a data security incident occurs, and ultimately your exposure when litigation comes. Second, does your business conduct regular phishing simulations? Human beings are almost always the weakest link in your business's data security systems, making regular testing and training your best safeguard.

Other pre-incident preparations fall squarely in the province of in-house counsel. Do you have a response plan in place? Do you have an incident response provider and backup? Do you have a notification vendor? Are you connected with a ransomware negotiator familiar enough with your business to quickly appear when and if needed? Have you developed law enforcement relationships, particularly with the FBI, whom you can contact when the time comes? Are you aware of your company's insurance policies, notice requirements, and coverage limitations? Waiting for an incident to learn the answers to these questions comes too late.

**Things to do after a cyber security incident**
This is when implementing a well-thought-out incident response plan pays. That plan will inevitably include a third-party conducted forensic examination, to learn the who, what, why, when, where, and how, of the data security incident. The results will dictate your next steps, including whether notification is required, the quintessential question that you have to get right.

Data breach notification statutes vary, but most require such notification be made in connection with a good faith and prompt investigation once an entity becomes aware that a data breach may have occurred.[1] A leading data breach secondary source provides the following guidance: learn "everything" there is to know about the breach, which means "find out as much as possible" about the information breached, including both searchable and non-searchable files, and give particular emphasis to the sensitivity of the data and whether it was encrypted.[2]

Although case law regarding the reasonable standard for conducting a forensic investigation remains limited, the authority that does exist makes clear that companies

1 Colo. Rev. Stat. Ann. § 6-1-716 (2); see also Ark. Code Ann. § 4-110-105 (d); Or. Rev. Stat. Ann. § 646A.604 (8).

2 Thomas on Data Breach: A Practical Guide to Handling Data Breach Notifications Worldwide, § 3:6 (Investigation mechanics—What information was impacted?).

must take steps to investigate potential data breaches and evaluate any impacted data. For example, in the Yahoo! data breach litigation, the court concluded that the plaintiffs sufficiently pleaded class claims for delay of notification, albeit that was an extreme example with the company delaying notification for about two years.3

Case law is not the only source of legal duty when it comes to investigating data breach incidents. For example, in an ethical opinion, the Texas Bar noted "[t]he lawyer must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A post-breach investigation must be sufficient to ensure the intrusion has been stopped and then to evaluate the data lost or assessed."[4]

With respect to regulatory enforcement, many state statutes provide penalties for failing to report a data breach. For example, under the Florida Information Protection Act ("FIPA"), an entity that fails to report a data breach could be subject to the following civil penalties: 1) $1,000 per day for the first 30 days; 2) $50,000 per "30-day period" for up to 180 days; and 3) a maximum penalty of $500,000 for violations that last more than 180 days.[5] Penalties for a failure to report a data breach apply per breach, not per individual affected.

In extreme cases, failure to make good faith efforts to investigate a data breach and make any legally required notification may also result in more serious, criminal exposure. For example, in August 2020, the Department of Justice filed a criminal complaint against Uber's Chief Security Officer ("CSO") in connection with the attempted cover-up of a 2016 hack of Uber.[6] According to the criminal complaint, while Uber was responding to Federal Trade Commission ("FTC") inquiries relating to a 2014 breach incident, Uber's CSO received an email from a hacker informing him that Uber had been breached again. The hackers ultimately revealed that they had accessed and downloaded an Uber database containing PII associated with approximately 57 million Uber users and drivers, which included the drivers' license numbers for approximately 600,000 people who drove for Uber.

Rather than report the 2016 breach, Uber's CSO allegedly took deliberate steps to prevent knowledge of the breach from reaching the FTC, including paying off the hackers, requiring the hackers to sign non-disclosure agreements, and failing to provide the management team with critical information. Based on these allegations, Uber's CSO was charged with obstruction of justice and misprision of a felony. The maximum statutory penalty for the obstruction charge is five years in prison, and the maximum penalty for the misprision charge is three years in prison. In 2023, the CSO was found guilty and was sentenced to three years' probation.[7]

**Brace for class action litigation**

Over the past few years, data breach class action lawsuits in which individuals seek to hold companies liable have proliferated. Since 2020, the number of data breach class action lawsuits filed in the United States may multiplied five (5) fold – 1,500 filings in 2024 alone. Its increasingly easy for class action plaintiff lawyers to cash-in on the boon, using state notification requirements and social media to target potential defendants and sign-up class representatives through which they file their cookie-cutter complaints and serve their cookie-cutter discovery requests.

**Standing**

Challenges to standing are often the go-to defense. To establish Article III standing, a plaintiff must show: (1) he or she has suffered an "injury in fact" that is (a) concrete and particularized and (b) "actual or imminent, not conjectural or hypothetical"; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[8]

To date, the predominant issue in federal data breach class action litigation has been whether individuals whose PII was compromised have suffered an actual or threatened injury, also known as "injury-in-fact," sufficient to establish Article III standing. Plaintiffs have argued that several different types of harms should constitute injury-in-fact for standing purposes, including, among other things, a diminution in value of their PII; loss of privacy; and an increased risk of future identity theft, including the cost of credit monitoring and identity theft protection and the time and effort expended dealing with the effects of a data breach.

Defendants have found success in defeating standing based on a lack of injury-in-fact. For example, some courts have declined to recognize alleged diminution in the value of PII as an "injury in fact" because PII does

3 In re Yahoo! Inc. Customer Data Sec. Breach Litig., 313 F. Supp. 3d 1113, 1123 (N.D. Cal. 2018); see also Hiscox Ins. Co. Inc. v. Warden Grier, LLP, 474 F. Supp. 3d 1004, 1006 (W.D. Mo. 2020) (finding plaintiffs sufficiently pleaded claims against their attorneys where the attorneys were aware a threat actor gained access to personal information, failed to hire an IT team to investigate the breach, paid a ransom to prevent dissemination of the personal information, and failed to notify plaintiff or plaintiff's clients of the data breach).

4 Lawyers' Obligation After an Electronic Data Breach or Cyber Attack: Formal Op. 483, 2019 TXCLE-ABL 5-V, 2019 WL6324367.

5 Fla. Stat. § 501.171(9)(b).

6 See U.S. Attorney's Office release, Former Chief Security Officer for Uber Charged With Obstruction Of Justice, available at https://www.justice.gov/usao-ndca/pr/former-chief-security-officer-uber-charged-obstruction-justice.

7 Ex-Uber Security Chief Sentenced Over Covering Up Hack, May 5, 2023, available at: https://www.bbc.com/news/technology-65497186.

8 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

not typically have a "value" capable of being diminished.[9] Likewise, courts routinely reject alleged loss of privacy as a basis to establish a concrete and particularized injury required for standing.[10]

Finally, with respect to the risk of future identity theft, courts have rejected standing arguments on this basis because while a risk of future harm may be sufficient to establish standing in suits for "forward-looking, injunctive relief,"[11] in a suit for monetary damages, "the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm.[12]

**Negligence**

Data breach plaintiffs almost always base their complaint on negligence and allege that the company that suffered the breach failed to maintain reasonable security measures in accordance with industry standards necessary to prevent the breach. To establish negligence, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care, (2) a breach by the defendant of that standard, (3) a causal connection between the defendant's conduct and the resulting injury, and (4) actual damages.[13]

Negligence claims have two vulnerabilities at the pleading stage. First, negligence alone is not actionable; actual injury or damages must be present before a cause of action in negligence arises.[14] Even if a plaintiff is found to have pled a threshold Article III injury for standing purposes, courts have found that's not necessary enough for negligence. Second, negligence requires a legal duty, but not every state has recognized duties in the data breach context beyond, for example, statutory notice requirements.[15]

You should also explore whether the allegations of "breach" are sufficiently stated under the appliable pleading standard, whether Twombly or the state analog, and the applicability of other state specific defenses, such as the economic loss doctrine.[16]

**Unjust Enrichment**

Depending on the state, unjust enrichment generally requires: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and impoverishment; (4) the absence of justification for the enrichment and impoverishment; and (5) the absence of a remedy provided by law.[17] These claims are based on the theory that companies are unjustly enriched (and impacted individuals are impoverished) when they fail to implement reasonable data-security measures to protect their consumers' PII.[18]

As a preliminary matter, PII doesn't possess any value in the "enrichment" sense[19], nor is there anything inequitable about the provision of PII incident to whatever application was made or service given.[20] Moreover, these claims are subject to dismissal when they are pled with contractual claims upon a finding that a valid express or implied contract existed because the contract between the parties preempts any unjust enrichment claims.[21]

9 See, e.g., In re Zappos.com, Inc., 108 F. Supp. 3d 949, 954 (D. Nev. 2015), rev'd on other grounds by In re Zappos.com, Inc., 888 F.3d 1020 (9th Cir. 2018) (rejecting argument that data breach diminished value of PII and reasoning "[p]laintiffs do not allege any facts explaining how their [PII] became less valuable as a result of the breach or that they attempted to sell their information and were rebuffed because of a lower price-point attributable to the security breach"); Adkins v. Facebook, Inc., No. C 18-05982 WHA, 2019 WL 3767455, at *3 (N.D. Cal. Aug. 9, 2019) (rejecting theory that data breach rendered PII less valuable in context of Section 17200 claim and finding no standing where, post-data breach, plaintiff's "[PII] has maintained the same value to him" (emphasis in original)); See Travis v. Assured Imaging LLC, No. CV-20-00390-TUC-JCH, 2021 WL 1862446, at *9 (D. Ariz. May 10, 2021) (agreeing with other courts in declining to find that theory of diminution in value of PII as a result of data breach constitutes an injury in fact for Article III standing); Fernandez v. Leidos, Inc., 127 F. Supp. 3d 1078, 1088-89 (E.D. Cal. 2015) (no standing where plaintiff did not allege current or future intent to sell PII or that he was foreclosed from doing so because of data breach).

10 See, e.g., In re Zappos.com, Inc., 108 F. Supp. 3d 949, 962 (D. Nev. 2015), rev'd on other grounds by In re Zappos.com, Inc., 888 F.3d 1020 (9th Cir. 2018) (data breach plaintiffs alleging loss of privacy "failed to show how that loss amounts to a concrete and particularized injury"); Duqum v. Scottrade, Inc., No. 15-CV-1537-SPM, 2016 WL 3683001, at *8 (E.D. Mo. July 12, 2016), aff'd sub nom. Kuhns v. Scottrade, Inc., 868 F.3d 711 (8th Cir. 2017) (concluding no injury in fact was established where data breach plaintiffs failed to allege "any facts demonstrating that they suffered any damages or injury due to a loss of privacy or breach of confidentiality").

11 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021).

12 The law of standing under state constitutions varies, with some states interpreting their standing requirements consistent the U.S. Constitution, and others requiring a lesser showing. For state court class actions, defendants must confirm whether they have a viable standing argument under state law.

13 See In re Banner Health Data Breach Litigation, No. CV-16-02696-PHC-SRB, 2018 WL 11352137, (D. Ariz. Aug. 7, 2018).

14 See, e.g., Amburgy v. Express Scripts, Inc., 671 F. Supp. 2d 1046 (E.D. Mo. 2009) (citing Doe v. Chao, 540 U.S. 614, 621 (2004)).

15 For example, in Community Bank of Trenton v. Schnuck Markets, Inc., 887 F.3d 803, 816-18 (7th Cir. 2018), the Seventh Circuit applied both Illinois and Missouri law in considering whether a common law duty to safeguard customer data exists in the context of data breaches. The Seventh Circuit, acknowledging the dearth of Missouri appellate court guidance, considered Missouri's data privacy statute (Mo. Ann. Stat. § 407.1500), together with the fact that Missouri's Attorney General has the "exclusive authority" for enforcing Missouri's data breach notice statute via a civil action, to ultimately hold that Missouri courts would not recognize a common law duty to safeguard customer data. Schnuck, 887 F.3d at 817-18.

16 See Vance Romero v. Selene Fin., LP, No. 4:22-CV-00829-BCW, 2023 WL 8586721, at *4 (W.D. Mo. Nov. 20, 2023) (holding economic loss doctrine barred negligence claim where plaintiff's emotional distress and other non-monetary allegations were "unquantifiable" and "not supported by any factual allegations.").

17 Freeman v. Sorchych, 226 Ariz. 242, 251, ¶ 27, 245 P.3d 927, 936 (Ct. App. 2011).

18 See, e.g., Shields v. Mondelez Global, No. 1:23-cv-03999 (June 23, 2023).

19 See, e.g., JB Contracting, Inc. v. Bierman, 147 S.W.3d 814, 820 (Mo. Ct. App. 2004) (no unjust enrichment when benefit conferred on defendants was "incidental" to and a result of plaintiffs' pursuit of the potential profits to be gained); Clark v. Daby, 300 A.D.2d 732, 733 (N.Y. App. Div. 2002) (dismissing plaintiff's unjust enrichment claim where "any benefit to defendant was purely incidental"); Emergency Physicians Integrated Care v. Salt Lake Cty., 167 P.3d 1080, 1086 (Utah 2007) (stating that unjust enrichment does not result if the defendant has received only an incidental benefit from plaintiff's service).

20 See, e.g., Dedloff v. Whole Foods Mkt. Group, Inc., 688 F. Supp. 3d 893, 904-05 (E.D. Mo. 2023) (dismissing unjust enrichment claim where plaintiff "received exactly" the amount of product "she bargained for."); In re SuperValu, Inc., Customer Data Sec. Breach Litig., No. 14-MD-2586-ADM/TNL, 2018 WL 1189327, at *16 (D. Minn. Mar. 7, 2018) (concluding data breach unjust enrichment claim "lacks merit" because plaintiff "admits that he obtained goods in exchange for the financial benefits he conferred upon" defendant), aff'd sub nom. In re SuperValu, Inc., 925 F.3d 955 (8th Cir. 2019).

21 See, e.g., Bovay v. Sears, Roebuck & Co., No. 1-14-2671, 2017 Ill. App. Unpub. LEXIS 35, at *80 (Ill. App. Ct. 2017) ("Furthermore, the unjust enrichment claims fail because the relationship between Sears and plaintiffs was governed by the agreements during the class period . . . Given the various agreements that governed the relationships between Sears and plaintiffs during the class period, plaintiffs' 'quasi-contract' unjust enrichment claims fail."); In re Zappos.com, Inc. Customer Data Sec. Breach Litig., No. 12-cv-00325, 2016 U.S. Dist. LEXIS 60453, at *24 (D. Neb. May 6, 2016) (dismissing plaintiffs' unjust enrichment claim because "they failed to allege that they conferred any benefit upon Zappos outside of the contracts they formed to purchase goods"); In re Sony Gaming Networks and Customer Data Security Breach Litigation, 996 F. Supp. 2d 942 (S.D. Cal. 2014) ("Under Florida, Massachusetts, Michigan, Missouri, New Hampshire, New York, Ohio, and Texas law a plaintiff may not recover for

**Unfair and Deceptive Business Practice**

Individuals often assert claims under state consumer fraud and unfair/deceptive trade practice law. Under these claims, plaintiffs allege that (1) defendant's statements regarding the reasonableness of their data security practices were false and/or misleading, (2) plaintiffs relied on defendant's false and/or misleading conduct, and (3) as a result, plaintiffs suffered harm. For example, California's Unfair Competition Law ("UCL") prohibits "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising."[22]

There is significant variation in how courts address these issues, but these claims typically turn on whether the relevant statute required the plaintiffs to demonstrate actual harm under state law and whether fear of future identity theft is recognized as an actual harm. Courts, however, have found plaintiffs asserted viable claims even when they cannot demonstrate economic loss. For example, in the Marriott Data Breach Litigation, the court found plaintiffs had asserted a viable UCL claim because they alleged that "had consumers known the truth about Defendants' data security practices—that they did not adequately protect and store their data—they would not have stayed at a Marriott Property, purchased products or services at a Marriott Property, and/or would have paid less."[23]

**California Privacy Rights Act**

The California Privacy Rights Act ("CPRA") provides an additional potential cause of action for class representatives who are California residents and who seek to represent a California class.[24] The CPRA provides a private right of action for unauthorized access, theft, or disclosure of unredacted, unencrypted PII as a result a business's failure to implement and maintain reasonable security measures and procedures.[25]

Damages for private actions include (1) the greater of a statutory amount between $100 and $750 per consumer per incident and actual damages; (2) declaratory or injunctive relief; and (3) any other relief the court deems proper.[26] Because the CPRA offers these statutory damages, the statute is popular among data breach plaintiffs and there is often a California subclass in data breach class actions.

**Don't go-it alone**

While data security incidents are stressful and come with cascading obligations and consequences, there are dedicated professionals – lawyers, forensic experts, and other providers – in this space ready to help when the worse happens. Do not go-it alone. Engage the appropriate team early to navigate your business through the storm.

unjust enrichment where a 'valid, express contract governing the subject matter of the dispute exists….'").

22 See Cal. Bus. & Prof. Code § 1700.

23 In re Marriot International Inc., Customer Data Breach Security Breach Litigation, 440 F. Supp. 3d 447, 492 (D. Md. 2020).

24 See, e.g, California Pizza Kitchen, Inc., 2022 WL 16894503, at *3 (C.D. Cal. July 29, 2022) (denying motion to dismiss CCPA claim).

25 See CPRA Section 1798.150.

26 CPRA Section 1798.150(a)(1).

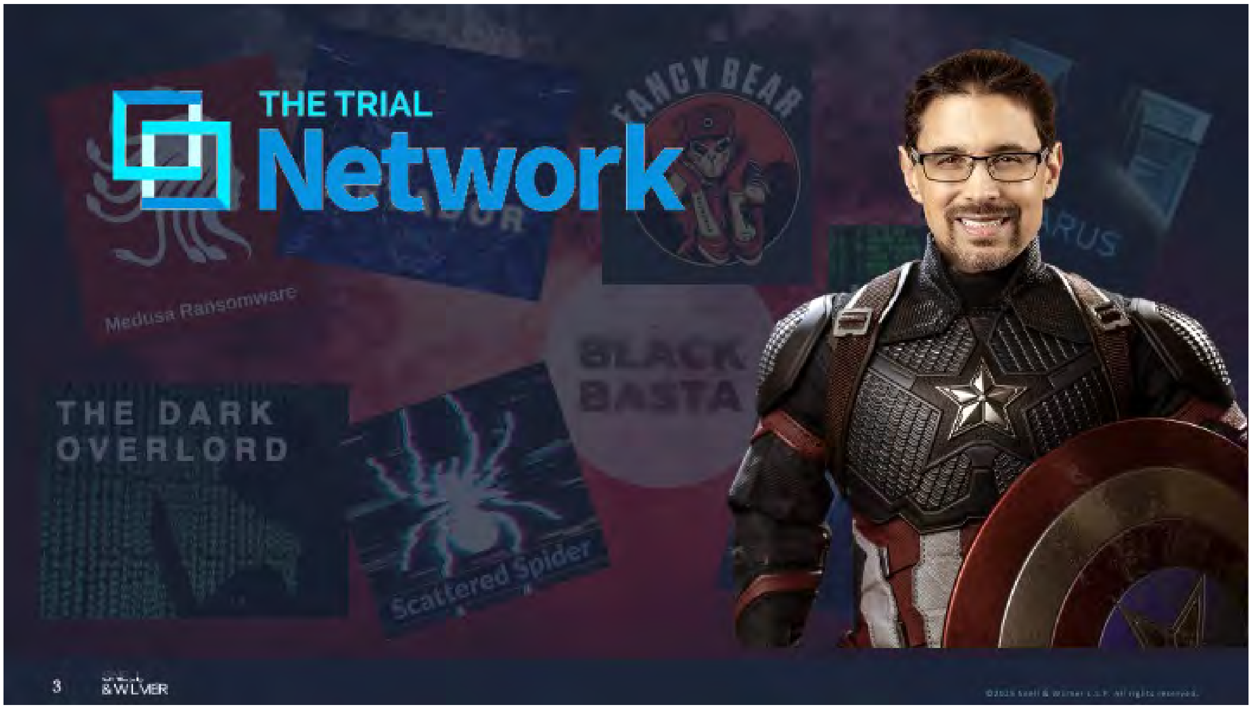
# So, You’ve Been Cyber-Attacked. Now What?

Greg Marshall

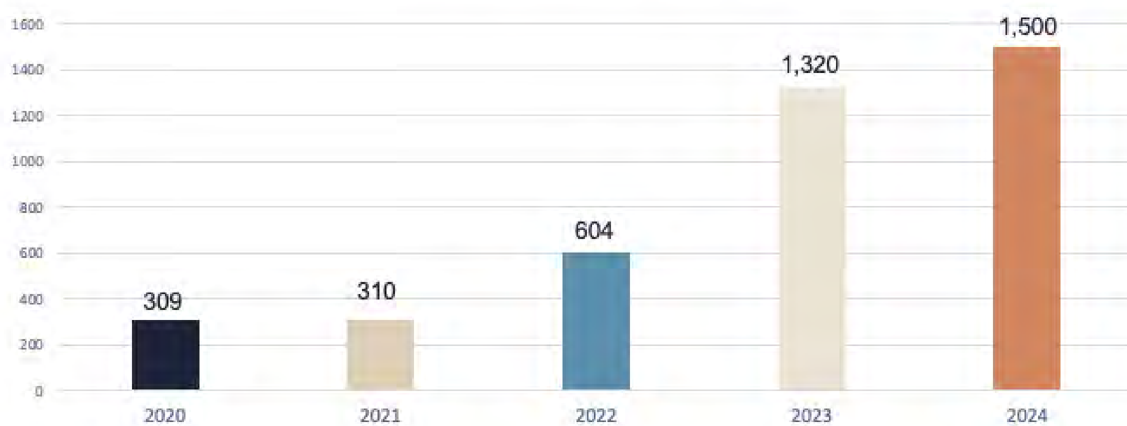
SNELL & WILMER

1 SNELL & WILMER


2 SNELL & WILMER




## Class Action Data Breach Filings by Year




4

## Things to do before an incident

- ✓ Encryption
- ✓ Multi-factor authentication
- ✓ Log activity monitoring
- ✓ Offline backups
- ✓ Phishing simulation



## Things to do before an incident (cont.)

- ✓ Incident response plan
- ✓ Incident response provider
- ✓ Notification vender
- ✓ Ransomware negotiator
- ✓ Law enforcement relationships (FBI)
- ✓ Insurance

## Things to do after an incident

- ✓ Investigation
  - Forensic – who, what, why, when, where
  - Sensitive information review
- ✓ Engage counsel / providers
- ✓ Alert insurer
- ✓ FAQs
- ✓ Future prevention

7

## Notice requirements

# Things Not To Do After an Incident

- X Ignore it
- X Wipe it
- X Pay it
- X Crowd source it



# Brace for Class Actions!

# Typical Claims

- Negligence
- Unjust enrichment
- Privacy invasion
- Breach of contract
- Unfair business practices

11

# California

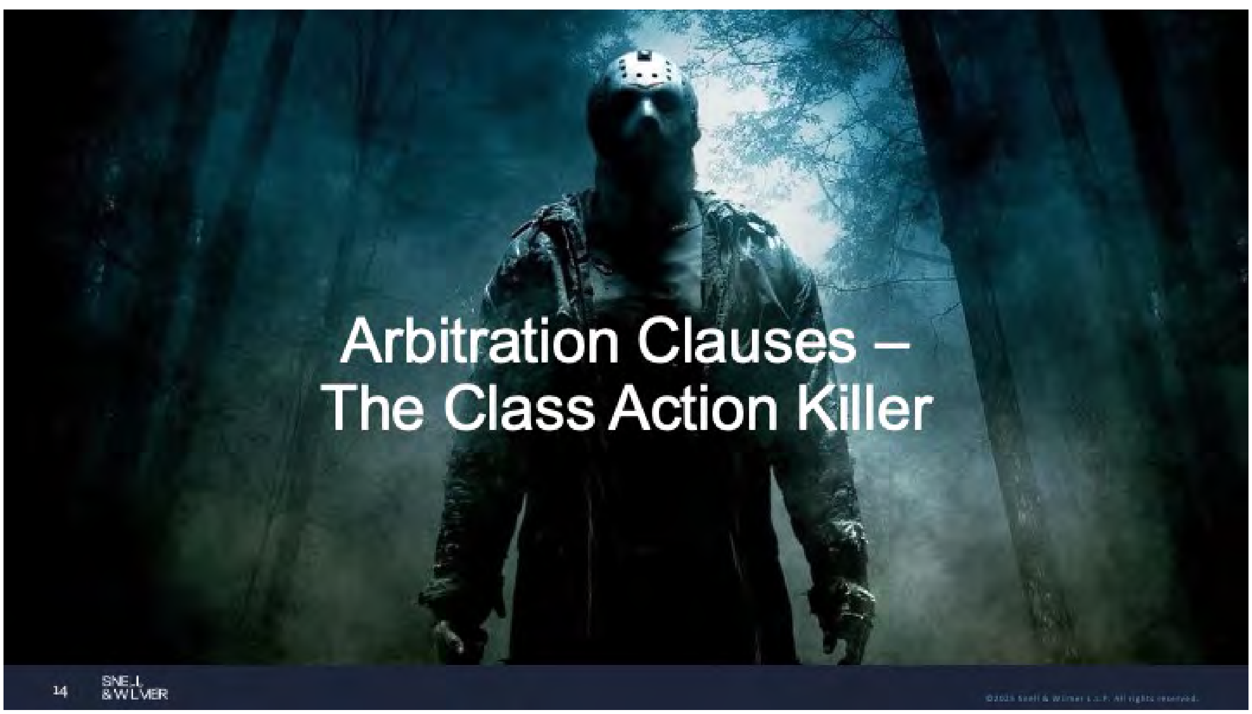
- The Privacy Rights Act

12

# Typical Alleged Damages

- Increased fraud risk
- Identity theft risk
- Credit monitoring costs
- Loss of privacy
- Loss of benefit of the bargain
- Diminution of PII value





# TransUnion LLC v. Ramirez

## The Supreme Court Hardens the Concrete

15 SNELL & WILMER

# Three Immutable Elements of Standing

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

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# What Does "Concrete" Mean?

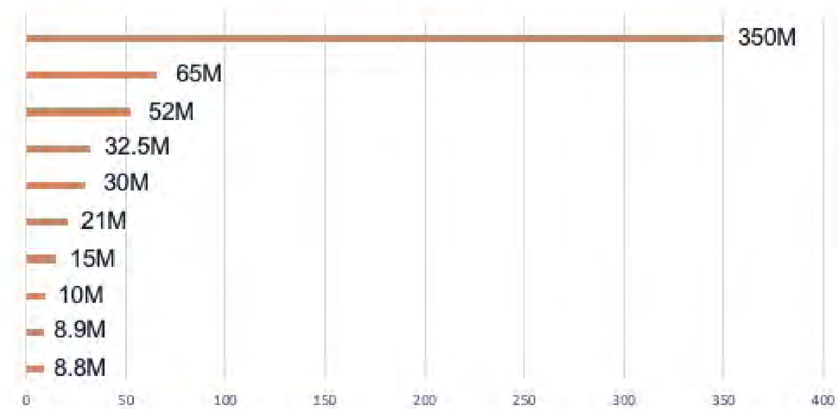
- Real impact on real persons, not abstract
- Plaintiffs must have a "personal stake"




# The Risk of Future Harm

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

# 2024 - Top 10 Data Breach Class Action Settlements

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# Settlement Considerations

- Individual settlement
- Class settlement
  - Payments
  - Credit monitoring
  - Enhanced security
  - Claims made

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# Gregory J. Marshall

**Partner | Snell & Wilmer (Phoenix, AZ)**

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

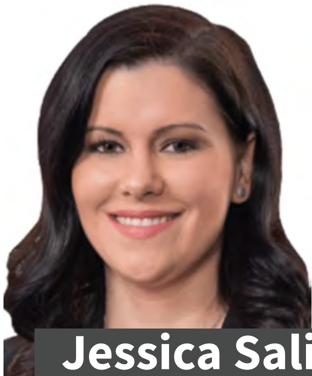
Greg's practice focuses on the defense of banks and lenders. His clients include national and regional banks, credit unions, mortgage lenders and servicers, FinTech companies, credit card issuers, automobile finance servicers, and money transmitters. His practice includes class actions and managing defense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

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

**Services**
- Class Action Litigation
- Litigation, Investigations, and Trials
- Financial Services Litigation
- Insurance and Licensure
- International
- Nonprofit Law
- Personal Injury
- Product Liability Litigation
- Automotive
- Manufacturing
- Aircraft

**Awards and Recognition**
- Top Lawyers, Phoenix Magazine (2025)
- The Best Lawyers in America®, Commercial Litigation, Financial Services Regulation Law (2023-2026)
- Benchmark Litigation, Litigation Star – Arizona, General Commercial (2025)
- Southwest Super Lawyers, Rising Stars Edition, Banking (2012-2013)
- Arizona's Finest Lawyers
- Top 50 Pro Bono Attorneys, Arizona Foundation for Legal Services & Education (2011)

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



# Geofencing the Jury Box: Digital Influence in Trial Practice

**Jessica Salisbury-Copper**
Thompson Hine (Dayton, OH)

**Blurred Lines: Constitutionally Protected Speech or Targeted Advertising Intended to Persuade a Jury?**
*Jessica Salisbury-Copper*

The pervasive use of smartphones could turn courthouses into data perimeters. Litigants or their proxies can geofence a courthouse, target likely jurors' devices, and drip-feed messages designed to influence perceptions about a party, an issue, or the legitimacy of the proceedings.

The tactic is quiet, fast, and hard to trace—an almost invisible cousin of courthouse picketing. It also sits at the fault line of two bedrock commitments: the First Amendment's protection of commercial speech and the justice system's duty to safeguard an impartial jury.

The use of geofencing techniques to send targeted advertisements to would-be jurors exploits the space between general advocacy and direct juror contact. Is a courthouse geofence a digital leaflet in the public square—or jury tampering?

**What is geofencing and how is it used?**
An individual's location can be "geo-tracked" using datapoints like cell sites, connection to Wi-Fi networks, Bluetooth devices, and the use of apps that store location information.[1] That location information can be used to create a boundary, or a "geofence," around a geographical area. "Geofencing is a location-based service in which an app or other software uses GPS, RFID, Wi-Fi or cellular data to trigger a pre-programmed action when a mobile device or RFID tag enters or exits a virtual boundary set up around a geographical location, known as a geofence."[2]

Most individuals are familiar with the concept of geofencing as a marketing tool to deliver targeted advertisements to consumers based on their real-time physical location. By creating a virtual boundary around a specific area—like a store, event venue, or competitor's location—businesses can trigger ads, promotions, or notifications to cell phones as people enter or exit the defined zone. This allows marketers to reach potential customers with timely, relevant messages, increasing the likelihood of engagement and sales.

But geofencing has crossed paths with the legal landscape in several ways. One of the most common discussions on the topic is in the controversial area of geofence warrants, where law enforcement issue warrants for geolocation information to identify a criminal suspect.[3] Courts have reached inconsistent conclusions on whether geofence warrants are unconstitutional or potentially permissible if appropriately tailored, and the increased use of geofencing has spurred some lawmakers to take legislative action. Geofencing is also a tool used by lenders or lessors to disable and/or repossess a vehicle when a borrower is in default, or as a tool for employers to track employee location.[4]

**Knowledge is Power – But Not Necessarily a Submission to Personal Jurisdiction**
Geofencing's increased prevalence has made its way into jurisdictional arguments, with some plaintiffs claiming a company has purposefully availed itself of, and thus had minimum contacts with, a jurisdiction when it did not use a geofence to geoblock users in that jurisdiction. Though courts have concluded that affirmative geoblocking can weigh against the exercise of personal jurisdiction, they have also held that the "failure to take affirmative steps to block its entire website in the United States is insufficient to establish minimum contacts."[5]

On the other hand, one court relied on the fact that a

1 Sabrina A. Neff, Thinking Inside the Box: Geo-fencing Technology, Litigation and Lessons for the Consumer Financial Services Industry, Conference on Consumer Finance Law Quarterly Report, Vol. 78, No. 1 (2025).

2 Sarah K. White, What is Geofencing? Putting Location to Work, CIO (Nov. 1, 2017), https://www.cio.com/article/288810/what-is-geofencing-putting-location-to-work.html#:~:text=How%20geofencing%20works,when%20developing%20a%20mobile%20app (last accessed September 14, 2025).

3 Marlaina Pinto, Abortions, Location Data, and the Fourth Amendment: Geofence Warrants in a Post-Roe World, 22 Colo. Tech. L.J. 175 (2023). "Most recently, the FBI's investigation into the January 6 Capitol riots 'included the biggest-ever haul of phones from controversial geofence warrants,' with Google identifying 5,723 devices." Id.

4 Stacy-Ann Elvy, Legal and Privacy Implications of Vehicle Monitoring Technology, 110 Iowa L. Rev. 43 (2024).

5 Safex Found., Inc. v. Safelaunch Ventures Ltd., 694 F.Supp.3d 1 (D.C., 2023).

company's geolocation technology allowed it to know that it was collecting data for an individual in that jurisdiction to conclude that the collection of that information constituted express aiming sufficient to confer personal jurisdiction.[6]

**The Alleged Use of Targeted Advertisements to Persuade the Jury**

As geofencing moves closer to the courthouse, it has, and may continue to, collide with longstanding rules against jury tampering. In Pilliod v. Vionsanto, Monsanto's constitutional right to free speech (almost) collided with the parties' constitutional protection to a trial by an impartial jury.[7] The plaintiff sought to preclude Monsanto from publishing advertisements related to safety, testing, and studies after, on the day jury selection began, Monsanto placed a full-page ad in the Wall Street Journal stating that its product was thoroughly tested. Because the ad in the Wall Street Journal was not misleading and was intended for a broader audience, the court unsurprisingly held that the ad was constitutionally protected commercial speech and not sufficiently targeted to warrant jury tampering.

But the plaintiff in Pilliod also alleged that Monsanto was using geomarketing to target ads about the product's safety to cell phones and devices in the area of the courthouse, claiming "that this targeted advertising on a central issue in [the] case is jury tampering." It was the court's discussion of that allegation that is likely to be of interest to civil litigants in the digital age.

The court first explained that the allegation of geomarketing was an assertion of counsel without any evidentiary support. Though the court could have relied on the lack of evidentiary support to deny the motion without further explanation, it went further. The court explained that even with evidentiary support, "targeted high-tech advertising is different from, but very similar to, the low-tech practice of people carrying signs outside a courthouse or carrying placards or wearing buttons inside a courtroom." Though the court could have enjoined geomarketing the courthouse, it declined because that "would not preclude general marketing [in the region], and the jurors might be exposed to such marketing at home and on their ways to and from the courthouse."

**The Outcome in Pilliod Does Not Give Free Reign to Geotarget the Jury**

The holding in Pilliod raises the question of whether litigants could use geofencing techniques to send targeted advertisements as an effective method of persuading the jury. Although targeted advertisements have proven to be effective, the use of such methods to geomarket the jury could be uniquely risky. Drawing a digital fence around the jury room converts a "public" message into a direct contact with a captive, case-linked audience. Though businesses have a right to free speech, messages deliberately aimed at jurors through location filters could be viewed as targeted contact rather than general publicity. Counsel's involvement in any such targeted advertising only magnifies the risk as the rules of professional conduct generally prohibit extrajudicial statements that could impact the fairness or impartiality of a trial.[8]

**Conclusion**

The friction between constitutionally protected speech and the right to a trial before an impartial factfinder cannot be resolved by absolutism. Location-based advertising that is calibrated to reach jurors jeopardizes the integrity of the trial process even as it sits beside legal doctrines that are technologically outpaced. Courts have several tools that can be used not to suppress ideas but to prevent targeted advertisements from distorting the forum where facts are to be found.

Though the holding in Pilliod was favorable for the defendant, the outcome may have been different if actual evidence of geomarketing were presented or if there were any suggestion that Monsanto's counsel was involved. As a result, parties should exercise caution if implementing targeted advertisements in the location where a trial is being held, as such actions may invite judicial scrutiny and unwanted risks.

6 Briskin v. Shopify, Inc., 135 F.4th 739, 756 (9th Cir. 2025) ("We conclude that Shopify's intentional activities constitute express aiming toward California and its consumers to obtain and use their personal data for its own commercial gain." Briskin v. Shopify, Inc., 135 F.4th 739, 756 (9th Cir. 2025)).

7 2019 Cal. Super. LEXIS 23599 (Cal. Super. April 4, 2019).

8 See e.g., Kroft v. Viper Trans, Inc., 263 N.E.3d 1245 (Ill. App. 2025) (trial court erred in not declaring a mistrial because counsel's social media posts entitled "What Jurors Should Know But Don't" were improper because they were a deliberate and impermissible attempt to influence the jury).

# Geofencing the Jury Box

## Digital Influence in Trial Practice

Jessica Salisbury-Copper

THOMPSON HINE



SmartPaTH

# What is geofencing?

Uses GPS, Wi-Fi, or cell data to create virtual boundary around geographic area

Can trigger actions or notifications when a mobile device enters or leaves the "virtual fence"

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SmartPaTH

## Geofence Warrants

- Anonymized data for devices in defined area
- Additional information to narrow down suspects
- Unmask user

## Geoblocking

- Location used to prevent access
- Often to comply with inconsistent state regulations
  - Gambling
  - Lending
  - E-commerce

## Jurisdictional Challenges

- Plaintiff: Defendant purposefully availed itself due to the failure to geoblock
  - Most courts: geoblocking weighs against personal jurisdiction, but not vice versa
  - But: express aiming via known geolocation data

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## Contract enforcement

- Use of location technology to disable and/or repossess a vehicle
- Track assets or monitor employee compliance

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## *Pilliod v. Monsanto* – Geomarketing…the jury?

Sought to preclude advertising based on:

- full-page ad in WSJ stating Roundup was thoroughly tested
- alleged use of geofencing/geomarketing to target ads to devices around the courthouse



Thompson Hine

## Alleged Targeted Ads

- Would-be jurors from a prior trial said they started receiving pop-up ads touting Roundup's safety
- Counsel claimed Monsanto was also sending ads about safety and scientific studies to people inside the county administration building

Thompson Hine

## Protected Speech or Jury Tampering?

- WSJ ad protected because it was not misleading and was in a national publication
- Prior restraint not justified
- Constitutional discussion served as backdrop for targeted ad outcome

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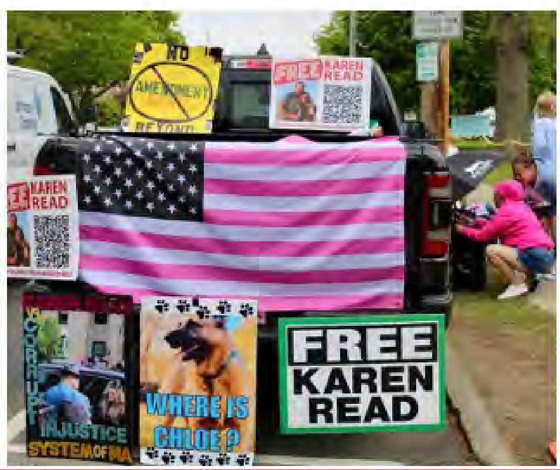
THOMPSON HINE

## Protected Speech or Jury Tampering?

- Targeted ad alleged by counsel but unsupported by evidence
- Targeted high-tech advertising not that different from buttons, placards, or signs
- Jurors may be exposed to Roundup marketing at home anyway

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## Don't Forget Rules of Professional Conduct

- Prohibit extrajudicial statements that could impact fairness or impartiality
- No suggestion that counsel was involved in alleged targeted ads in *Pilliod*

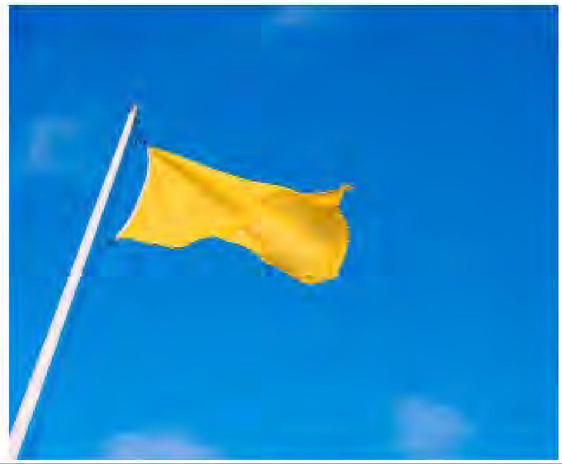
## Alternatively (but unrelated to geofencing)

Appellate court overturned $43 million jury verdict based on Plaintiff's counsel's blog/social media post entitled:

"*What Jurors Should Know but Don't*"

## Practical Guidance

- Do not send targeted advertisements to prospective jurors
- Broad, non-case specific marketing
- Ensure ads are not misleading



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# Jessica E. Salisbury-Copper

**Partner | Thompson Hine (Dayton, OH)**

Jessica's practice focuses on financial services litigation and compliance and complex commercial disputes. Her willingness to dig deep and get her hands dirty allows her to unravel complex situations. Jessica focuses on outstanding client service, which makes her the choice for many of the firm's clients. She is known in the litigation practice group for her intelligence, organizational skills, and dedication to clients who are facing complex litigation issues. Her ability to collaborate and work as part of a team allows her to identify the appropriate Thompson Hine lawyers to support clients' needs in every aspect of running their businesses.

Jessica's financial services practice focuses on individual and class action litigation in mortgage, student loan, credit card, debt collection, auto loan, and servicing matters. She regularly counsels national and local providers of credit on regulatory and litigation matters. Her clients include banks and nonbank lenders, mortgage lenders and servicers, third-party service providers, auto lenders, and debt buyers.

**Focus Areas**
- Business Litigation
- Product Liability Litigation
- Financial Services Litigation
- Class Actions, Mass Torts & Multidistrict Litigation

**Representative Cases**
- Carey v. KeyBank, N.A., 2024 U.S. Dist. LEXIS 132073 (N.D. Ohio July 26, 2024) (dismissing claims for breach of contract, breach of fiduciary duty, fraud, conspiracy, and violation of RESPA and TILA).
- Davis v. KeyBank, N.A. (In re Davis), 2024 Bankr. 1510 (Bankr. D. Nev. May 10, 2024) (dismissing claim alleging violation of 11 U.S.C. § 524 on behalf of a putative class of student loan borrowers because there is no private right of action for violation of bankruptcy discharge injunction).
- Baker v. Huntington Nat'l Bank, 2024 U.S. Dist. LEXIS 16985 (S.D. Ohio Jan. 31, 2024) (dismissing claims against bank premised on alleged inability to enforce promissory note).
- Poynter v. Rushmore Loan Mgmt. Servs. LLC, 2022 U.S. Dist. LEXIS 45343 (S.D. Ohio Mar. 15, 2022) (obtained summary judgment in client's favor in case alleging breach of contract and violations of RESPA, the FDCPA, and TILA in connection with the application of payments on a residential mortgage loan).
- Richissin v. Rushmore Loan Mgmt. Servs., 2020 U.S. Dist. LEXIS 223128 (N.D. Ohio Nov. 30, 2020) (dismissing RESPA claim because alleged notice of error did not relate to servicing or a covered error as set forth in applicable statutes and regulations).

**Distinctions**
- Selected for inclusion in 2024 Community Service Award for Newer Attorneys, Ohio State Bar Foundation
- Selected for inclusion in The Best Lawyers in America® 2025-2026 for Commercial Litigation, and Litigation-Banking and Finance
- Selected to the Ohio Rising Stars list, 2014-2025

**Education**
- Ohio Northern University College of Law, J.D., 2009, with high distinction
- Morehead State University, B.A., 2006, magna cum laude

# DEI in the Crosshairs: Legal Challenges and Compliance Strategies

**David Harless**
Christian & Barton (Richmond, VA)

**DEI in the Crosshairs: Legal Challenges and Compliance Strategies**
*W. David Harless*

**Background and January 2025**
Over the past couple of decades, many institutions—government entities, colleges, universities, private companies—have expanded their Diversity, Equity and Inclusion ("DEI") programs and infrastructure to address systematic bias and disparities. Diversity means representation across varied identities and backgrounds. Equity means fairness achieved by recognizing and remedying systemic disparities. Inclusion means creating environments where all individuals feel valued, respected, and able to participate fully.

Since taking office on January 20, 2025, President Trump and his administration have issued sweeping Executive Orders (EO) to dismantle DEI programs and infrastructure within the federal government and its agencies. These efforts have extended further into affecting federal contractors, subcontractors, and the private sector. The underlying narrative emphasizes a return to "merit-based opportunity" and a rejection of identity-based policies and programs. While the stated intent is to return to "merit-based" governance, the scope of authority and clash with existing civil rights regimes have sparked significant legal battles and institutional uncertainty.

Specific to the private sector, the President has directed that the Attorney General of the United States take "appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI," to propose "specific steps or measures to deter DEI programs or principles," and to "identify… potential civil compliance investigations" to accomplish such deterrence.[1]

**2025 Presidential Executive Orders**
Executive Order 14151 – Ending Radical and Wasteful Government DEI Programs and Preferencing[2] Signed: January 20, 2025

Executive Order 14151 mandates the termination of all DEI, DEIA (Diversity, Equity, Inclusion, & Accessibility), and environmental justice offices, grants, programs, contracts, requirements, and policies across federal agencies. The President directed that his administration officials identify and report federal agencies' DEI-related functions and relabel such programs. Furthermore, he directed that federal agencies take steps to eliminate dedicated DEI-related positions.

One key provision of EO 14151 is the direction that federal agencies provide the Director of the Office of Management and Budget with a list of all federal contractors who have provided DEI training or DEI training materials to federal agency or department employees and a list of federal grantees who received federal funding to provide or advance DEI, DEIA, or "environmental justice" programs, services, or activities.

Executive Order 14173 – Ending Illegal Discrimination and Restoring Merit-Based Opportunity[3] Signed: January 21, 2025

Executive Order 14173 specifically revokes Executive Order 11246 (affirmative action mandate for federal contractors). Executive Order 11246 was signed by President Lyndon B. Johnson on September 24, 1965. The Trump Administration allowed the related regulatory scheme to stay in effect for an additional 90 days. This action in effect nullified the compliance and reporting obligations of federal contractors regarding race, sex, and ethnicity.[4] EO 11246 did not expressly require racial or gender preferences or quotas. However, its use of the term "affirmative action" generated a long-standing perception that EO 11246 implicitly required set-asides

1 Quotes from Executive Order 14173, https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

2 https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/.

3 https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

4 Executive Order 11246 did not initially include sex as a protected classification. Sex was added to EO 11246 in 1967 by Executive Order 11375.

and/or preferences. DEI programs and "affirmative action" have not been distinguished from each other by the Trump Administration.

This EO removes any affirmative action related enforcement clauses and contract requirements. It specifically targets the Federal Government, and the recipients of federal contracts and funding, e.g., major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education. EO 14173 requires contractors and grant recipients to certify that they do not operate DEI programs deemed illegal and mandates anti-discrimination compliance as a condition of payments and funding. Overall, EO 14173 seeks to reverse DEI programs and initiatives required through earlier Executive Orders and to require review of policies and programs to eliminate any references to such programs and initiatives.

This EO directs the Office of Federal Contract Compliance within the Department of Labor to immediately cease: (i) promoting diversity, (ii) holding federal contractors and subcontractors responsible for taking "affirmative action," and (iii) allowing or encouraging federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin. Additionally, this EO impacts the inclusion of "sexual orientation" and "gender identity" as protected group designations.

Section 4 of EO 14173 is dedicated to "encouraging the private sector to end illegal DEI discrimination and preferences." Additionally, President Trump directed that the Office of the Attorney General ("OAG") make recommendations for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end discrimination and preferences, including DEI.

Section 5 of EO 14173 directs all state and local educational agencies that receive federal funds, as well as institutions of higher education that receive federal grants and participate in the federal student loan assistance program must comply with Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

Executive Order 14281 – Restoring Equality of Opportunity and Meritocracy[5] Signed: April 23, 2025

Executive Order 14281 emphasizes individual merit over demographic characteristics. The order announces the Administration's policy "to eliminate the use of disparate impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." Disparate impact liability is the legal theory that neutral policies causing unequal results across demographic groups can constitute discrimination. The Administration contends in the EO that disparate impact liability has hindered businesses from making employment decisions based on merit and skill or their needs.

The EO directs federal agencies to step back from enforcing disparate-impact claims under civil rights laws, such as Title VI, Title VII, and the Fair Housing Act. Agencies are required to: review their programs and policies that consider protected characteristics, revise any existing policies that fall under that category, submit compliance reports to OMB within 90 days, and propose updates to related guidance to fully align with the Administration's executive orders. All federal agencies are instructed to de-prioritize enforcement related to disparate impact liability. Furthermore, the Attorney General is ordered to assess whether federal authority overrides state laws imposing disparate impact liability.

EO 14281 does not create new or alter existing laws or regulations for private employers. Disparate impact claims have been recognized by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Congress later codified disparate impact liability in the Civil Rights Act of 1991, 42 U.S.C. § 1981. EO 14281 does not overrule Griggs or purport to nullify the statute passed by Congress. The disparate impact standard for employment discrimination allows individuals to challenge facially neutral policies that disproportionality harm a protected group, even without proof of intent by the employer. After a plaintiff shows a policy has a significant negative impact on a protected class, the employer must prove the policy is a "business necessity" and "job related." Employers should understand that individual and disparate impact discrimination claims can still be brought.

Executive Order 14319 – Preventing Woke AI in the Federal Government[6] Signed: July 23, 2025

Executive Order 14319 purports to ensure that federally funded and procured artificial intelligence (AI) is truthful, accurate, and neutral. Specifically, the Administration forbids the funding or procurement of AI resources that contain any ideological biases and social agendas.[7] One of the biases specifically named in the EO is diversity,

5 https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/

6 https://www.whitehouse.gov/presidential-actions/2025/07/preventing-woke-ai-in-the-federal-government/

7 "Ideological biases" are defined by this EO to mean beliefs that disregard the commitment to truth in favor of preferred outcomes.

equity, and inclusion. For example, the EO contends that AI influenced by DEI bias suppresses or distorts factual information about race or sex, manipulates racial or sexual representation in model outputs, and incorporates other prohibited concepts such as critical race theory, transgenderism, unconscious bias, intersectionality, and systemic racism.

The EO establishes two main “Unbiased AI Principles” for federal agencies when creating and developing AI systems:

Truth-Seeking: AI models must prioritize historical accuracy, scientific inquiry, and objectivity, while also acknowledging uncertainty when data is incomplete or contradictory. It must be truthful in responding to prompts seeking factual information or analysis.

Ideological Neutrality: AI models must act in a neutral fashion. It should use nonpartisan tools that do not manipulate responses to serve any specific ideology. Further, developers of AI may not encode partisan or political ideologies unless those judgments are specifically sought by the user of the AI.

**Sources of Interpretation**
Official Guidance from Federal Government

I. Department of Justice

A.February 5, 2025[8] - The Attorney General (AG) released a memorandum for all department employees with its central purpose to begin ending DEI and DEIA discrimination and preferences. The AG cited to Students for Fair Admissions v. Harvard, 600 U.S. 181 (2020), in which the Supreme Court stated “[e]liminating racial discrimination means eliminating all of it.” This memorandum shifted the focus of the DOJ’s Civil Rights Division to “investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.”

The memo encompasses programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. There is no prohibition on “educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.”

B. July 29, 2025[9]- The Attorney General issued guidance intended to clarify “the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (‘DEI’) programs.”[10] The guidance is directed to “entities that receive federal financial assistance or that are otherwise subject to federal antidiscrimination laws,” including private employers. It mandates that such entities must ensure that their programs and activities comply with federal law and do not discriminate based on race, color, national origin, sex, religion, or other protected characteristics, regardless of the labels, objectives, or intentions. The AG labels the guidance as “Best Practices” and as non-binding suggestions for compliance and avoidance of legal consequences for noncompliance. The memorandum notes that these are “not mandatory requirements but rather practical recommendations to minimize the risk of violations.”

The AG’s guidance identifies a non-exhaustive list of five categories of practices that the DOJ considers unlawful and which could result in the loss of federal funding, an audit, and/or legal enforcement proceedings.

Entities should not grant preferential treatment based on protected characteristics. This includes scholarships or programs that are reserved or restricted to certain demographic groups. The memo includes the example of a university’s DEI program that establishes a scholarship fund exclusively for students of a specific racial group (“Black Student Excellence Scholarship”) and excludes otherwise qualified applicants of other races. This includes internships, mentorship, or leadership programs and initiatives that reserved spots for specific racial or other protected characteristic groups. This applies to even well-intentioned programs or groups that have the mission to promote diversity.

Another example that the AG used for this category was preferential hiring or promotion DEI practices. This includes any policy that prioritizes candidates from “underrepresented groups” for admission, hiring, or promotion where the “underrepresented groups” are determined based on a protected characteristics like race. The last example was a university’s DEI initiative which designated a “safe space” exclusively for a specific racial or ethnic group.

Entities are prohibited from using proxies for protected characteristics. The AG insists that federally funded entities do not use ostensibly neutral criteria that indirectly fosters consideration of race, sex, or other

8 https://www.justice.gov/ag/media/1388501/dl.

9 https://www.justice.gov/ag/media/1409486/dl.

10 The memo specifically includes programs that go by other names, such as Diversity, Equity, Inclusion, and Accessibility (“DEIB”) and Diversity, Equity, Inclusion, and Belonging (“DEIB”).

protected characteristics. Thus, even if the criteria appear facially neutral, entities still must be cautious in application.

The AG's memo includes three examples. The first example is a "cultural competence" requirement. If a federal funds recipient requires applicant to demonstrate "lived experience" or "cross-cultural skills," the AG considers this a method to evaluate candidates' racial or ethnic backgrounds rather than objective qualifications. The second example is when a federally funded organization implements recruitment strategies targeting specific geographic areas or institutions chosen for their racial or ethnic composition. The third example is when a federally funded program requires "overcoming obstacles" narratives or diversity statements. This would allow entities to use the narrative as a proxy for consideration of certain protected characteristics.

Organizations should not segregate based on protected characteristics when organizing programs, activities, or resources such as training sessions in a way that separate or restricts access based on race, sex, or another protected characteristic. This prohibition applies even if the intention is to promote inclusion or address historical inequities. Exceptions are narrow and include only cases where federal law has expressly permitted race-based remedies for specific, documented acts of past discrimination.

The AG's memo clarifies that segregation in terms of sex-separated athletic competitions and intimate spaces (bathrooms, showers, locker rooms, changing rooms, etc.) is not only permissible, but required by federal law. Failure of entities or educational institutions to maintain sex-separate athletic competitions and intimate spaces violates federal law. Federally funded institutions are prohibited from allowing biological males that identify as women to access single-sex spaces designed for biological females. Also, biological males are not allowed to compete in women's athletic events as it would deny women equal opportunity by eroding competitive fairness. Any violation would risk creating a hostile environment under Title VII or denying women access to the full scope of sex-based protections in education under Title IX.

There are three examples of this unlawful practice included in the AG's memo. First, all forms of race-based training sessions are strictly prohibited including, for example, "Black Faculty Caucus" or "White Ally Group"). Instead, a federally funded university should opt for a "Faculty Academic Support Network" open to all faculty regardless of race or sex interested in promoting student success. Second, it is unlawful to segregate facilities or resources by race or sex such as a "Black, Indigenous, and People of Color-only student lounge" at a university. Even if access is open to all, any identity-based segregation fosters a hostile environment. Third, it is unlawful to segregate through program eligibility such as a community organization that hosts a DEI workshop series that requires participants to identify with a specific racial or ethnic group such as advertising a workshop "for underrepresented minorities only."

Entities should not use protected characteristics such as considering race or sex as a basis for selecting candidates for employment, awarding contracts, or in program participation. This includes hiring, promotions, vendor agreements, internships, admissions, scholarships, and trainings. Employers are encouraged to eliminate "diverse slate" requirements, diversity decision-making panels, or diversity-focused evaluations. Furthermore, entities should not require a specific level of working hours from individuals of certain protected characteristics to complete the contract. The AG believes that this would create unequal treatment and disadvantage otherwise qualified candidates, regardless of any intent to advance diversity goals.

The AG's memo uses the example of a federally funded research institute adopting a policy requiring that all interview candidates include a minimum number of candidates from specific racial groups. This includes requiring a certain percentage of finalists to be from "diverse" backgrounds. Another example is of an agency that implements a DEI policy that prioritizes awarding contracts to women-owned or minority-owned businesses. This includes any contract selection process that uses sex or race as a tiebreaker. The AG is concerned about equally or more qualified businesses that are without a preferred group status. The last example of an unlawful activity is a university's internship program that requires 50% of selected participants to be from underrepresented groups based on race, sex, or another protected characteristic.

Organizations should eliminate any training programs that promote discrimination or hostile environments regardless of their original intent. The AG is focusing on DEI training programs where the content, structure, or implementation essentially stereotypes, excludes, or disadvantages individuals based on protected characteristics.

The AG's example is a federally funded school district requiring teachers to complete a DEI training that includes statements that stereotype individuals based on protected characteristics such as “all white people are inherently privileged” or topics on “toxic masculinity.”

The AG’s guidance concludes with non-mandatory recommendations on best practices for entities. The recommendations for recipients of federal funds include: ensure inclusive access, focus on skills and qualifications, prohibit demographic-driven criteria, document legitimate rationales, scrutinize neutral criteria for proxy effects, eliminate diversity quotas, avoid exclusionary training programs, include nondiscrimination clauses in contracts to third parties and monitor compliance, and established clear anti-retaliation procedures and create safe reporting mechanisms. The AG urges entities to review all programs, policies, and partnership to ensure compliance with federal law and discontinue any that discriminate based on a protected status. These non-binding suggestions are to assist entities in avoiding legal pitfalls and risks.

II. Equal Employment Opportunity Commission (EEOC)

The Equal Employment Opportunity Commission (EEOC) issued its own guidance for employers regarding Diversity, Equity, and Inclusion (DEI) initiatives on March 19, 2025. This official guidance was the EEOC’s formal response to President Trump’s Executive Orders related to DEI, especially Executive Order 14173. The EEOC stated that even if programs or initiatives are well-intentioned, they may result in unlawful discrimination. The EEOC guidance restates that anti-discrimination laws prohibit workplace decisions or programs based on protected characteristics, even when they were intended to promote diversity and equity.

One of the key takeaways from the EEOC’s guidance is that the use of quotas or “workforce balancing” based on protected characteristics are prohibited. Another prohibited action is segregating employees based on race, sex, or other protected traits through clubs, groups, or training opportunities. The guidance makes clear that employment decisions or actions even motivated by protected characteristics are unlawful, even if they are labeled under DEI.

According to the guidance, an employer is not justified in taking an employment action based on race, sex, or another protected characteristic because the employer has a business necessity or interest in diversity. Essentially, Title VII does not provide any “diversity interest” exception to these rules. The EEOC’s position is that there is no such thing as reverse discrimination; there is only discrimination.

With respect to training, the EEOC states that DEI training may give rise to a hostile work environment claim and that reasonable opposition to a DEI training may constitute protected activity.

The EEOC encourages employers to review policies to ensure that they comply with the Administration’s view of equal opportunities free from discrimination regardless of the intentions. Employers should not retaliate against any employee who opposes a DEI action or program as it would be unlawful to do so. Employers should reduce unconscious bias by removing any identifying information from applications or job hiring process to mitigate any appearance of bias influencing their decisions. Employers should provide training on how to not engage in unlawful discrimination regardless of the intent behind the efforts. Entities should make sure that any policies and programs comply with the Administration’s view of anti-discrimination laws.

**Selected Caselaw/Litigation**

I. Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023)

On June 29, 2023, the U.S. Supreme Court issued a highly anticipated decision in Students for Fair Admission v. Harvard, which ended affirmative action in higher education. The Court held that the race-conscious admissions’ programs of Harvard University and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Traditionally, the Court has allowed colleges to consider race as a factor in admissions only under limited circumstances, such as when those programs satisfy its strict scrutiny framework. Under this framework, a university or college was able to consider race-conscious program if it had a compelling interest to do so and it could be achieved through narrowly tailored means. In Grutter v. Bollinger, 539 U.S. 306 (2003), the Supreme Court held that the University of Michigan Law School’s race-conscious admissions program which considered race as one factor among many in a holistic review process satisfied the strict scrutiny standard.

Immediately following this decision, many educational institutions and employers began to revisit and change their affirmative action and DEI policies. More importantly, this case serves as the foundation and putative Constitutional authority for the Trump Administration’s aggressive crackdown on DEI policies and initiatives.

In striking down the admissions processes of Harvard and UNC, the Supreme Court found that the admissions systems failed to meet the strict scrutiny, non-stereotyping, and termination criteria established by Grutter. The majority found that the universities could not demonstrate their compelling interests in a measurable way, failed to avoid racial stereotypes, and did not offer a logical endpoint for when race-based admissions would cease. As a result, the admissions programs violated the Equal Protection Clause of the Fourteenth Amendment. The Court noted that it is not prohibiting universities from considering an applicant's discussion of how race affected their life, so long as that discussion is concretely tied to a quality of character or unique ability that the applicant can contribute to the university.

Even though this case applies solely to affirmative action in college admissions, there have been lower court interpretations that directly impact DEI programs and initiatives in the private sector.

II. American Alliance for Equal Rights v. Fearless Fund, 103 F.4th 765 (11th Cir. 2024)

The American Alliance for Equal Rights (AAER) sued Fearless Fund, which described itself as a venture capital fund that invests in women of color-led businesses and with a mission to "bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies." The "Fearless Strivers Grant Contest" was a competition that awards $20,000 in prize money, digital tools, and mentorship to four winners to assist business growth. However, the prospective contestants for the competition were limited to businesses owned or led by "black females who are … legal U.S. residents." To qualify for the competition, a business must be at least "51% black woman owned."

The AAER claimed that the Fearless Fund competition violated the contract discrimination prohibitions of 42 U.S.C. § 1981. 42 U.S.C. § 1981 prohibits private parties from discriminating based on race when making or enforcing contracts.

On June 3, 2024, the Court of Appeals for the Eleventh Circuit affirmed the lower court's issuance of a preliminary injunction against Fearless Fund finding that the grant program was "racially exclusionary" and "substantially likely" to violate Section 1981. The Court found that the Fearless Fund competition categorically excluded non-Black applicants from eligibility because of their race. The Court further held that the Fearless Fund had no affirmative action-based defense to its conduct. The Court rejected the Fearless Fund's argument that the First Amendment protects its conduct because "the First Amendment does not protect the very act of discriminating on the basis of race."

III. Mid-America Milling Company, LLC v. United States Department of Transportation, No. 3:23-CV-00072-GFVT, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024)

The Disadvantaged Business Enterprise ("DBE") program was created by Congress in 1983 and is administered and enforced within the Department of Transportation.[11] The program requires that ten percent of federal highway construction funds be paid to small businesses owned and controlled by "socially and economically disadvantaged individuals." Under the regulations, any individuals in the following groups are rebuttably presumed to be socially and economically disadvantaged individuals: (i) Black Americans; (ii) Hispanic Americans; (iii) Native Americans; (iv) Asian-Pacifica Americans; (v) Subcontinent Asian Americans; and (vi) Women. 29 C.F.R. § 26.5.

In 2021, Congress reauthorized the DBE Program with respect to federal highway and transit funding with "not less than 10 percent of" funding going to small businesses owned or controlled by socially and economically disadvantaged individuals.[12] In 2024, Congress reauthorized a similar requirement with respect to federal airport concessionaires and construction funding.[13]

In this case, two contractors that did not qualify for the DBE program sought to enjoin the rebuttable presumption given to minority-owned businesses pursuant to the DBE program. They alleged that they had "a long history of participating in federally financed road-construction projects and a long history of being discriminated against by the DBE program." The plaintiffs had routinely bid for federally funded surface transportation contracts in both Kentucky and Indiana.

The district court found that the rebuttable presumption is a race and gender classification that violates the Constitution's guarantee of equal protection and entered a preliminary injunction applying only to the two plaintiffs in the case and the future bids they make in any state on DOT contracts. However, the case is seen nationally as a benchmark of the vulnerability of not only the DBE program, but other federal government set aside programs for minority owned businesses or minority participants.

IV. National Association of Diversity Officers in Higher Education v. Donald J. Trump., 767 F.Supp.3d 243 (D. Md. 2025)

11 23 U.S.C. 304 & 324; 49 C.F.R. §§ 26, 26.67(d), 26.5, 26.67(a)(3)(i)-(d).

12 Infrastructure Investment and Jobs Act ("IIJA") § 11101(e)(3), Pub. L. No. 117-58 (2021).

13 FAA Authorization Act of 2024 § 730(a), Pub. L. No. 118-63; see also 49 U.S.C. § 47113(b).

This case was brought by the City of Baltimore and three associations—one which represents institutions of higher education and diversity officers and professionals in such institutions, one representing academic professional and faculty members, and one representing restaurant workers. The Plaintiffs sought a preliminary injunction against certain provisions in two of President Trump's executive orders ending DEI programs and policies. The Plaintiffs argued that the EOs were unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause, as well as other violations of the First Amendment's Free Speech Clause, the Constitution's Spending Clause, and Constitutional separation-of-powers principles.

The District Court found that Plaintiffs were likely to succeed on the merits of their Fifth Amendment due-process claim regarding one provision of the President's EO which directed agencies to terminate "equity-related" grants or contracts, and regarding the provision that threatened enforcement action to deter DEI programs and policies. Further, the Court found that the Plaintiff were likely to succeed on their First Amendment claim regarding the EO's provision which required recipients of federal funds to certify that they do not operate programs promoting DEI, and regarding the provision that threatened enforcement action to deter DEI initiatives. However, the Court found that the Plaintiffs were unlikely to succeed on the merit of their First Amendment claim that challenged a provision directing the Attorney General to identify a plan to deter DEI programs and principles. The Court issued a nationwide injunction barring Defendants from enforcing those provisions against both the Plaintiffs and "similarly situated non-parties," that applied "to and binds Defendants other than the President, as well as all other federal executive branch agencies, departments, and commissions, and their heads, officers, agents, and subdivisions."[14]

The government has obtained a stay of the preliminary injunction pending appeal.

V. National Urban League v. Trump, 783 F.Supp.3d 61 (D.D.C. 2025)

Nonprofit organizations, including the National Urban League, brought an action against President Trump and federal agencies and officials challenging different provisions of President Trump's Executive Orders on DEI. The Plaintiffs argued that the EOs were impermissibly vague and violated the First Amendment, and thus, sought a preliminary injunction to enjoin the enforcement of the Executive Order provisions at issue.

The District Court held that the Plaintiffs lacked standing to challenge some provisions of the Orders directing executive actions that did not directly affect the Plaintiffs, but that the Plaintiffs had standing to challenge Orders terminating funding received by the Plaintiffs or imposing conditions on their receipt of such funding. Regarding claims the Plaintiffs had standing to bring, the Court found that the Plaintiffs failed to identify due-process property or liberty interest in federal grants and contracts lost or threatened by President Trump's Executive Orders. The Court held that the EOs gave enough guidance to avoid constitutional infirmity and satisfy fair-notice scrutiny under the Due Process Clause. Regarding the First Amendment claims, the Court found that requiring termination of funds was not a violation, and requiring certification of compliance with federal anti-discrimination laws was not a violation. Ultimately, the Court denied the Plaintiff's Motion for a Preliminary Injunction.

**Suggested Compliance Strategies for Private Employers**

Initially, a company must determine its risk tolerance in considering the refashioning of its DEI initiatives. As demonstrated by the caselaw, reverse discrimination is no longer a credible moniker for discrimination claims pursued by individuals who historically have been considered outside of a "protected class." Now, gender means male and female, race means all races, and national origin means all origins and ethnicities.

The practical consequences of this paradigm shift are that employers are now as vulnerable to employment discrimination claims by white employees as others and by male employees as female employees, etc. It is in this unfamiliar environment that a company must evaluate the risks associated with its DEI initiatives.

The compliance guidance from the Trump administration is not a model of clarity. However, there are some measures that employers can adopt to mitigate their exposure to discrimination claims or enforcement proceedings against their hiring, retention, promotion, and other employment policies.

1. Eliminate any references to "affirmative action."
2. Suspend numerical or statistical analysis of workforce composition.
3. Eliminate placement goals and programs for women and minorities.
4. Remove gender and minority identification information from applications and during the hiring process.
5. Avoid reference to socioeconomic status, first-generation status, or geographic diversity status which may serve as a shadow pretext for

14 National Association of Diversity Officers in Higher Education, et. al. v. Trump, et. al., 769 F.Supp.3d 465 (D. Md. 2025).

discriminatory hiring, promotion, evaluation, and job opportunity decisions based on racial, sex-based, or other protected characteristics.

6. Eliminate references to "Diversity, Equity, and Inclusion" and adopt instead descriptions that emphasize a culture where policies, practices, and programs promote fairness and the same treatment for all employees.
7. Document employment decisions and objective criteria employed in making the decisions.
8. Include nondiscrimination clauses in contracts with third parties.
9. Avoid exclusionary training programs, ensuring that all training is open to all qualified participants regardless of protected characteristics.
10. Suspend DEI training or other training that may be perceived as promoting preferences for historically protected groups of individuals since such training could be perceived as creating a hostile work environment for non-protected participants.
11. Establish and communicate policies that prohibit retaliation against individuals who engage in protected activities, such as raising concerns, filing complaints, or refusing to participate in potentially discriminatory programs or training.
12. Post new "Know Your Rights" posters once the EEOC releases them.

**Conclusion**

The Trump Administration has embraced an anti-DEI executive agenda which seeks to rollback decades of DEI policy enforcement. These directives prioritize "merit-based" criteria alone and eliminate any identity-conscious programs.

The Executive Orders have created significant uncertainty for organizations across all sectors. Some have dismantled their programs to avoid scrutiny, while others maintain their diversity commitments despite the political landscape. Organizations should look to their legal team and consultants on how to navigate these changes. Legal teams should identify any compliance issues while crafting strategies for preserving inclusive practices. The focus should be on fair hiring, equitable career development, and respectful workplace policies.

# DEI in the Crosshairs: Legal Challenges and Compliance Strategies

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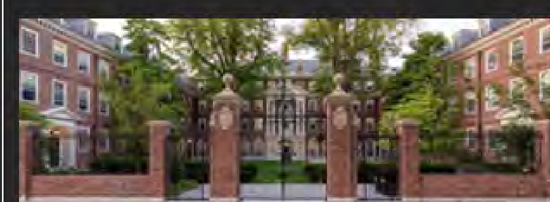

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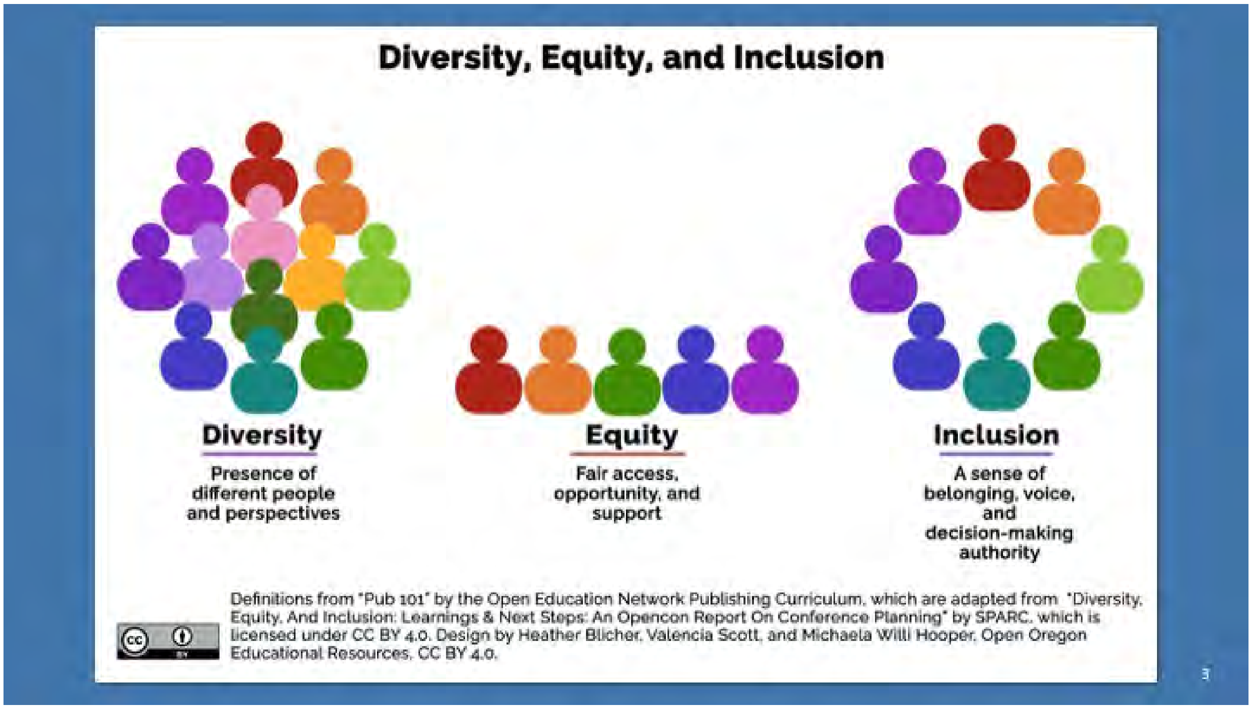
Diversity, Equity, and Inclusion
Diversity
Presence of different people and perspectives
Equity
Fair access, opportunity, and support
Inclusion
A sense of belonging, voice, and decision-making authority
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New Administration Takes Office
January 2025
"President Trump signs an Executive Order" by Trump White House Archived, Public Domain Mark
US President Donald Trump signs executive orders in the Oval Office of the White House in Washington, DC, January 20, 2025. (Photo by Jim WATSON / POOL / AFP) (Photo by JIM WATSON/POOL/AFP via Getty Images)
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## Executive Order 14151 – January 20, 2025

- Mandates the termination of all DEI, DEIA, and environmental justice offices, grants, programs, contracts, requirements, and policies across federal agencies
- Directs OMB (with the help of agencies) to make a list of all federal fund recipients who provide or advance DEI programs, services, or activities
- Eliminates DEI-related positions


## Executive Order 14173 – January 21, 2025

- Revokes President Johnson's 1967 Executive Order that created compliance obligations for federal contractors regarding race, sex, and ethnicity
- Removes any affirmative action related enforcement clauses and contract requirements for race, sex, and ethnicity
- Requires contractors to certify that they do not operate any DEI programs deemed illegal and discriminatory – withholding funds is threatened

## Executive Order 14281 – April 23, 2025

- Emphasizes individual merit over demographic characteristics
- Eliminates the use of disparate impact liability in all contexts – the theory that neutral policies causing unequal results across demographic groups is discriminatory
- Creates a goal to have a "colorblind society" that avoids race, sex, or any other group-based considerations


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## Department of Justice Guidance February 5, 2025


Shifted the focus of the DOJ's Civil Rights Division to investigate and eliminate DEI and DEIA preferences, policies, programs, etc. in the private sector and recipients of federal funds

Applies to any programs or policies that discriminate, exclude, or divide individuals based on race or sex

8

## Department of Justice Guidance July 29, 2025


Applies federal anti-discrimination laws to DEI programs and initiatives including private sector

Mandates that entities ensure that programs and activities comply with federal law and do not discriminate

Identifies a non-exhaustive list of five categories of practices that the DOJ considers unlawful

9

## Equal Employment Opportunity Commission (EEOC)

- Issues guidance to employers regarding their DEI initiatives and how to be compliant with the new EOs
- Even if programs are well-intentioned, they may still result in unlawful discrimination
- Use of quotas or “workforce balancing” based on protected characteristics is prohibited

10

## *STUDENTS FOR FAIR ADMISSIONS V. HARVARD*, 600 U.S. 181 (2023)

- Landmark case that ended affirmative action in higher education
- Colleges and universities can no longer be race-conscious as part of a holistic review process

11

## *AMERICAN ALLIANCE FOR EQUAL RIGHTS V. FEARLESS FUND*, 103 F.4TH 765 (11TH CIR. 2024)

- A private venture capital fund's grant competition awarded money to only businesses owned or led by Black women
- The 11th Circuit found that the grant program was "racially exclusionary" and "substantially likely" to violate Section 1981

12

## *MID-AMERICA MILLING COMPANY, LLC V. UNITED STATES DEPARTMENT OF TRANSPORTATION* (E.D. KY. SEPT. 23, 2024)

- The Disadvantaged Business Enterprise ("DBE") program included rebuttable presumptions for women and minority groups
- The Court found that the rebuttable presumption is a race and gender classification that violates the 14th Amendment

13

## Effects on the Private Sector


- Official guidance from federal agencies addressing practices of federal funding recipients are instructive to the private sector
- Be aware of potential litigation for programs, initiatives, and employment practices that the DOJ or EEOC considers discriminatory

14

## Compliance & Execution


- Eliminate placement goals for women and minorities
- Remove gender and minority identification information from applications and during the hiring process
- Eliminate references to "Diversity, Equity, and Inclusion" and adopt instead descriptions that emphasize a culture where policies, practices, and programs promote fairness and the same treatment for all employees

15


## Compliance & Execution

Avoid references to socioeconomic status, first-generation status, or geographic diversity status which may serve as a shadow pretext for discriminatory hiring, promotion, evaluation, and job opportunity decisions based on racial, sex-based, or other protected characteristics.

16


## Compliance & Execution

Suspend DEI training or other training that may be perceived as promoting preferences for historically protected groups of individuals since such training could be perceived as creating a hostile work environment for non-protected participants.

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- Employment Issues and Executive Agreements
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- Products Liability and Torts
- Municipal Governance and Public Sector

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- Defense of companies against business conspiracy, trade secret and interference with contract claims.
- Represent parties in disputes over indemnification and allocation of liability for commercial and products liability claims.
- Defense of claims involving fiduciary duties of officers, directors, and members of corporations, closely-held companies and partnerships
- Defense and assertion of violations of restrictive covenants, such as non-compete, non-solicit, confidentiality, trade secret and no-hire clauses.
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**Recognitions**

- The Best Lawyers in America® - Bet-the-Company Litigation, Commercial Litigation, Employment Law-Management, Litigation-Labor & Employment, Personal Injury Litigation-Defendants, 1995-2026
- Chambers USA - Litigation: General Commercial, 2004-2025
- Virginia Super Lawyers - Business Litigation, 2006-2025
- Legal Elite (Virginia Business) - Civil Litigation, 2010, 2019-2020, 2022-2024; • Labor/Employment, 2000-2009, 2011-2019, 2021
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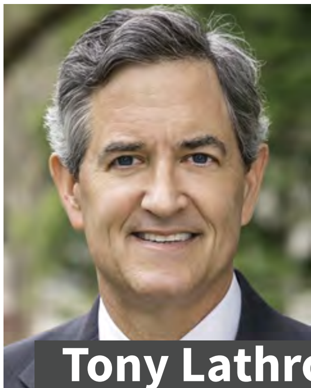

# Flying Cars and Air Taxis: Legal and Regulatory Updates in Transportation


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**Flying Cars and Air Taxis: Legal and Regulatory Updates in Transportation**
*Tony Lathrop*

The last several years have ushered in a wave of technological advancements in transportation. The days of autonomous vehicles (AVs) on the roads are essentially here, with air taxis and flying cars not far behind. AVs have driven millions of miles on public roads, including hundreds of thousands of paid robotaxi rides, and an official air taxi provider has been announced for the LA28 Olympic and Paralympic Games. The development and deployment of these new technologies have given rise to legal and regulatory challenges in several areas, including the interplay between state and federal regulation, cybersecurity and privacy, liability and insurance, intellectual property, and securities. We will highlight advancements in the industry and legal and regulatory developments at the dawn of a future shaped by disruptive transportation technology.

**Autonomous Vehicles on the Roads**

Great strides have been made in the development and deployment of autonomous vehicles on the roads in the U.S. and elsewhere. Some of the most significant developments have been in the areas of shipping and logistics, the deployment of robotaxis for commercial use, and the provision of public transportation options.

Autonomous Trucking. For example, in 2021, Walmart became the first company to use autonomous delivery trucks with no safety driver in the “middle mile” of its supply chain, with the trucks operating on a fixed 7-mile route between a distribution center and a local store.[1] In April 2025, Aurora Innovation then became the first company to operate a driverless commercial long-haul trucking service with heavy duty trucks, with the trucks operating on a route between Dallas and Houston.[2] Several additional companies have plans to operate driverless trucking services in the near term, including Waabi, Bot Auto, Daimler Trucks and Torc Robotics, and Volvo, which plans to offer autonomous long-haul trucking services to other companies such as DHL and Uber Freight, instead of selling the trucks it manufactures.[3]

Robotaxis. Robotaxis are becoming more common place, with China leading the way worldwide and Waymo leading the pack in the U.S. According to data as of June 2025, China had eight robotaxi companies operating in sixteen large cities and Waymo was leading in the U.S. operating in five cities with approximately 1,500 vehicles and testing in an additional ten cities.[4] In 2018, Waymo introduced its commercial autonomous ride-hailing service in Phoenix and then opened its service to the all members of the public in Phoenix in 2020.[5] Waymo expanded its service on a limited basis to San Francisco and Los Angeles between 2021-2024, opening in both markets to all members of the public in 2024.[6] Waymo operates through its own app in Phoenix, Los Angeles and San Francisco, and it partnered with Uber this year to offer service in Austin and Atlanta.[7] Waymo is reported to have driven over 100 million miles autonomously on public roads.[8] And its autonomous cars in Austin provide more trips per day than 99% of all human Uber drivers, according to Uber’s CEO.[9] Waymo recently announced a similar partnership with Lyft to offer service in Nashville beginning in 2026,[10] and the company plans to offer

1 Michelle Cheng, Walmart has started using driverless trucks for its online grocery business, YahooTech! (Nov. 9, 2021), https://tech.yahoo.com/business/articles/walmart-started-using-driverless-trucks-212530238.html.

2 Aurora Debuts First Driverless Trucking Service in US, Transport Topics (May 1, 2025) https://www.ttnews.com/articles/aurora-full-self-driving.

3 Richard Bishop, The Long Haul To Autonomy Is Getting Started As Leaders Show The Way, Forbes (May 30, 2025), https://www.forbes.com/sites/richardbishop1/2025/05/30/the-long-haul-to-autonomy-is-getting-started-as-leaders-show-the-way/.

4 Marcus Lu, Mapped: Every Robotaxi Service Operating in 2025, Visual Capitalist (July 24, 2025), https://www.visualcapitalist.com/mapped-every-robotaxi-service-operating-in-2025/.

5 https://waymo.com/about/#story.

6 Id.

7 Waymo’s robotaxies to start carrying riders in Atlanta, expanding Uber partnership, PBS News (June 24, 2025), https://www.pbs.org/newshour/nation/waymos-robotaxies-to-start-carrying-riders-in-atlanta-expanding-uber-partnership.

8 Sam Westmoreland, Waymo expands lead over Tesla with launch of robotaxi services in new US cities: ‘The team is testing across more than 10 cities this year’, The Cool Down (Aug. 12, 2025), https://www.thecooldown.com/green-business/waymo-self-driving-cars-dallas-expansion/.

9 Tom Carter, Uber CEO says the Waymo robotaxis on its app in Austin are busier than 99% of human drivers, Yahoo!Finance Business Insider (May 7, 2025), https://finance.yahoo.com/news/uber-ceo-says-waymo-robotaxis-125257107.html.

10 Bringing fully autonomous rides to Nashville, in partnership with Lyft, Waymo Company News (Sept. 17, 2025), https://waymo.com/blog/2025/09/waymo-is-coming-to-nashville-in-

service in Dallas next year[11] and to continue its testing and expansion plans in additional cities like San Diego, Las Vegas, Miami, and Tokyo.[12]

Zoox is another robotaxi company in the process of ramping up commercial operations. In July 2025, Zoox launched limited robotaxi service in Las Vegas, offering free rides for select riders to gather feedback. Its permit to offer paid rides is pending satisfaction of compliance items. And Zoox is planning to provide service in other areas, including San Francisco, Austin, and Miami.[13] Zoox has taken a different approach to developing autonomous robotaxi services by designing a vehicle without the traditional driving controls like a steering wheel, pedals, and mirrors. This is referred to as a "purpose-built" vehicle, which differs from the approach Waymo and others have taken by modifying traditional vehicles to equip them with autonomous driving capabilities. In 2022, Zoox chose to self-certify its vehicles as being compliant with Federal Motor Vehicle Safety Standards (FMVSS) instead of applying for an exemption. The National Highway Traffic Safety Administration (NHTSA) opened an investigation due to questions regarding the sufficiency of the self-certification. Zoox subsequently filed for an exemption in June 2025 after NHTSA expanded the Automated Vehicle Exemption Program and NHTSA granted the exemption in August 2025. It is the first exemption for an American-built, steering wheel-less autonomous vehicle. NHTSA closed the investigation and Zoox must now cover or remove all statements that its purpose-built vehicles comply with or conform to all applicable FMVSS.[14]

AV Public Transportation. Autonomous vehicles also are being deployed by cities to provide public transportation services. For example, the City of Detroit ran an AV pilot program called the Accessibili-D Shuttle through which scheduled and on-demand AVs connected seniors and people with disabilities to health care, city parks, grocery stores, and other locations.[15] The pilot ran from June 2024 to June 2025 and was considered a success. Accordingly, the City recently announced that is looking to enter into a long-term contract to continue providing the services from the pilot program.[16] Jacksonville, Florida boasts the launch of "the first fully autonomous public transportation system network in the United States," with the June 2025 start of its NAVI (Neighborhood Autonomous Vehicle Innovation) service.[17] Jacksonville's Autonomous Innovation Center (AIC), which is the command center of the NAVI, opened in April 2025.[18]

AV Aviation Support. Autonomous vehicles are making their way on to the tarmac as well, with the goal of efficiently and safely executing crucial functions to support airport operations. Research is being conducted under the Airport Autonomy Initiative (AAI) on AVs that can perform tasks such as scanning the perimeter for people and objects, mowing the lawn, and sweeping the runways to clear debris. Recent tests have been conducted at the Atlantic City International Airport.[19] The AAI is led by The National Aerospace Research and Technology Park (NARTP), the National Center for Manufacturing Sciences, and the U.S. Air Force Air Mobility Command.[20]

**Advanced Air Mobility (AAM)**

At the same time these advancements in the autonomous vehicle industry have been made, efforts in Advanced Air Mobility (AAM) have progressed significantly – in industry, as well as on the regulatory front. We highlight the major players and applications of AAM – from air taxis (both personal and commercial) and flying cars to food delivery, medical, military and logistics applications, as well as significant regulatory efforts and legal considerations pertinent to the industry. The regulatory process itself has changed while companies have been navigating their way to market. eVTOL technology has introduced a new category of aircraft for the first time, it has been said, in nearly 80 years. Over the course of the last several years, great emphasis has been placed on facilitating innovation and the integration of AAM into the regulatory and operational framework of the aviation industry. It is clear that ushering in the reality of AAM is a priority, worldwide.

Air Taxi Market & Vision 2028. According to market research, the global air taxi market is anticipated to

partnership-with-lyft.

11 Introducing our next city: Dallas, Waymo Company News (July 28, 2025), https://waymo.com/blog/2025/07/our-next-city-dallas.

12 Sharon Feldman, What we know about Waymo's 2025 expansion plans, ARS Technica (Feb. 27, 2025), https://arstechnica.com/cars/2025/02/what-we-know-about-waymos-2025-expansion-plans/.

13 Kim Passoth, Fully self-driving vehicles now transporting people on Las Vegas Strip, Fox 5 Vegas (July 30, 2025), https://www.fox5vegas.com/2025/07/30/fully-self-driving-vehicles-now-transporting-people-las-vegas-strip/.

14 See NHTSA Issues First-Ever Demonstration Exemption to American-Built Automated Vehicles, U.S. Department of Transportation (Aug. 6, 2025), https://www.transportation.gov/briefing-room/nhtsa-issues-first-ever-demonstration-exemption-american-built-automated-vehicles; NHTSA Investigation Summary (NHTSA Action Number: AQ23001) https://www.nhtsa.gov/recalls?nhtsaId=AQ23001.

15 Jeff Hood, Detroit gets moving on autonomous vehicles, Deloitte Client Story, https://www.deloitte.com/us/en/what-we-do/case-studies/case-study-detroit-gets-moving-on-autonomous-vehicles.html.

16 Accessibili-D AV mobility shuttle nears end of successful 1-year trial, City to explore long-term service, (May 23, 2025), https://detroitmi.gov/news/accessibili-d-av-mobility-shuttle-nears-end-successful-1-year-trial-city-explore-long-term-service.

17 JTA Launches Nation's First Public Transportation Autonomous Vehicle Revenue Service, (June 27, 2025), https://www.jtafla.com/media-center/press-release/jta-launches-nation-s-first-public-transportation-autonomous-vehicle-revenue-service/.

18 JTA opens Autonomous Innovation Center downtown with 14 Holon vehicles already approved for purchase, News4JAX (Apr. 17, 2025), https://www.news4jax.com/news/local/2025/04/17/jta-opens-autonomous-innovation-center-downtown-with-14-holon-vehicles-already-approved-for-purchase/.

19 Researchers test new airport tarmac technology, NBC News (June 29, 2025), https://www.nbcnews.com/nightly-news/video/researchers-test-new-airport-tarmac-technology-242441797571.

20 Driving innovation in airfield automation, Airport Technology (May 6, 2025), https://www.airport-technology.com/sponsored/driving-innovation-in-airfield-automation/.

grow notably over the next decade. The air taxi market reportedly was $1.32 billion in 2024 and is expected to have a compound annual growth rate of 21.72%, reaching $7.74 billion by 2033.[21] "Bolstered by the development of electric vertical takeoff and landing (eVTOL) aircraft, urban air mobility solutions, and increasing demand for quicker, congested-free transit, air taxis are becoming a transformative future transport mode."[22] Among these catalysts for market growth, increasing investments and regulatory support are noted as well.[23] On June 6, 2025, the President issued an Executive Order on Unleashing American Drone Dominance, which in part, establishes an eVTOL integration pilot program (eIPP) "to accelerate the deployment of safe and lawful vertical operations in the United States." Under the eIPP, at least five pilot projects will be selected to advance operations "including advanced air mobility, medical response, cargo transport, and rural access."[24]

In July 2025, Former Acting FAA Administrator Chris Rocheleau expressed that he expects FAA certified eVTOLs to be operating in U.S. before the end of 2028, with smaller-scale eVTOL commercial operations in the next 18 months and the wide roll-out and full certification of eVTOL operations towards the end of the decade.[25] A vision for 2028 may be right on target, as Archer Aviation has been named the official air taxi for the LA28 Olympic and Paralympic Games and Team USA. Archer Aviation is one of the leading eVTOL companies in the U.S. and will be responsible for transporting "VIPs, fans, and stakeholders" in its four-passenger electric air taxi, the Midnight, which is piloted or flown by a pilot. During the LA28 games, Archer also will be "electrifying vertiport take-off-and-landing hubs for key venues and providing support for emergency services and security."[26]

Autonomous/Pilotless eVTOLs. In 2020, the first pilotless air taxi test flight in the United States was conducted by EHang as part of the North Carolina Transportation Summit hosted by the North Carolina Department of Transportation.[27] In 2023, EHang's EH216-S eVTOL became the world's first passenger-carrying autonomous eVTOL to obtain a Type Certificate, Standard Airworthiness Certificate, and Production Certificate from the Civil Aviation Administration of China, which allowed EHang to crank up commercial production.[28] It was recently reported that the EH216-S is in commercial service in China and has flown more than 66,000 flights across 19 countries.[29] Ehang recently announced plans to manufacture a longer-range autonomous eVTOL that would "expand its autonomous capabilities to intercity, cross-sea, and cross-mountain flights."[30]

Wisk Aero is developing the first pilotless, passenger-carrying eVTOL air taxi in the U.S., with plans to have certification complete and commercial operations in the U.S. in full swing by 2030. Australia is planned to follow with Wisk service by the 2032 Olympics. Wisk has a price target of $3 per passenger, per mile for the four-passenger aircraft.[31] FlyNow Aviation is developing and testing an autonomous eCopter that has no internal controls and would operate much like a passenger-carrying drone. FlyNow has conducted untethered flight tests and is aiming to launch commercial operations in 2027.[32]

Piloted eVTOLs. Joby Aviation and Archer Aviation are leading the pack to offer commercial piloted air taxi services in the U.S. Neither company has completed the required certification process, but they are years into it and have made great strides towards the finish line. Both companies have expressed plans to join the eIPP established under the Executive order on Unleashing American Drone Dominance.

There are three types of certifications required, as defined by 14 CFR Part 21 – type, production, and airworthiness. The FAA explains:

- Type certification is the approval of the design of the aircraft and all component parts (including propellers, engines, control stations, etc.). It signifies the design is in compliance with applicable airworthiness, noise, fuel venting, and exhaust emissions standards….
- Production certification is the approval to manufacture duplicate products under an FAA-approved type design. It signifies that an organization and its personnel, facilities, and quality system can produce a product or article that conforms to its approved

21 Air Taxi Market Size, Share, Trends & Forecast 2025–2033, Renub Research https://www.renub.com/air-taxi-market-p.php.

22 Id.

23 Id.

24 Executive Order 14307 Unleashing American Drone Dominance https://www.govinfo.gov/content/pkg/FR-2025-06-11/pdf/2025-10814.pdf.

25 Yves Le Marquand, Certified eVTOLs to operate in US before end of 2028: FAA Chief, Helicopter Investor (July 4, 2025), https://www.helicopterinvestor.com/news/103657/faa/.

26 Archer Selected as the Official Air Taxi Provider of the LA28 Olympic and Paralympic Games and Team USA in Exclusive Deal, (May 15, 2028), https://la28.org/en/newsroom/archer-selected-as-official-air-taxi-provider-of-la28-games.html.

27 EHang, EHang Conducts First-Ever U.S. Trial Flight of Pilotless Air Taxi at North Carolina Transportation Summit (Jan. 7, 2020) https://www.ehang.com/video/show/318.html.

28 Otilia Drăgan, EHang Moves Toward a Beefed-up Long-Range Autonomous Air Taxi, autoevolution (Aug. 26, 2025), https://www.autoevolution.com/news/ehang-moves-toward-a-beefed-up-long-range-autonomous-air-taxi-256502.html; EHang's EH216-S Pilotless eVTOL Completes Debut Flight in Downtown Shanghai, World-Class Central City is Set to Embrace Air Taxi Transportation, (Jan. 16, 2025), https://www.ehang.com/news/1180.html.

29 Drăgan, https://www.autoevolution.com/news/ehang-moves-toward-a-beefed-up-long-range-autonomous-air-taxi-256502.html.

30 Id.

31 Wisk Aero, Wisk Unveils World's First Self-Flying, Four-Seat, All-Electric, Vertical Takeoff and Landing Air Taxi, (Oct. 3, 2022), https://wisk.aero/news/press-release/generation6/.

32 Phillip Butterworth Hayes, FlyNow Aviation reports untethered flight progress for its eCopter eVTOL, Urban Air Mobility News.com (July 23 2025), https://www.urbanairmobilitynews.com/air-taxis/flynow-aviation-reports-untethered-flight-progress-for-its-ecopter-evtol/.

design.

- Airworthiness certification is necessary for operation of civil aircraft outside of 14 CFR Part 107 or without an exemption under the Special Authority for Certain Unmanned Systems (U.S.C. 44807). An airworthiness certificate can be either in the Standard or Special class and signifies that an aircraft meets its approved type design (if applicable) and is in a condition for safe operation.

Special airworthiness certificates limit operation and use of the aircraft, often severely.[33]

According to Archer, the Type Certification and Production Certification processes are still in progress, with the company having completed the Final Airworthiness Criteria but not the Means of Compliance and "For Credit" Flight Test.[34] Joby's goal is to launch commercial service in 2026.[35] Joby had reportedly completed four out of five "required stages for commercial passenger operations, with third-party audits confirming 80% compliance in its final phase," as of mid-year 2025.[36] In addition to being out in front in the certification process, Joby continues to push forward hitting milestones in the eVTOL space. In just the past several months Joby has:

started commercial market readiness efforts in Dubai, successfully completing piloted, vertical-takeoff-and-landing wingborne flights there (June 2025);[37]

- completed the first ever piloted eVTOL flight between two U.S. public airports, which also marked the first time it shared FAA-controlled airspace with other aircraft (August 2025);[38]
- expanded into a joint venture with ANA Holdings to launch Joby air taxis in Japan, making plans to showcase piloted operations of the aircraft (i.e., vertical takeoffs, full transition to wingborne flight, and landings) at EXPO 2025 in Japan in October (August 2025);[39] and
- Demonstrated SuperpilotTM autonomous flight technology with USAF, 7,000+ miles of autonomous operations across more than 40 flight hours (September 2025)[40]

In August 2025, Joby announced that it was purchasing Blade Air Mobility's passenger helicopter business, which positions Joby with key infrastructure and a customer base of more than 50,000.[41] In September 2025, Uber announced that, through its partnership with Joby, Blade helicopter rides would be available through the Uber app beginning in 2026.[42] There are other eVTOL companies pushing forward, including Eve Air Mobility, which has been touted as pulling ahead of Archer and Joby in the race due to several factors like a multibillion dollar backlog of orders.[43]

There are eVTOL designs meant for personal use – the Air One is an example. The eVTOL received FAA Experimental Airworthiness Certification in September 2025. Its wings and arms fold to make transportation and storage easier – it should be small enough to fit into a 20-foot container or to be pulled on a trailer by a large SUV or truck. According to Air, the FAA's recent MOSAIC Rule that updated requirements for designs in the light sports aircraft (LSA) category played a role in its certification.[44] The MOSAIC Rule was proposed in 2023 and the Final Rule was issued in July 2025. It makes changes to the permissible designs of the Light Sport Aircraft (LSA) category and to Sport Pilot privileges.[45]

Autonomous Deliveries & Logistics. Logistics and deliveries are a valuable use of autonomous eVTOL technology. In January 2025, MightyFly presented its hybrid autonomous eVTOL cargo aircraft, which can carry cargo for 600 miles and uses Autonomous Load Mastering System to autonomously open the cargo bay to receive or exclude packages. MightyFly completed a demonstration of its technology for the U.S. Air Force.[46]

33 Certification, Federal Aviation Administration (Last Updated Sept. 12, 2024), https://www.faa.gov/uas/advanced_operations/certification.

34 https://archer.com/certification.

35 Amy Thielen, Joby Aviation Aims for final FAA certification by 2026, (July 21, 2025), https://seekingalpha.com/news/4469589-joby-aviation-aims-for-final-faa-certification-by-2026

36 Cyrus Cole, Joby Aviation's Path to FAA Certification and Commercial Scalability in the eVTOL Sector, ainvest.com (July 21, 2025), https://www.ainvest.com/news/joby-aviation-path-faa-certification-commercial-scalability-evtol-sector-2507/; see also Jonathan Spira, Joby Aviation electric air taxi begins final phase of FAA certification program, Charged Electric Vehicles Magazine (Jan. 6, 2025), https://chargedevs.com/newswire/joby-aviation-electric-air-taxi-begins-final-phase-of-faa-certification-program/.

37 Joby Cements Global Lead in Air Taxi Industry with Dubai Flights and Beginning of Commercial Market Readiness Work, Business Wire (June 30, 2025), https://finance.yahoo.com/news/joby-cements-global-lead-air-120000905.html.

38 Joby, Joby Achieves the First Piloted eVTOL Air Taxi Flight Between Two Public Airports (Aug.15, 2025), https://www.jobyaviation.com/news/first-piloted-evtol-air-taxi-flight-between-two-public-airports/.

39 Joby, ANA Holdings, Joby Plan to Accelerate Air Taxi Deployment in Japan; Will Hold Demonstration Flights at EXPO 2025 Osaka, Kansai, Japan, (Aug. 5, 2025), https://ir.jobyaviation.com/news-events/press-releases/detail/137/ana-holdings-joby-plan-to-accelerate-air-taxi-deployment.

40 Joby, Joby Completes Landmark U.S. Defense Exercise with Autonomous Flight Technology, (Sept. 3, 2025) https://ir.jobyaviation.com/news-events/press-releases/detail/142/joby-completes-landmark-u-s-defense-exercise-with.

41 Electric air taxi company Joby to acquire Blade Air's passenger business, CNBC (Aug. 4, 2025), https://www.cnbc.com/2025/08/04/electric-air-taxi-company-joby-to-acquire-blade-airs-passenger-business.html.

42 Uber will launch Blade helicopter rides next year through expanded Joby partnership, CNBC (Sept. 10, 2025), https://www.cnbc.com/2025/09/10/uber-to-add-blade-helicopter-rides-through-expanded-joby-partnership-.html.

43 Surbhi Jain, Archer, Joby Upstaged By Chinese, Brazilian Rivals In Battle For Future Of Flight, Benzinga (Aug. 22, 2025), https://www.benzinga.com/trading-ideas/long-ideas/25/08/47292428/archer-joby-upstaged-by-chinese-brazilian-rivals-in-battle-for-future-of-flight.

44 Charles Alcock, FAA Grants Experimental Airworthiness Certification for Air One eVTOL, (Sept. 3, 2025), https://www.ainonline.com/aviation-news/futureflight/2025-09-02/faa-grants-experimental-airworthiness-certification-air-one.

45 U.S. Transportation Secretary Sean P. Duffy Announces Improvements to Recreational Aviation Safety, Expansion of Light-Sport Sector, USDOT (July 22, 2025), https://www.transportation.gov/briefing-room/us-transportation-secretary-sean-p-duffy-announces-improvements-recreational-aviation.

46 Prabhat Ranjan Mishra, 600-mile range: Unmanned eVTOL autonomously places packages, can transport military cargo, (July 6, 2025), Interesting Engineering, https://interestingengineering.com/military/autonomous-mightyfly-evtol-transports-military-cargo.

Chipotle, on the other hand, is now partnering with Zipline to execute autonomous food deliveries in the Dallas, TX area.[47]

A True Flying Car. Sometimes you will hear people refer to eVTOLs with a more traditional aircraft design as flying cars, likely because of the notion that they will be used to provide air taxi services or personal flights and are akin to a car. But there is a flying car…a literal flying car that is being developed by a company named Alef Aeronautics. It is the first car that drives on the road that has been granted FAA permission to take off vertically and fly, similar to the eVTOLs we've been discussing. In 2023, Alef was awarded a special airworthiness certification for purposes of testing its flying car.[48] When the car takes off from the road, it transitions by tilting forward and flying forward like a biplane with two wings. The shifting of the passenger cabin and flying forward makes the battery efficient. The car will carry one or two occupants and will have a road-range of 200 miles and a flying range of 110 miles. During the last week of August 2025, Alef announced that it had permission to begin operations at Half Moon Bay Airport and Hollister Airport.[49] "Planned operations include driving, vertical takeoff, forward flight, and vertical landing, as well as air and ground maneuvering," and "Alef may also test how its systems integrate with common air traffic patterns."[50] Alef said it is on schedule to start production of its first commercial cars by the end of 2025 or beginning of 2026, which are currently priced near $300,000.

**Advanced Air Mobility (AAM) Regulation**

"A new era of aviation is here. The FAA is ready." The FAA summarizes the state of AAM regulation as follows: "[w]e have regulations in place to ensure that aircraft in the powered-lift category are properly certificated, are able to safely operate in our National Airspace System alongside existing aircraft, and we have determined what pilot qualifications are necessary to fly them."[51] The National Association of State Aviation Officials (NASAO) AAM Multistate Collaborative has highlighted the role that states have to play in the success of AAM as well: "[W]hile the FAA retains national authority over certification and operations, state governments will play a decisive role in ground-based planning, infrastructure, and funding to enable safe, scalable AAM services."[52] We highlight several significant developments that have positioned the AAM industry and regulators to meet the moment successfully.

New Powered Lift Category. Through a process that began years ago, the FAA has created the first new category of aircraft since the introduction of the helicopter – powered lift aircrafts, which "have characteristics of both airplanes and helicopters. They're capable of vertical take-off and landing (VTOL) and low speed flight, similar to a helicopter, and fly using a wing during cruise flight, similar to an airplane."[53] After attempting to apply current rules to this burgeoning technology, the FAA embarked on the process of establishing the Powered Lift Category. A proposed rule was published in 2023 and worked its way through the process, culminating in a Final Rule that was published in October 2024. The Final Rule is meant to "facilitate the certification of powered-lift pilots, clarify operating rules applicable to operations involving a powered-lift, and finalize other amendments which are necessary to integrate powered-lift into the National Airspace System (NAS)."[54]

On July 18, 2025, the FAA issued Advisory Circular Type Certification – Powered Lift (AC 21.17-4), which provides guidance for the type, production, and airworthiness certification of powered-lift. It also designates airworthiness criteria in appendix A as an acceptable, but not the only means, of showing compliance with 14 CFR 21.17(b) for FAA type certification of certain powered-lift.[55] The AC means special rulemaking provisions will no longer need to be the basis for meeting airworthiness requirements. The rules are also aligned with Special Federal Aviation Regulations (SFAR) covering operational rules and pilot certification for powered-lift aircraft that the FAA issued in October 2024.

Beyond Visual Line of Sight (BVLOS) Drone Proposed Rule. In August, a new rule was proposed[56] that would allow drone operators to continue to operate drones that go out of their line of sight without needing to get a waiver. The rule contains other requirements to continue to ensure safety. The rule is seen as beneficial for many applications, including "[p]ackage delivery, agriculture,

47 Kelly McCarthy, Chipotle burritos will take flight with 1st autonomous aircraft delivery option GMA, (Aug. 21, 2025), https://www.goodmorningamerica.com/food/story/chipotle-burritos-flight-1st-autonomous-aircraft-delivery-option-124848054?cid=social_twitter_abcn.

48 Chris Isidore, A flying car prototype just got an airworthiness certificate from the FAA, (July 6, 2023), https://edition.cnn.com/2023/07/03/tech/flying-car-faa/index.html.

49 Claire Reid, World's first flying car will soon be flying and landing at California airports, (Aug. 31, 2025), https://supercarblondie.com/alef-aeronautics-worlds-first-flying-car-flying-and-landing-california-airports/.

50 Sharon Song, Bay Area flying car company begins operations at two airports, KTVU (Aug. 25, 2025), https://www.ktvu.com/news/bay-area-flying-car-company-begins-operations-two-airports.

51 Advanced Air Mobility | Air Taxis http://faa.gov/air-taxis.

52 Amy Wilder, U.S. States Collaborate To Implement Advanced Air Mobility, AIN (August 28, 2025) https://www.ainonline.com/aviation-news/2025-08-26/nasao-collaborative-charts-path-state-aam-efforts.

53 Advanced Air Mobility | Air Taxis http://faa.gov/air-taxis.

54 RIN 2120-AL72, Integration of Powered-Lift: Pilot Certification and Operations; Miscellaneous Amendments Related to Rotorcraft and Airplanes, FAA (Oct. 22, 2024), https://www.faa.gov/newsroom/integration-powered-lift-pilot-certification-and-operations-miscellaneous-amendments.

55 AC No: 21.17-4 https://drs.faa.gov/browse/AC/doctypeDetails?modalOpened=true.

56 RIN 1652-AA80 Normalizing Unmanned Aircraft Systems Beyond Visual Line of Sight Operations https://www.faa.gov/newsroom/BVLOS_NPRM_website_version.pdf.

aerial surveying, public safety, recreation and flight testing."[57]

International and Interstate Collaboration. The National Aviation Authority (NAA) Network is an international collaborative effort formed in 2022 among the U.S. and four other nations (Australia, Canada, New Zealand, and the UK) with an interest in fostering the efficient integration of AAM into our transportation spaces. In June 2025, the NAA released its Roadmap for Advanced Air Mobility Aircraft Type Certification which "sets forth a unified and strategic approach to foster collaboration, safety assurance, technological innovation, and AAM inclusive bilateral agreements."[58] The effort has been hailed as "a powerful demonstration of mutual trust and unprecedented cooperation, proving that the skies can indeed be truly global."[59]

The National Association of State Aviation Officials (NASAO) formed an advanced air mobility (AAM) multistate collaborative project to focus on the states' role in incorporating AAM into the national airspace. In August 2025, the Multistate Collaborative released a set of topic papers which discuss "how 36 states across the U.S. can support the integration of AAM into the National Airspace System through infrastructure planning, policy alignment, and coordination with the FAA."[60]

**Legal & Regulatory Considerations**

Great progress has been made in the development and regulation of autonomous and AAM transportation. Yet, we are still in the early stages of crafting a legal framework to incorporate this technology. This can present uncertainty on the one hand, and opportunity on the other. In addition to keeping abreast of relevant legal and regulatory developments, companies should consider how and whether they can participate in the development process to shape the environment in which they will be operating. The creation of rules applicable to a new type of aircraft for the first time in nearly 80 years, an exempted steering wheel-less autonomous vehicle cruising the roads, and the international and interstate collaborative efforts in the AAM space, all are testimonies to the power of engaging in the process and working towards solutions that will continue to foster meaningful and beneficial innovation. Many of the legal and regulatory questions raised in the context of autonomous vehicles also will be raised in the context of eVTOLs and other AAM options.

As the level of automation in vehicles/aircraft increases, the principles guiding liability determinations may shift to place more responsibility on vehicle/aircraft and/or component manufacturers and less on the "driver" or occupant of the vehicle. Product liability will likely be a major component of the analysis with more automated vehicles, but other legal frameworks may be applicable in these cases. Individuals using autonomous technology do need to be aware that they will not necessarily be free of all liability. It remains to be seen what will become of the liability analysis with automated and connected vehicles/aircraft communicating with each other and infrastructure.

An atmosphere of innovation provides an opportunity for intellectual property disputes to arise. Traditional patent and trade secret cases will come as no surprise. Indeed Wisk Aero, Archer Aviation, and Boeing were involved in a patent infringement and trade secret theft dispute over the development of eVTOL technology. The case ultimately was settled in 2023 and the companies entered into a collaborative arrangement "that look[ed] forward to the growth and development of the AAM industry. Archer [] agreed to make Wisk its exclusive provider of autonomy technology for future variants of Archer's aircraft" and "Boeing [made] an investment in Archer that [would] support the integration of Wisk's autonomous technology in future variants of Archer's aircraft."[61]

With the push to develop new technologies in these industries, securities fraud class actions have been filed claiming that companies have misrepresented the viability of their cutting-edge technology. For example, EHang Holdings Ltd. has faced several class actions filed by shareholders claiming that the company made material misrepresentations regarding its autonomous aerial vehicle platform and business. There are innovation risks that raise questions – how soon do you test? How much do you disclose to the public/regulators? Is there a risk of claims of false advertising and misrepresentation?

Data security and privacy also are concerns when advancements in technology and infrastructure are in play. With aircraft and vehicles ever more connected and communicating with each other and infrastructure there is the potential for cyber-attacks and mishandling of data. We must probe liability and policy questions, such as who owns the data? How is it being used? Is it being sold and to whom? How should it be stored? What constitutional

57 Joanna Putman, DOT announces new proposal aimed at boosting U.S. drone development, gov1 (Aug. 8, 2025), https://www.gov1.com/technology/dot-announces-new-proposal-aimed-at-boosting-u-s-drone-development.

58 Roadmap for Advanced Air Mobility Aircraft Type Certification, The National Aviation Authority Network (June 2025), https://www.faa.gov/air-taxis/NAA-Network-Roadmap-Advanced-AirMobility-Aircraft-Type-Certification-Edition-April2025.pdf.

59 Greg Bowles, A Historic Leap: Five Nations Unite to Accelerate Global Air Mobility with Joby at the Forefront, (June 16, 2025), https://www.jobyaviation.com/blog/joby-five-nation-agreement/.

60 Amy Wilder, U.S. States Collaborate To Implement Advanced Air Mobility, AIN (Aug. 28, 2025) https://www.ainonline.com/aviation-news/2025-08-26/nasao-collaborative-charts-path-state-aam-efforts.

61 Wisk Aero, Wisk Aero, Archer, and Boeing Reach Agreement To Settle Litigation and Enter into Autonomous Flight Collaboration; Boeing Invests in Archer's Latest Funding Round, (Aug. 10, 2023), https://wisk.aero/news/press-release/wisk-aero-archer-and-boeing-reach-agreement-to-settle-litigation-and-enter-into-autonomous-flight-collaboration-boeing-invests-in-archers-latest-funding-round/.

concerns are attendant to the collection of and access to this data? These are all questions we should consider, while also considering how these technological advances can fit into our lives and business strategies. The future is upon us.


Flying Cars
and Air Taxis:
Legal and Regulatory
Updates in
Transportation
The Trial Network
Presented By
Tony Lathrop
November 8, 2025


Tomorrow's
Transportation
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From Autonomous
Vehicles on Public
Roads
to
An Official Air Taxi
for the 2028
Olympics
Image Source: zoox.com


AUTONOMOUS
Image Source: www.itsla.com
WAYMO
Image Source: iStock
AVs Have Driven Millions Of Miles On Public Roads, Including Hundreds Of Thousands Of Paid Robotaxi Rides.
Image Source: www.forbes.com

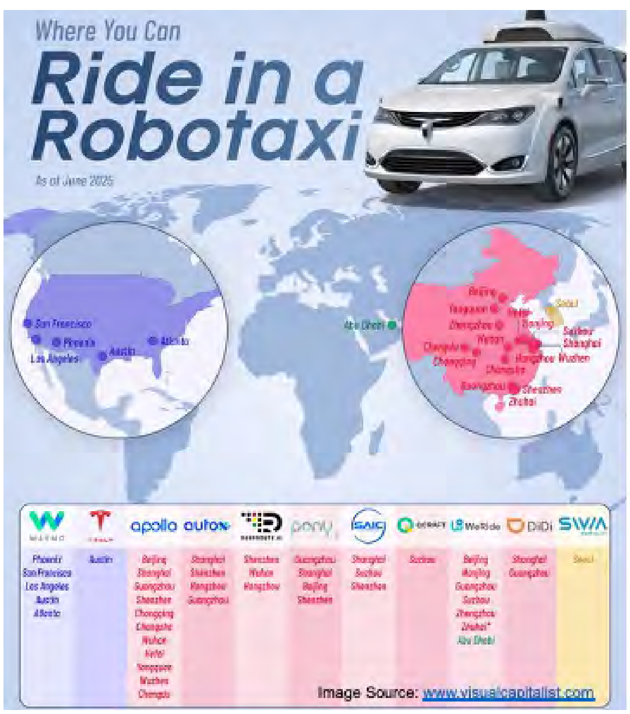

LOS ANGELES MEMORIAL COLISEUM
ARCHER SELECTED AS THE OFFICIAL AIR TAXI PROVIDER OF THE LA28 OLYMPIC AND PARALYMPIC GAMES AND TEAM USA IN EXCLUSIVE DEAL
ACHR28
Image Source: la28.org



- 2021: Walmart 1st to use autonomous delivery trucks w/ no safety driver in the "middle mile" of supply chain – on fixed 7-mile route.
- April 2025: Aurora Innovation 1st to operate commercial self-driving long-haul service w/ heavy duty trucks on public roads – Dallas to Houston route.


- Additional Companies Planning to Launch Driverless Trucking operations by 2027: Waabi, Bot Auto, Daimler Trucks and Torc Robotics

- Autonomous Long-Haul “Transportation as a Service” (TAAS) – Volvo Planning to Run Driverless Shipments for Other Companies, *e.g.* DHL and Uber Freight




**World Leader: China**

8 Companies Operating Across 16 Cities

**U.S. Leader: Waymo**

1500 Vehicles Operating in 5 Cities & Testing in 10 More

100+ Million Miles Driven on Public Roads


- 2018: Launched World's 1st AV Commercial Service in **Phoenix**
- 2020: Opened Service to All Members of the Public in Phoenix
- 2021-2023: Limited Service in **San Francisco** & **Los Angeles**
- 2024: Opened Service to All Members of the Public in SF & LA
- 2025: Partnership with Uber: **Austin** & **Atlanta**

## Next for Waymo

**2025**

Pilot in NYC: Testing w/ Humans Behind the Wheel Due to State Law (Aug – Sept)

**2026**

- Lyft Partnership in Nashville
- Service in Dallas

## Zoox
## 1st Authorized Robotaxi Without Steering Wheel

**Purpose-Built:** Designed to be fully autonomous w/out traditional steering wheel, pedals, mirrors, and other controls.

**Self-Certified** in 2022 as Compliant w/ Federal Safety Standards; NHTSA Opened Investigation re: Self-Certification.

Image Source: zoox.com

## Zoox
## 1st Authorized Robotaxi Without Steering Wheel

**June 2025:** Applied for NHTSA Exemption

**August 2025: Granted 1st Exemption** from U.S. rules requiring the use of certain features as part of expanded Automated Vehicle Exemption Program; Investigation Closed.

Image Source: zoox.com

# Zoox in Vegas

- Began Testing In 2019
- July 2025 Launched Free Rides For Select Riders To Provide Feedback
- Permit For Paid Rides Pending – Up to 100 Vehicles
- San Francisco, Austin, Miami Planned


Images From: www.fox5vegas.com

# Detroit Accessibili-D Autonomous Shuttle Pilot


Image Source: Deloitte.com

- Detroit's Office of Mobility Innovation (OMI) Used USDOT Autonomous Driving System Demonstrate Grant to form Michigan Mobility Collaborative (MMC).
- MMC Proposed Accessibili-D Program: Scheduled And On-Demand AVs Serve As A Connection B/W Seniors And People With Disabilities To Health Care, City Parks, Grocery Stores, And More.

## Detroit Accessibili-D Autonomous Shuttle Pilot

Image Source: Deloitte.com

- Pilot Ran June 20, 2024 – June 30, 2025:
  - Launched with 3 AVs, 2 wheelchair-accessible, 68 stops across 11-square miles.
  - Expanded to 110 stops.
- Successful Pilot → City Seeking to Secure Long-Term Contract to Continue Service

## NAVI
## Jacksonville, FL

Images From: www.jtafla.com


1st Fully Autonomous Public Transportation System Network In U.S.

3.5-mile Route Through Downtown Jacksonville The Central Business Core To The Sports & Entertainment District.

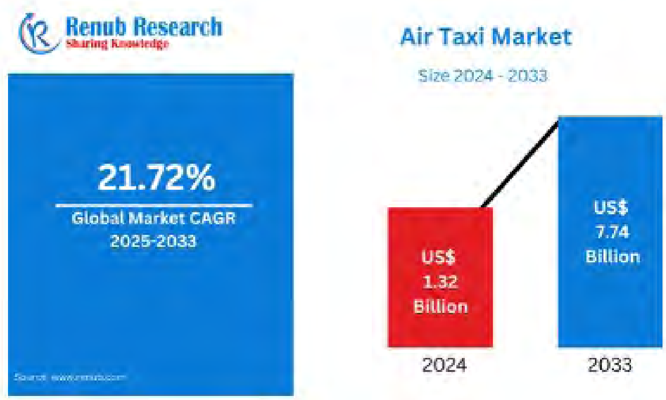
NAVI
NEIGHBORHOOD AUTONOMOUS VEHICLE INNOVATION

# Airfield Autonomy Initiative (AAI)

- FAA & DoD (DoW) Support
- Testing at Atlantic City International Airport
- Scan Perimeter For People And Objects, Mow Lawn, Sweep Debris


# Advanced Air Mobility (AAM)

## Global Air Taxi Market




"Bolstered by the development of electric vertical takeoff and landing (eVTOL) aircraft, urban air mobility solutions, and increasing demand for quicker, congested-free transit, air taxis are becoming a transformative future transport mode."

https://www.renub.com/air-taxi-market-p.php

## Catalysts For Air Taxi Market Growth

- Technological Advances in eVTOL and Electric Propulsion
- Urban Congestion and Time-Saving Demand
- Growing Investment and Regulatory Support

## Electric Vertical Takeoff and Landing (eVTOL) Integration Pilot Program (eIPP)

EXECUTIVE ORDER ON UNLEASHING AMERICAN DRONE DOMINANCE (June 6, 2025):

- Establishes an eVTOL integration pilot program (eIPP) “to accelerate the deployment of safe and lawful vertical operations in the United States.”
- At least 5 Pilot Projects to be selected to advance operations including advanced air mobility, medical response, cargo transport, and rural access.


# FAA 2028 Vision for eVTOLs

FAA Certified eVTOLs Operating in U.S. Before End of 2028

Small-Scale Revenue Generating eVTOLs Up in 18 Months

Wide Roll-Out and Full Certification Towards End of Decade

- Then-Acting FAA Administrator Chris Rocheleau
(Named Deputy Administrator in July 2025)

https://www.helicopterinvestor.com/news/103657/faa/

# 2028 LA Olympics Official Air Taxi


- Transporting VIPs, Fans, and Stakeholders
- Electrifying Vertiport Take-off-and-landing Hubs For Key Venues
- Providing Support For Emergency Services & Security
- Plans to Joins eIPP

1st AAV Test Flight in the U.S. in North Carolina
January 2020

[redacted]



Ehang EH216-S

1st Certified Pilotless Passenger-Carrying eVTOL


Obtained World's 1st Type Certificate, Production Certificate & Standard Airworthiness Certificate For Pilotless eVTOL Issued By The Civil Aviation Administration Of China.


Ehang VT30
Long-Range
Pilotless eVTOL
An autonomous air taxi with long-range capabilities
The VT30 will expand Ehang's AV capabilities to intercity, cross-sea, and cross-mountain flights
Image Source: autoevolution.com


Image Source: wisk.aero.com
Wisk Aero
Pilotless
eVTOL in U.S.
• Developing 1st Autonomous, Passenger-Carrying eVTOL Air Taxi in U.S. – 4-person
• Price Target Of $3 Per Passenger, Per Mile.
• Plans to be Certified And Flying Passengers in the U.S. by 2030 and in Australia in 2032 For The Olympics Set To Be Held There.

## FlyNow Aviation Autonomous eCopter

- No Internal Controls; Would Operate Much Like a Passenger-Carrying Drone.
- Conducted Untethered Flight Tests, Aiming to Launch Commercial Operations in 2027.


Image Source: https://www.iotworldtoday.com/

## FAA Certification Process

14 CFR Part 21 Defines 3 Certifications:

1. **Type:** approval of design of aircraft & all component parts.
2. **Production:** approval to manufacture duplicate products under an FAA-approved type design.
3. **Airworthiness:** Standard or Special class, signifies an aircraft meets its approved type design (if applicable) and is in condition for safe operation.
   - Special airworthiness certificates limit operation and use of the aircraft, often severely.


## Archer Certification Status

- Part 145 Maintenance & Repair Certificate - Complete
- Part 135 Air Carrier & Operator Certificate - Complete
- Type Certification - In Progress (Final Airworthiness Criteria - Complete, Means of Compliance - In Progress, "For Credit" Flight Test - Preparing to Begin)
- Production Certification - In Progress

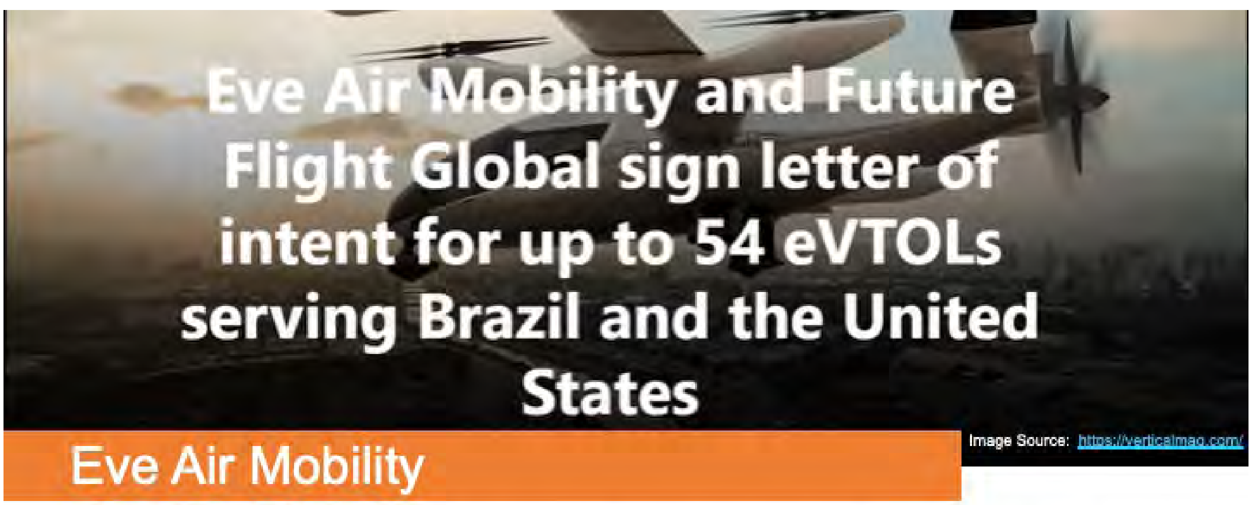
Source: https://archer.com/certification


## Joby Aviation Piloted Air Taxi

- Reportedly Completed 4 out of 5 "Required Stages For Commercial Passenger Operations, with Third-party Audits Confirming 80% Compliance In Its Final Phase," as of Mid-2025.
- Goal to begin commercial flights in 2026
- Plans to Join eIPP


Joby Recent Milestones
• Started commercial market readiness efforts in Dubai, completing piloted, vertical-takeoff-and-landing wingborne flights (June 2025);
• Completed 1st piloted eVTOL flight between two U.S. public airports; also 1st time shared FAA-controlled airspace with other aircraft (August 2025);


Joby Recent Milestones
• Expanded into joint venture with ANA Holdings to launch Joby air taxis in Japan, plans to showcase piloted operations at EXPO 2025 in Japan (August 2025);
• Demonstrated Superpilot™ autonomous flight technology with USAF, 7,000+ miles of autonomous operations across more than 40 flight hours (September 2025)


Joby and Archer's "slower progress risks leaving them spectators in what increasingly looks like a two-horse race between EHang and Eve."

## Air One Personal Use & Cargo


- September 2025 – FAA Experimental Airworthiness Certification for Piloted and Uncrewed eVTOL
- Folding Wings/Arms – Can be Pulled by Standard Trailer by Large SUV or Truck
- The Modernization of Special Airworthiness Certification (MOSAIC) Rule – Updated Light Sports Aircraft Designs

## Logistics & Military Ops

- Autonomous hybrid eVTOL Cargo Aircraft
- Autonomous Load Mastering System (ALMS)
- USAF Flight Test – Executed a DoD-relevant Mission


Zipotle Autonomous Delivery
Chipotle Partnership with Zipline
Dallas, TX
Zipline
Image Source https://www.goodmorningamerica.com


Alef Aeronautics Designing & Developing World's 1st Real Flying Car
ALEF AERONAUTICS
Image Source: nbcnews.com
FUTURE OF THE ROAD
THE FLYING CAR INCHES CLOSER TO REALITY
NIGHTLY NEWS
ALEF FLYING CAR
Alef is designing and developing the world's first real flying car
Image Source: https://alef.aero/


3,200+
PreOrders

$300,000

1st Car Granted FAA Permission To Take Off Vertically And Fly –

Special Air Worthiness Certification July 2023 Exhibition, Research And Development.


# Advanced Air Mobility Regulation

"A new era of aviation is here. The FAA is ready."

http://faa.gov/air-taxis


"We have regulations in place to ensure that aircraft in the powered-lift category are properly certificated, are able to safely operate in our National Airspace System alongside existing aircraft, and we have determined what pilot qualifications are necessary to fly them."

- FAA

http://faa.gov/air-taxis


"[W]hile the FAA retains national authority over certification and operations, state governments will play a decisive role in ground-based planning, infrastructure, and funding to enable safe, scalable AAM services."

– NASAO AAM Multistate Collaborative

https://www.ainonline.com/aviation-news/2025-08-26/nasao-collaborative-charts-path-state-aam-efforts

## Significant Regulatory Developments

- October 2024: FAA Final Rule for Powered Lift Category of Aircraft – covers pilot qualifications and training and operational requirements for eVTOLs in the USA.

- July 18, 2025: FAA Advisory Circular Type Certification – Powered Lift (AC 21.17-4) provides guidance for the type, production, and airworthiness certification of powered-lift; designates airworthiness criteria in appendix A as an acceptable, but not the only means, of showing compliance with 14 CFR 21.17(b) for FAA type certification of certain powered-lift.

## Significant Regulatory Developments

August 2025: Beyond Visual Line of Sight (BVLOS) Proposed Rule – would eliminate the requirement for drone operators to obtain waivers or exemptions for flights that extend beyond the operator's direct line of sight.

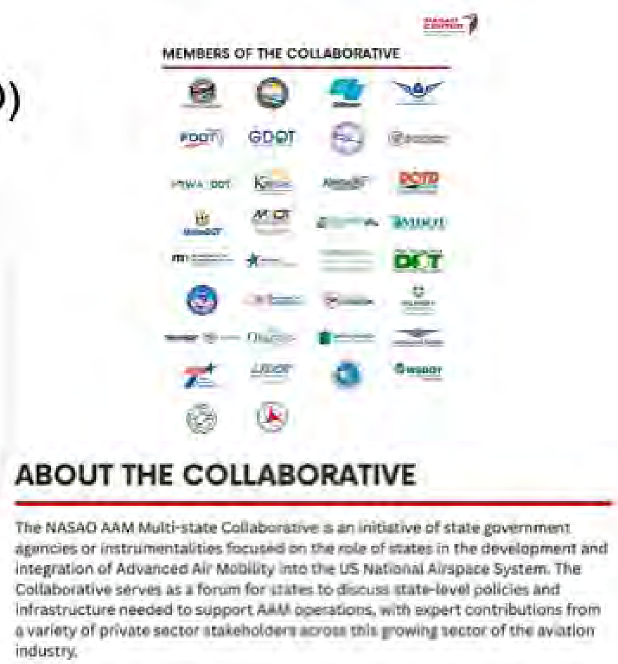
Considered beneficial for applications including package delivery, agriculture, aerial surveying, public safety, recreation and flight testing.

## National Aviation Authority (NAA) Network (Australia, Canada, New Zealand, the UK, and the U.S.)

- Formed 2022
- June 2025: "The NAA Network's Roadmap for Advanced Air Mobility (AAM) Type Certification sets forth a unified and strategic approach to foster collaboration, safety assurance, technological innovation, and AAM inclusive bilateral agreements."


## The National Association of State Aviation Officials (NASAO) Advanced Air Mobility (AAM) Multistate Collaborative

- Formed 2023
- August 2025 Topic Papers Released: How 36 states across the U.S. can support the integration of AAM into the National Airspace System through infrastructure planning, policy alignment, and coordination with the FAA.




Innovation Risks & False Advertising
Theories of Product Liability
Data Privacy: Liability & Policy Considerations
Insurance Considerations
Intellectual Property
Securities Fraud: Marketing & Performance Expectations

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# Anthony “Tony” T. Lathrop

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

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

Tony has more than 30 years of experience representing a diverse portfolio of clients in a broad range of complex civil litigation and administrative matters. His clients include: vehicle and aircraft manufacturers, real estate developers, engineering firms transportation infrastructure firms, various service providers, mining/mineral transformation companies, pulp and paper manufacturers, and networking/cloud connectivity providers.

Tony routinely collaborates with MVA colleagues on other practice teams to bring varied experience and perspectives to bear when the firm’s clients will benefit from a multi-disciplinary approach to matters.

Through his commitment to leadership in the legal, transportation, and planning communities of North Carolina, Tony has regular and significant interaction with local, state, and federal elected officials, and governmental agencies, trade organizations, interested stakeholder groups, and industry professionals on matters of policy and advocacy, project planning and management, funding, economic development, public-private partnerships, and general business development efforts.

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

**Notable**
- Best Lawyers in America, Commercial Litigation, 2010-2026; Workers’ Compensation Law - Employers, 2010-2026
- North Carolina Super Lawyers, Business Litigation, 2006-2025
- Martindale-Hubbell, North Carolina Top Rated Lawyer
- Benchmark Litigation “Local Litigation Star,” General Commercial, 2015-2025
- North Carolina Pro Bono Honor Society, 2021
- Advisory Member, NC FIRST (Future Investment Resources for Sustainable Transportation), 2019-2021
- NCDOT’s Board of Transportation - Chair, April 2025-present; Member, 2017-present; Chair, Finance Committee (formerly the Funding & Appropriation Strategies (FAST) Committee), 2017-March 2025

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

# The Hidden Psychology of Judging


**Derek Stikeleather**

Goodell DeVries Leech & Dann (Baltimore, MD)


**The Hidden Psychology of Judging**
*Derek Stikeleather*

Faith in the rule of law requires trust in judges to evenly apply the law as neutral arbiters, regardless of their personal or political views. But even the most principled judges are human—and research shows that the human brain's wiring can cause wide swings in judicial decisions. One area of special psychological sensitivity is the heuristic commonly known as "anchoring." Whether judges realize it or not, the first number presented—often a dollar amount—operates as the decisionmaker's reference point for any subsequent numerical determination. But research shows that even unrelated and totally irrelevant numbers can significantly impact a decisionmaker's analysis. Civil litigators, whose cases often boil down to a battle over the proper amount of monetary compensation to resolve a dispute, should be trained to recognize these startling psychological phenomena.

Much of the modern debate over the impact of anchoring in civil litigation stems from a 1974 article in the journal Science, titled "Judgment under Uncertainty: Heuristics and Biases," by Amos Tversky and Daniel Kahneman. 185 Science 1124 (1974). The authors detailed a series of heuristics, i.e., mental shortcuts, that their research revealed. Among them was "anchoring"—the bias towards initial values when decisionmakers must estimate or quantify final values. As one quick example, high-school students given five seconds to estimate the product of 8x7x6x5x4x3x2x1 estimated more than those given 1x2x3x4x5x6x7x8. Although both groups vastly underestimated the correct answer, those given the descending numbers (8,7,6, . . .) estimated more than four times higher than those given the ascending numbers (1,2,3, . . .) .

The more startling result was the impact that plainly irrelevant numbers had on estimates. Study participants were asked to spin a "Wheel of Fortune" to yield a random number between one and 100. They were then asked whether the percentage of African nations with U.N. membership was higher or lower than the arbitrary wheel-generated number. Finally, they were asked for their best estimate of the actual percentage of African nations with U.N. membership. The researchers compared the estimates of subjects who saw the number 10 on the wheel with those who saw the number 65. The estimates of those who saw the number 10 averaged 25% membership, while the estimates of those who saw the number 65 averaged 45.8%—almost double. The anchoring effect was unchanged even when participants were offered payment for correct estimates.

Plaintiffs have not hesitated to exploit the power of anchoring when speaking with judges, jurors, mediators, and even defense counsel. Plaintiffs rarely begin mediating without an excessively high number, and their requests to juries for non-economic damages for pain and suffering are rarely modest. More recently, many personal-injury plaintiffs forgo all requests for tangible economic damages (medical bills, lost wages) to clear the jury's mind before requesting only non-economic damages. This allows plaintiffs to present a multi-million dollar sum as the first monetary value that jurors hear in the case.

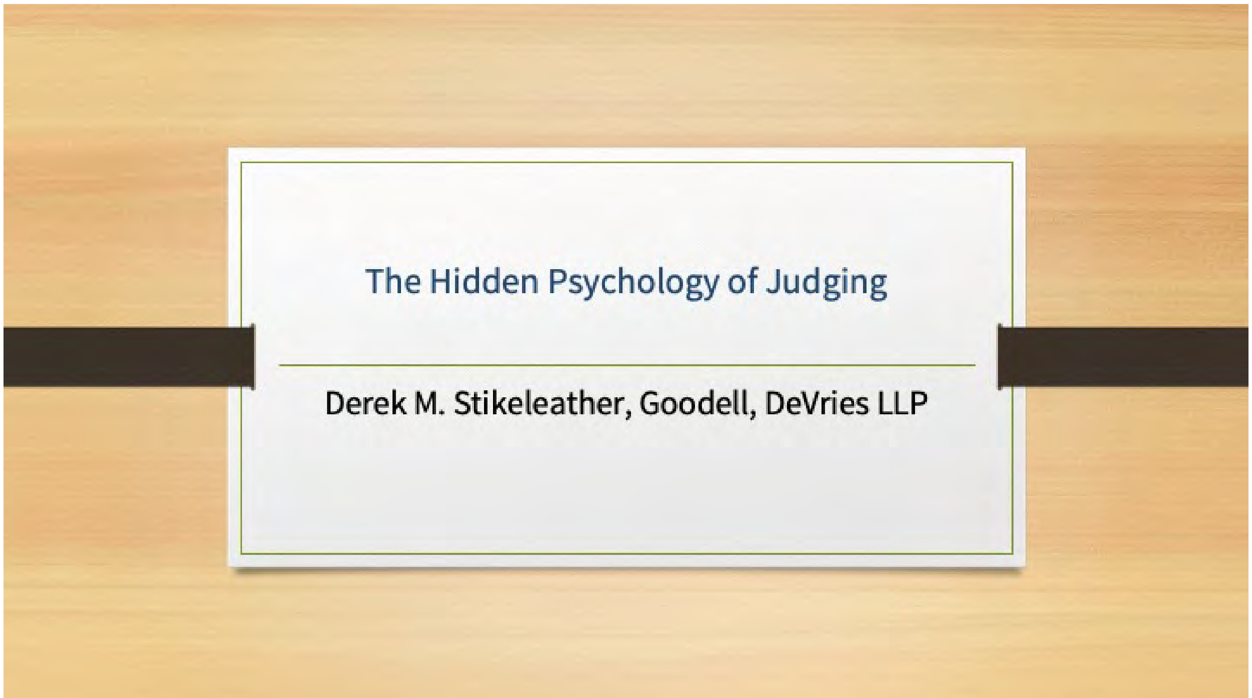
As Defendants have increasingly objected to anchoring tactics as improper and manipulative, Plaintiffs have countered with a 2011 article from the Journal of Empirical Legal Studies, titled "Damage Anchors on Real Juries." Diamond et al, 8 J. Empirical L. Studies 148 (2011). Using data from the 2003 Arizona Jury Project, a transcribed video study of dozens of real jury deliberations in Arizona state trial courts. The authors concluded that "fears about undue influence from attorney damage proposals are inflated both because attorneys tend to tailor their demands to the evidence and because juries are critical consumers of the demands attorneys make and heavily discount them." Yet the authors still recognize that other "research on anchoring has demonstrated that the anchoring effect is extremely robust. Although anchors are more influential when decisionmakers are not confident in their judgments, anchoring operates even when participants are experts in the judgment domain and occurs even when participants are forewarned and highly motivated to remain uninfluenced."

The Diamond study has notable limitations. It used the deliberations and attorney demands from only 31 trials where juries awarded damages, leaving it "without sufficient power and controls to stringently test the reliability of the comparisons." Id. at 158. Noting the extent to which actual jurors made comments critical of plaintiff's monetary demands during deliberations, the authors explained that "we are not suggesting that attorney recommendations have no influence as anchors, but rather that they may be less influential reference points in a modern adversarial context than in the laboratory environment of earlier work." Id. at 176. Although finding the danger of anchoring bias apparently "overstated as applied to the real world of deliberating juries," the authors still emphasized that they were "not suggesting that award decisions are uninfluenced by irrelevant factors, including anchoring and other pervasive cognitive shortcuts." Id. at 178. They also conceded that "the potential power of extreme anchors may justify limited prophylactic action." Id. at 178.

None of this research addressed whether judicial training, experience, temperament and ability makes judges less susceptible to anchoring tactics. Cornell Law professor Jeffrey Rachlinski's research on judicial decision-making repeatedly shows that judges are just as susceptible as jurors to anchoring tactics. See Rachlinski et al., Judging the Judiciary by the Numbers: Empirical Research on Judges, Annu. Rev. Law Soc. Sci. 2017. 13:203-29. As a simple example, bankruptcy judges must choose an interest rate when creating a bankruptcy plan, and they are trained to ignore the original contract interest rate. But exposing bankruptcy judges to that original interest significantly affects the assigned rate in bankruptcy proceedings—contrary to black-letter legal doctrine that each judge presumably knows well.

Rachlinski's research shows that anchoring "can generate ridiculous outcomes." Awards that judges gave a hypothetical employment discrimination plaintiff were eight times higher when the judges were told that the plaintiff reported that a case similar to hers—on the Judge Judy television show—had produced a $415,300 award. Another group of judges tripled the average award against a hypothetical roadside bar for noise-ordinance violations when the bar's name was changed from Club 58 to Club 11,866.

Practitioners must remain vigilant to the use of anchoring and be ready to educate judges that they are not immune to its ill effects.


The Hidden Psychology of Judging
Derek M. Stikeleather, Goodell, DeVries LLP


Classic Anchoring
Sales: sticker shock, then a "deal"

## Judgment under Uncertainty: Heuristics and Biases

- Amos Tversky and Daniel Kahneman. 185 Science 1124 (1974).
- Quickly multiply
  - 1 x 2 x 3 x 4 x 5 x 6 x 7 x 8 = ?
  - 8 x 7 x 6 x 5 x 4 x 3 x 2 x 1 = ?

## Judgment under Uncertainty: Heuristics and Biases

10 or 65

- Respondents asked (1) if the percentage of African nations with U.N. membership is higher or lower, then (2) what the percentage is.
- Median responses:

| | |
|---|---|
| 10 | 25% |
| 65 | 45.8% |

## Damage Anchors on Real Juries

Diamond et al., 8 J. Empirical L. Studies 148 (2011). Arizona Jury Project 2003

- "[F]ears about undue influence from attorney damage proposals are inflated both because attorneys tend to tailor their demands to the evidence and because juries are critical consumers of the demands attorneys make and heavily discount them."

## Damage Anchors on Real Juries

Diamond et al., 8 J. Empirical L. Studies 148 (2011). Arizona Jury Project 2003

- BUT other "research on anchoring has demonstrated that the anchoring effect is extremely robust. . . anchoring operates even when participants are experts in the judgment domain and occurs even when participants are forewarned and highly motivated to remain uninfluenced."

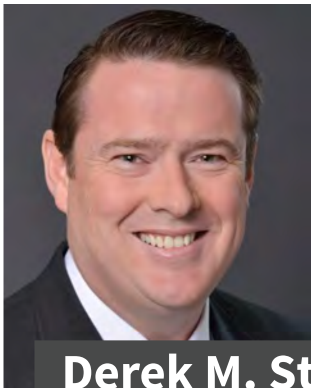
# Research on Judges

Judges are very human, and the human brain is amazing.

## Judging the Judiciary by the Numbers: Empirical Research on Judges

Rachlinski et al., Annu. Rev. Law Soc. Sci. 2017. 13:203-29

- The out-of-state polluter
- The Judge Judy effect
- Roll the dice for criminal sentencing
- The Roadhouse Bar



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# Derek M. Stikeleather

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

Derek Stikeleather chairs the Appellate Practice Group at Goodell DeVries. He practices primarily in appellate advocacy and complex litigation, often as national appellate counsel for clients responding to nuclear verdicts. Derek has vast experience in commercial disputes and defending medical malpractice, product liability, and class action claims. As national appellate counsel, Derek works closely with trial counsel across many disciplines not only on appeals but also before and during trials to brief and argue expert challenges, summary judgment, and other dispositive issues. A dedicated writer, Derek fundamentally believes that excellent briefing wins cases. In recent years, Derek has assisted with reducing a $110 million Minnesota verdict to $10 million, post-trial briefing on a $68 million New Mexico verdict, appeals of eight-figure judgments in Connecticut and Florida, and pre-trial expert challenges in Ohio and South Carolina. 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.

**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.
- Tyler v. College Park, 3 A.3d 421 (Md. 2010). Represented the City of College Park in its successful defense of the constitutionality of its rent-control ordinance. Co-authored winning brief to the Supreme Court of Maryland and successfully moved in the Appellate Court of Maryland to lift an injunction pending appeal to allow immediate enforcement of the ordinance. Precedential, published opinion affirms Maryland's constitutional standard for rational-basis review of legislative action.

**Honors and Awards**
- Litigation Counsel of America (LCA) – Fellow - Trial Law Institute; Diversity Law Institute
- Chambers USA - Litigation: Appellate (Maryland), Band 1 (2022-2025)
- Best Lawyers in America - Baltimore Lawyer of the Year, Appellate Practice (2024 and 2026); Appellate Practice (2023-2026); Medical Malpractice Law - Defendants (2026)
- Maryland Super Lawyers - Appellate Law (2017-2025)

**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)

# Does ESG Matter Anymore?


## Charlie Stoia

Porzio Bromberg & Newman (Morristowm, NJ)


**Does ESG Matter Anymore?**
*Charles J. Stoia and Stuart J. Backer*

**What is ESG?**
ESG stands for environmental, social, and governance and refers to the standards used to measure an organization's environmental and social impact. While socially responsible investing (SRI) has been a concept since the 1960s, the focus was largely on avoiding investments in companies seen as being involved in controversial activities such as tobacco, gambling, or arms production. Over time, ESG evolved into a concept that shifted away from the negative implications of SRI and focused on becoming a positive way to invest in companies that promoted social and environmental objectives.

ESG is associated with the idea that companies should not only pursue financial gain, but should also be mindful of their effect on the environment, fulfill social responsibility, and improve corporate governance in a way that makes a positive contribution to society as a whole. While the concept may seem philosophical, ESG is more than an idea and encompasses data and metrics necessary to inform decision making for companies and investors alike.

The environmental factor includes steps taken by a company to address issues such as climate change, greenhouse gas emissions, deforestation, biodiversity, carbon emissions, waste management, and pollution. Social refers to the impact an organization has on people, culture, and communities, looking at the social impact of diversity, inclusivity, human rights, and supply chains. Governance refers to how an organization is directed and looks to factors like executive compensation, succession planning, board management practices, and shareholder rights.

**Why ESG?**
Companies who commit themselves to ESG objectives may realize benefits both internally and in their relationships with consumers and investors. While ESG may be viewed as a public relations play to attract investors, some view it as an effective strategy that may have a positive impact on the operations of a company itself. For example, a focus on the reduction of a corporation's carbon footprint can foster innovation of technologies or processes that are more efficient and cost effective. For example, during the Covid pandemic, some companies who had already emphasized a commitment to non-fossil fuel energy were able to avoid skyrocketing fuel and energy costs, while some of their less "green" counterparts struggled.

Some believe that societal and governance initiatives provide a competitive advantage by boosting a business's reputation in the community, drawing investors, and creating a desirable work environment for employees. They see the benefits of an effective ESG strategy as providing a business with long-term stability by helping mitigate risk and foster loyalty from employees, investors, and consumers alike.

Despite the possible benefits associated with ESG, implementing these strategies is costly. On top of the monetary costs associated with the establishment and maintenance of ESG policies, it can also lead to conflict with the corporation's existing shareholders. Commitment to ESG involves sacrificing short-term gains in order to possibly realize benefits in the long term, which may not benefit short term existing shareholders.

Some economists question whether ESG benefits corporations at all. Not only do these economists take issue with decisions to sacrifice short and medium-term gains, but they are concerned by various factors that may diminish the value of ESG initiatives such as "greenwashing" and the inconsistent processes used to evaluate corporations who successfully implement them.

ESG initiatives have allowed many businesses to increase their brand reputation through legitimate processes, but have also opened the door for deception. Greenwashing is a term used to describe companies who have claimed themselves as ESG responsible but in reality have nothing to do with improving the environment. The effectiveness of greenwashing is aided by the lack of uniform standards to evaluate a company's commitment to ESG. Inconsistent evaluations also may make it difficult for investors to assess a company's performance on key issues or compare the businesses across industry sectors and geographic regions. Additionally, the inherent subjective element of ESG investing can result in an off-set between new investors who agree with the long-term goals of a company and current shareholders who disagree with the decision to pursue them. Historically, critics of ESG argue that the skepticism created by greenwashing and the subjective elements of ESG investing severely limit the benefit from any such initiatives.

**Is ESG Viable in 2025?**
ESG has become a political hot potato. Some are looking to stop all ESG initiatives and others believe the concept is more important than ever.

In 2023, BlackRock CEO Larry Fink notably distanced himself and his company from the term ESG. Fink stated that he no longer uses the term ESG because it was politicized by both the right wing and left wing. In a 2024 investment stewardship report, BlackRock removed mention of global warming instead opting to focus on "adapting to strengthen their financial resilience."

A recent class action lawsuit against American Airlines addressed ESG and some people's dissatisfaction with it. Bryan Spence sued on behalf of a class of American Airlines retirement plan participants claiming that the airline breached fiduciary duties under ERISA because the plan's asset manager, BlackRock, was more focused on ESG initiatives than a return on investment. Spence alleged that BlackRock covertly converted core index portfolios into ESG funds, which harmed the financial interests of the retirement plan participants and their beneficiaries by pursuing socio-political outcomes rather than focusing solely on financial performance. The court agreed with Spence and found that American Airlines and BlackRock breached their duties of loyalty under ERISA.

In July 2025, Reuters reported that "support for shareholder resolutions pressing U.S. companies for environmental and social reforms fell to 16% on average for the 12 months ended June 30, half the rate of three years ago." In that article, Reuters cited to numerous consultants who indicated that large investors seemed reluctant to support resolutions that might attract questions from customers or political criticism. Green Century, a climate-focused asset manager, found that its resolutions calling for reports on greenhouse gas emissions and biodiversity, for instance, won 13.6% on average this year, against 21% in 2024. The President of Green Century stated that the likely reason was that big investors "don't want to lose clients, and they don't want a target on their backs."

Current supporters of ESG argue that it is still an important consideration for investors. They contend that more robust corporate reporting on ESG metrics has allowed investors to support ESG-compliant companies without the need for separate ESG-focused shareholder resolutions.

**Resources:**
https://designmyreport.com/blog/esg-investing.php
https://www.sciencedirect.com/science/article/pii/S0140988325002555
https://www.ibm.com/think/topics/environmental-social-and-governance
https://www.investopedia.com/terms/e/environmental-social-and-governance-esg-criteria.asp
https://www.mdpi.com/2071-1050/16/19/8487
https://esgthereport.com/what-are-the-benefits-of-esg-for-companies/
https://www.thecorporategovernanceinstitute.com/insights/guides/simple-guide-esg/?srsltid=AfmBOoqyakzTVnHtjnkEYOu5zXLUS4KqDfaJCCp_svy8vAXATNUOFbUJ
https://link.springer.com/article/10.1007/s43621-025-01401-8
https://medium.com/@ronaldforlee/the-pros-and-cons-of-esg-for-businesses-and-investors-f5fb453a03f9
https://www.weforum.org/stories/2025/01/why-esg-initiatives-need-a-solid-economic-foundation/
https://www.reuters.com/sustainability/boards-policy-regulation/us-investors-back-away-climate-social-reforms-2025-07-11/
https://www.pionline.com/esg/blackrock-ceo-larry-fink-says-he-no-longer-uses-term-esg/
https://www.bankingdive.com/news/blackrock-eases-esg-messaging-amid-increased-scrutiny/705210/
Spence v. Am. Airlines, Inc., Civil Action No. 4:23-cv-00552-O, 2025 U.S. Dist. LEXIS 11725 (N.D. Tex. Jan. 10, 2025)

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# Charles J. Stoia

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For almost 35 years, Charlie has represented litigants in commercial, insurance and environmental matters in the state and federal courts of New Jersey and New York. His extensive litigation and trial experience has earned Charlie a reputation as a hard-nosed litigator who is not afraid to take significant cases to trial.

Charlie prides himself on determining his clients' individual goals in litigation and directing the litigation to achieve those specific goals. He has achieved success for clients handling commercial litigation matters while utilizing creative fee structures.

**Practice Areas**
- Litigation
- Commercial Litigation

**Representative Matters**
- Successfully represented a multi-national company in insurance coverage litigation valued at more than $250 million against dozens of insurers involving multiple sites across the United States.
- Obtained an arbitration award in favor of a national airline in defense of a contractual indemnity claim alleging liability for environmental damages estimated at over $25 million.
- Represented the majority shareholder of a publicly traded company who sold his controlling ownership in the company for $7.5 million. When the purchaser failed to pay the balance of the sale price due under a promissory note, Charlie obtained a $5.4 million judgment against the surety company that issued a bond to secure the promissory note. When the judgment proved uncollectable, he successfully settled and obtained a jury verdict against the insurance brokers who negligently placed the promissory note with a surety company that was not authorized or admitted to issue surety bonds in New Jersey.
- Obtained dismissal on motion, without any discovery, in an action alleging that two pipeline companies were responsible for an alleged $25 million in damages resulting from MTBE contamination of drinking water wells on Long Island.
- Successful at trial in defense of an environmental contamination matter seeking $7 million alleging that client who operated a vapor degreaser at the site was responsible for costs to investigate and clean up environmental contamination.
- Won a verdict at trial against a former employee who was found liable for stealing the employer's confidential client list and using the list to improperly solicit clients.

**Recognitions**
- New Jersey Super Lawyers®  (2009-2025)
- The Best Lawyers in America® – Commercial Litigation (2015-2026)

**Education**
- Seton Hall Law School J.D., 1988- magna cum laude
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# Are Contractual Controls Still Worth the Paper They Were Written On?

**Roger Meyers**
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**Are Contractual Controls Still Worth the Paper They Were Written On?**
*Roger P. Meyers and Lisa Limb*

One of the fundamental virtues of contract law is its capacity to allocate risk predictably. As Corbin famously observed, "The purpose of contract law is to determine the obligation of the parties as expressed in their agreement and to enforce it." Arthur Linton Corbin, Corbin on Contracts § 1.1.[1] Parties negotiate terms—often meticulously—to control for uncertainty, limit liability, and preserve commercial expectations. Common tools for doing so include warranty disclaimers, integration clauses, damage caps, noncompete clauses, and provisions governing injunctive relief.

Yet this framework, long taken for granted in commercial practice, is under pressure. Courts have increasingly intervened to limit or even nullify these negotiated allocations—citing public policy concerns, equitable principles, or procedural fairness. Federal agencies, too, have entered the fray: the Federal Trade Commission's rule banning noncompete agreements is just one example of how administrative action is reshaping the enforcement landscape.

This article examines several types of commonly used contract provisions and how courts—particularly in the Sixth Circuit—are redefining their scope, sometimes to the point of rendering them ineffective. This article is not intended as a survey of majority views, but rather as a diagnostic exercise highlighting points of friction and legal uncertainty that commercial parties would do well to monitor. Against the backdrop of the types of issues described below, the discussion will focus on ways in which companies are trying to adapt and achieve predictability in the current environment of uncertain enforcement of contractual controls.

**Warranties and Damages Limitations**

Under the Uniform Commercial Code (UCC), parties to a commercial agreement are generally free to negotiate the terms of their deal, including disclaiming implied warranties, limiting categories of damages (e.g., incidental, consequential), and capping total liability.

These limitations, however, are not absolute. Parties often challenge them as procedurally or substantively unconscionable or argue that a limited remedy has failed its essential purpose. Procedural unconscionability focuses on unequal bargaining power, hidden terms, or lack of meaningful choice, while substantive unconscionability examines whether terms are overly harsh or one-sided. See Dart Transit Co. v. Paccar, Inc., 768 F. Supp. 3d 960, 973 (D. Minn. 2025) (rejecting the plaintiffs' unconscionability and essential purpose arguments).

Although the key concept behind the unconscionability principle has not significantly changed in many years, courts in some jurisdictions have demonstrated a willingness at times to construe "taking unfair advantage" in a broader and more flexible way that considers conduct not previously perceived as unconscionable. For example, California law grants broad leeway to trial courts to remedy unconscionable contracts, including severing unconscionable clauses rather than invalidating the contract as a whole. But in Heckman v. Live Nation Ent., 120 F.4th 670, 688–89 (9th Cir. 2024), the court found that the district court did not abuse its discretion in declining to sever the unconscionable provisions and enforce the remainder of the contract where there were multiple unconscionable provisions so that the "central purpose of the contract was unlawful and contrary to public interest." Such rulings create uncertainty as to what conduct may be deemed unconscionable and what the ramifications of such a determination may be See Pandolfi v. Aviagames, No. 24-5817, 2025 WL 2463742, at *1 (9th Cir. Aug. 27, 2025) (finding no error in refusing to enforce a delegation clause based on even "a modest degree" of procedural unconscionability).

The doctrine of failure of essential purpose also undermines contractually agreed limitations. U.C.C. § 2719(2) allows courts to permit broader remedies if a

1 All citations have been either shortened or cleaned up for readability

limited remedy fails of its essential purpose, as when a "repair or replace" clause cannot be fulfilled. Michigan courts have expanded this principle. In In re Chevrolet Bolt EV Battery Litigation, 633 F. Supp. 3d 921, 977 (E.D. Mich. 2022), the court held that a warranty failed its essential purpose when the manufacturer did not provide repairs within a reasonable time. In so holding, the court also found that class members who had failed to present their vehicles for repair, as the express warranty requires, could still proceed with their claim because they had demonstrated that the defects and repair failures were systemic. Id. at 976.

**Integration Clauses and Fraud Claims**

Integration (or merger) clauses serve to limit the evidence a court may consider when interpreting a contract. They are designed to enforce the "four corners" rule: that the written contract represents the full and final agreement of the parties. These clauses are vital in complex transactions to avoid post-hoc claims based on parol evidence, such as side conversations or oral understandings. But courts are increasingly allowing plaintiffs to sidestep these clauses by alleging fraud in the inducement.

Delaware courts, for example, have drawn a distinction between clauses stating that there are no other representations and clauses stating that a party is not relying on outside representations. The latter are known as non-reliance clauses and have been more successful in insulating parties from fraud-based claims. See Abry Partners v. F & W Acq., 891 A.2d 1032, 1059 (Del. Ch. 2006) ("murky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations."); Airborne Health, Inc. v. Squid Soap (Squid Soap I), 984 A.2d 126, 141 (Del. Ch. 2009) ("An anti-reliance provision must be explicit, and a standard integration clause is not enough."). California courts are even more liberal, often permitting plaintiffs to proceed with fraud claims despite strong integration clauses, reflecting a robust public policy favoring remedies for deceit. See Thrifty Payless, Inc. v. The Americana at Brand, LLC, 160 Cal. Rptr. 3d 718, 727 (Cal. App. 2d Dist. 2013) (allowing extrinsic evidence to establish fraud or negligent misrepresentation despite integration clause).

The Sixth Circuit has maintained that there is no per se rule that non-reliance clauses foreclose the possibility of recovery. Instead, a contextual analysis is undertaken, considering factors such as the sophistication of the plaintiff, the existence of fiduciary relationships, and the opportunity to detect fraud. See Nolfi v. Ohio Ky. Oil Corp., 675 F.3d 538, 548 (6th Cir. 2012). This approach allows for a nuanced examination of the circumstances surrounding the alleged fraud; yet it still can lead to results entirely contrary to the original expectations of the contracting party. For instance, in Xudong Song v. Rom, 2018 WL 1518963, at *4 (N.D. Ohio Mar. 28, 2018), the court permitted a fraud claim despite a nonreliance clause.

**Noncompete Agreements**

Noncompete clauses have in recent decades routinely been enforced when they are reasonable in time, scope, and geography, and when they protect legitimate business interests such as trade secrets, goodwill, or investments in employee training. Courts justified such clauses as necessary to prevent unfair competition and protect these business interests.

The tide has decisively turned on such provisions, however. In April 2024, the Federal Trade Commission (FTC) issued a rule imposing a comprehensive ban on noncompetes for all workers, including senior executives. Although the ban is currently on hold pending legal challenges, it reflects a broader policy trend against enforcing noncompetes, a trend mirrored at the state level. The Economic Innovation Group (EIG),[2] a bipartisan public policy organization which tracks noncompete agreement laws for every state, has noted that "lawmakers at the state level have shown an increasing interest in curbing the use of noncompetes in their state."

Courts are likewise increasingly evaluating noncompetes through a public policy lens. Some courts have found noncompetes to be harmful, while others—particularly the Sixth Circuit—acknowledge that "enforcement of valid restrictive covenants serves the public interest." See, e.g., Handel's Enters., Inc. v. Schulenburg, 765 F. App'x 125, 125 (6th Cir. 2019) ("public interest is always served in the enforcement of valid restrictive covenants contained in lawful contracts"); Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 551 (6th Cir. 2007) ("Enforcement of contractual duties is in the public interest.").

This shift against noncompetes has also spilled over to nonsolicitation or "no-poaching" clauses. Despite that the fact that nonsolicitation provisions protect distinct interests and are significantly less burdensome on employee mobility, they too are increasingly being viewed with hostility. For example, of the multiple states that introduced legislation either banning or limiting noncompletes in 2025, EIG reports that at least 3 states (MI, IL, HI) included nonsolicitation clauses as part of the ban or limitation.

2 (Sep. 4, 2025) https://eig.org/state-noncompete-map/.

**Injunctive Relief**

Many commercial contracts—especially in IP, confidentiality, and restrictive covenant contexts—include provisions stating that a party "shall be entitled to injunctive relief" in the event of breach. These clauses are often intended to shortcut equitable analysis by pre-establishing entitlement. However, courts regularly reject that shortcut, reaffirming that injunctive relief is an extraordinary remedy requiring independent judicial scrutiny.

The Supreme Court has made clear that parties cannot contract their way into an injunction. See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–93 (2006) (rejecting a "general rule" that permanent injunctions must issue upon a finding of patent infringement and requiring independent proof of irreparable harm and other equitable factors); Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944) (holding that statutory language mandating an injunction does not eliminate traditional equitable discretion). Such holdings may deprive an injured plaintiff of a remedy even when the defendant does not oppose the relief sought.

Meanwhile, courts are increasingly interpreting "irreparable harm" to mean some extraordinarily substantial injury, rather than the traditional absence of an adequate remedy at law. This shift has led to a paradox: the larger the company, the harder it may be to show irreparable harm, as monetary damages are often deemed sufficient. See Fetch! Pet Care v. Atomic Pawz, 2025 WL 1921753, at *12 (E.D. Mich. July 11, 2025) (finding that a clause declaring breaches of confidentiality/non-compete provisions irreparable insufficient to establish irreparable harm where "much of the damage here has already been done" and "any future loss to goodwill or fair competition is too speculative"). Indeed, some courts have suggested that only a threat to a business's overall viability justifies injunctive relief. Compare Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1382 (6th Cir. 1995) (injunction warranted where loss of business would render arbitration meaningless); Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp., 2014 WL 562264 (E.D. Mich. Feb. 13, 2014) (denying injunction where loss of goodwill did not threaten overall financial health "to such a degree that such losses cannot be made whole").

**Liquidated Damages**

Liquidated damages provisions serve an important role: they allow parties to avoid complicated proof of damages where the harm is difficult to calculate at the time of contracting. Under UCC § 2-718(1), they are enforceable only if: (1) the harm is difficult to ascertain at the time of contracting; (2) the amount stipulated is reasonable in light of anticipated/actual harm; and (3) the clause does not function as a penalty.

Courts often refuse to enforce liquidated damages provisions that fail this test. A key concern is whether the clause is punitive rather than compensatory. As noted in Williston on Contracts § 65:1, there is a "subtle distinction" between clauses that merely induce performance and those that operate coercively. Failure to observe this distinction has led to the invalidation of clauses that might otherwise have been enforceable.

Despite these challenges, liquidated damages clauses remain viable—if carefully drafted. Courts are particularly wary of provisions that impose a flat amount of damages regardless of the severity of the breach. For example, in Infinity Capital v. Francis David Corp., 851 Fed. Appx. 579, 584 (6th Cir. 2021), the court emphasized that clauses specifying the same damages for minor and major breaches are more likely to be struck down as penalties. Likewise, use of punitive or deterrent language—and especially calling a clause a "penalty"—increases the likelihood that a court will decline to enforce it. See Easton Telecom Services v. CoreComm Internet Group, 216 F. Supp. 2d 695, 699 (N.D. Ohio 2002); City of Brookhaven v. Multiplex, 891 S.E.2d 60, 64 (Ga. App. 2023).

**Conclusion**

Contract law has long facilitated private ordering based on respect for the terms parties choose in advance to govern their relationship. But that predictability has eroded in recent years, leaving contracting parties fewer tools to limit their exposure and obtain predictable outcomes. This is not to say that contractual language is irrelevant. But it does call for greater creativity and caution in drafting, and increased awareness of arguments that may be asserted in litigation with unexpected success.

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Roger P. Meyers leads the firm's complex business and commercial litigation practice and serves as the firm's general counsel. He routinely handles disputes involving business ownership and governance, mergers and acquisitions, commercial contracts, fraud and fiduciary duties, securities, health care, employee mobility and unfair competition, and trade secrets. He also has significant experience in appeals, arbitrations, class actions, and internal investigations, and has tried or arbitrated several disputes to final judgment. In addition to handling major business and governance disputes across industries, Roger has a particularly deep background in the health care, private equity and financial services, and technology / telecommunications industries.

**Related Services**
- Business and Commercial
- Class Actions
- Securities / Finance
- Fact Investigations

**Representative Matters**
- Defended closely held manufacturing business owner in $100 million alter-ego / veil-piercing action.
- Defended CEO of closely held financial-services company through trial and appeal in litigation involving claims of shareholder oppression, breach of contract and breach of fiduciary duty.
- Represented plaintiff investor through arbitration to final award of complex business dispute on claims for statutory oppression, breach of fiduciary duty, and conversion.
- Defended seller of digital marketing company in post-closing litigation with former investment advisor.
- Counsel for outside management of agricultural products holding company in business torts and governance action.

**Honors and Awards**
- Michigan Super Lawyers (2020 – present)
- Michigan Super Lawyers, Top 100, (MI: '24)
- Chambers USA Guide, Litigation: General Commercial (Michigan) Band 3 (2023 – 2024)
- Benchmark Litigation, Future Star (2024 – present)
- Inclusion in The Best Lawyers in America© Ones to Watch: Commercial Litigation (2024 – present)
- DBusiness Top Lawyers (2023 – Present)
- Thomson Reuters, Stand-Out Lawyer
- Michigan Lawyers Weekly, Leaders in the Law (2023)
- Michigan Lawyers Weekly, Go-To Lawyers for Business Law (2022, 2025)
- Detroit Bar Association Foundation Fellows Class (2020)
- Michigan Super Lawyers, Rising Star (2012-2019)
- America's Top 100 High Stakes Litigators® for Michigan (2018)
- Legal Aid Defender Association, Recognized for Pro Bono Service (2012)
- University of Michigan Law School, Order of the Coif

**Education**
- University of Michigan Law School, J.D., magna cum laude, 2009
- Suffolk University, B.S. Business Administration – Computer Information Systems, summa cum laude, 2003

# Climate Change Litigation: A Litigation Storm is Brewing

**Hugh Gottschalk**
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**Climate Change Litigation in the United States**
*Hugh Gottschalk*

In the United States, the term "climate change litigation" generally refers to lawsuits asserting state common law claims like nuisance, trespass and negligence for damages allegedly caused by climate change. Generally, they are brought by state and local governments against the producers of fossil fuels, and they allege that those fuels are a primary cause of climate change. Climate change litigation against fossil fuel companies has also involved claims that companies have made false or misleading statements about their products and activity. In almost all of these cases, plaintiffs seek compensation for their damages allegedly caused by defendants' conduct in causing climate change.

This paper discusses the legal background for climate change cases, the issues that are typically raised in these cases, and the overall status of the climate change litigation in the United States.

The key climate change cases include:

- Native Village of Kivalina v Exxon, 696 F.3d 849 (9th Cir 2012)
- American Electric Power Co. v. Connecticut, 564 U.S. 410 (2011)
- City of Honolulu v. Sunoco, 537 P.3d 1173 (Hawaii 2023)
- City Milwaukee V. Illinois, 451 U.S. 304 (1981)
- City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021)
- Illinois v. City of Milwaukee, 731 F.2d 403 (7th Cir. 1984)
- International Paper Co. V. Ouellette, 479 U.S. 481 (1987)
- Suncor v. Boulder County, 2025 WL 1363355. (cert petition pending)

**The Early Interstate Pollution Cases**

Climate change litigation necessarily involves the assertion of claims by a plaintiff related to a defendant's conduct outside the state's borders, but which has allegedly resulted in harm to the plaintiff within the state. Accordingly, a threshold question is whether a state court has jurisdiction to hear such claims.

The Supreme Court has long held that interstate or international pollution cases are inappropriate for state law to control. In American Electric Power Co. v. Connecticut, the Supreme Court made clear that the basic scheme of the Constitution demands a federal rule of decision in such inherently federal areas.[1] For more than a century, a mostly unbroken string of cases has applied federal law to disputes involving such claims. In Illinois v. City of Milwaukee,[2] the Court held that federal law must govern such claims because they touch basic interests of federalism and implicate the overriding federal interest in the need for a uniform rule of decision. As a result, a body of "federal common law" developed in this area.

Then, in International Paper Co. v. Ouellette,[3] the Court addressed the role of state and federal common law in the wake of the Clean Water Act's enactment. There, relying on the Clean Water Act's pervasive regulation and the fact that the regulation of interstate pollution is primarily a matter of federal law, the Court concluded that the only permissible state law actions seeking relief for interstate water pollution are those specifically preserved by the Act–suits in which the source of pollution at issue was located within the state.

The Supreme Court addressed the question of private claims involving interstate air pollution after the Clean Air Act in Am. Elec. Power Co. v. Connecticut ("AEP").[4] There, the plaintiffs sued several electric power companies, asserting federal common law public nuisance claims and seeking to abate defendants' carbon dioxide emissions. The Court rejected such claims, holding that the Clean Air Act displaced any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel

1 564 U.S. 410, 421 (2011).

2 406 U.S. 91, 105 n.6 (1972).

3 479 U.S. 481 (1987).

4 564 U.S. 410 (2011).

fired powerplants, and that any federal air pollution claims must be made under that Act. Although the Court held that the Clean Air Act displaces federal common law, it did not address the question of whether state law claims relating to air pollution, including climate change, are still viable.

In short, there is no more federal common law of interstate air pollution because the Clean Air Act has been displaced it, and the central question in the current climate change litigation is whether state common law tort claims can be used to litigate climate change issues, or whether such claims are preempted by the Clean Air Act.

**Climate Change Litigation in the U.S.**

Climate change lawsuits brought in the United States generally assert nuisance, negligence, and other tort claims brought against petroleum, chemical, energy, and fossil fuel producers. Some of these cases have been rejected by courts, variously holding that such claims are not justiciable, are pre-empted by federal law, or displaced by the Clean Air Act, with other courts allowing the claims to go forward. However, the U.S. Supreme Court has not yet weighed in on this threshold question.

For example, an early case asserting climate change claims was Native Village of Kivalina v Exxon Mobil.[5] In that case, the residents of the Village of Kivalina (a remote town in Alaska), brought several federal common law tort claims against 22 energy companies in federal court. They argued that greenhouse gas emissions produced by these companies contributed to climate change, and that climate change was causing rising sea levels, threatening to consume their seaside community. They asserted that this threat constituted a substantial and unreasonable interference with their rights, including the rights to use and enjoy public and private property in Kivalina. The Ninth Circuit held that the federal Clean Air Act displaced the federal common law of public nuisance, and dismissed the case without reaching the merits.[6]

In response to the Ninth Circuit's rejection of federal claims brought by private plaintiffs, various state and local governments have brought state law tort claims against fossil fuel producers, seeking similar damages and equitable remedies for climate change related harm. For example, in the City of New York v. Chevron Corp.,[7] the Second Circuit Court of Appeals dismissed New York City's lawsuit asserting state common law claims, concluding that state tort law could not be used to hold defendants liable for damage occurring outside the state. The Court concluded that this extra-territorial remedy could only be addressed through federal common law, but agreed with Kivalina and held that the Clean Air Act had displaced the federal common law of air pollution.

On appeal, the Second Circuit unanimously held that federal law precludes state-law claims seeking relief for injuries allegedly caused by global climate change. The claims had to be brought under federal common law, the court explained, but the Clean Air Act displaced any such claims with respect to emissions in the United States, and "foreign policy concerns foreclose[d]" such claims with respect to international emissions.

In contrast, the Hawaii Supreme Court's decision in City & County of Honolulu v. Sunoco LP[8] concluded that state law tort claims could be used to hold fossil-fuel producers liable for injuries resulting from the cumulative effect of interstate and international greenhouse gas emissions caused by the producers' worldwide production, sale, and promotion of fossil fuels. Disagreeing with the Second Circuit in New York, the Hawaii Supreme Court held that state law was presumptively competent to govern actions concerning interstate and international pollution, and was not preempted by the federal common law of interstate pollution, because the Clean Air Act displaced that body of law. The Court reasoned that, because federal common law no longer exists, the fact that it once governed could play no part in the Court's preemption analysis. Instead, the Court concluded that the correct preemption analysis requires an examination only of the Clean Air Act, which did not preempt state court pollution lawsuits.

**Suncor Litigation**

Boulder v. Suncor[9] is one of the critical climate change cases that has addressed these issues, and now has a petition for writ certiorari pending in the U.S. Supreme Court on the core question of whether state tort law can be used address climate change damages. The U.S. government has filed a brief asking the Court to grant the defendants' cert. petition.

The Suncor case is a good example of the substantive issues and the procedural battles that typify climate change litigation. In this case, the City and County of Boulder filed a complaint in Colorado state court against Suncor and Exxon Mobil, alleging that global greenhouse gas emissions have damaged Boulder's property, and injured the health, safety and welfare of Boulder's residents. According to the complaint, climate change has caused Boulder to experience more serious heat waves, wildfires, droughts, and floods, and the defendants have contributed to causing that climate change. Boulder asserted state common law claims for public nuisance,

5 , 696 F.3d 849, (9th Cir 2012).

6 696 F.3d 849, 2012 WL 4215921 (9th Cir 2012).

7 . 993 F.3d 81 (2nd Cir. 2021) (2019),

8 537 P.3d 1173 (2023).

9 2025 WL 1363355. (cert petition pending).

nuisance, trespass, unjust enrichment, and violations of the Colorado Consumer Protection Act.

The Defendants removed the case to the federal district court, arguing that the federal courts had exclusive jurisdiction over cases involving interstate pollution and climate change. Following removal, the federal district court issued an order remanding the case to state court, which the Tenth Circuit of Appeals affirmed. However, the U.S. Supreme Court vacated the Tenth Circuit and district court's decisions, providing clarifying instructions regarding the proper remand analysis. Using the U.S. Supreme Court's instructions, the District Court again remanded the case to state court, and the Tenth Circuit again affirmed.

With the case back in state court, the Defendants filed a Motion to Dismiss, arguing that Boulder's state law claims were preempted by the Clean Air Act and the U.S. Constitution. This motion presented the fundamental question in climate change litigation – can climate change claims that involve the world-wide impacts of national and international emissions of greenhouse gases be adjudicated under state common law tort theories?

The state court denied the motion, and Defendants filed an emergency appeal to the Colorado Supreme Court. The Colorado Supreme Court affirmed the trial court's denial of the motion to dismiss. The Court acknowledged that federal common law (rather than state common law) had historically governed disputes concerning interstate and international disputes implicating the conflicting rights of states, and that these state law claims would have been preempted. But the Court concluded that because the Clean Air Act had displaced this federal common law, that body of law no longer existed, and no longer "preempted" state tort law with respect to interstate pollution generally, and climate change specifically. The Court concluded that the Clean Air Act did not preempt plaintiffs' claims, and that the case involving state law tort claims could go forward in state court.

Defendants filed a cert. petition with the U.S. Supreme Court, which remains pending. The U.S. government has urged the Supreme Court to hear the case, to address the central issue in the climate change litigation – can state law tort claims be used to address the harms caused by climate change?

**Key Issues in Climate Change Litigation – Discussion**

A. Does a state have personal jurisdiction over out-of-state emitters or producers?

B. Do federal courts have exclusive jurisdiction to adjudicate interstate environmental sources of harm?

C. Should federal law (Constitution, federal common law, or the Clean Air Act) preempt state law claims?

D. How will an actor's fault be determined?

- Joint and several liability or allocated fault?
- Producers v. emitters?

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Hugh Gottschalk has taken more than 75 trials to verdict and over 20 arbitrations to award, delivering outstanding results for sophisticated clients. Hugh represents companies and individuals across diverse industries in complex commercial, torts, and intellectual property lawsuits. Hugh is a Fellow and past Colorado State Chair of the American College of Trial Lawyers, and he is ranked in Band 1 in Chambers USA. For three straight years, Super Lawyers has ranked Hugh in the Top 10 in Colorado based on input from his colleagues and peers. Hugh's commercial litigation experience is extensive. He has represented clients in numerous disputes involving alleged breaches of contracts, fraud and misrepresentation, securities, franchise matters, and intellectual property infringements. Hugh has served as national or regional trial counsel to several large and well-known companies in industries as diverse as oil and gas, automotive, information technology, manufacturing, and consumer and professional services.

**Practice Areas**
- Antitrust & Competition
- Commercial Litigation
- Environmental Litigation
- Franchise & Distribution
- Intellectual Property
- Mass Torts
- Catastrophic Injury Defense
- Product Liability
- Professional Liability
- Pro Bono

**Honors**
- American College of Trial Lawyers - Fellow; Chair, Colorado State Committee, 2016-2018
- American Board of Trial Advocates - Member
- Chambers USA - Commercial Litigation - Colorado, 2005-2025; Band 1 - 2018-2025; Band 2 - 2007-2017
- University of Colorado Law School - 2017 Distinguished Alumni Award - Private Practice
- Law Week Colorado - "People's Choice" Best Intellectual Property Lawyer, 2010; Lawyer of the Year, 2010
- The Best Lawyers in America - Personal Injury Litigation Lawyer of the Year, 2025; Denver Bet-the-Company Lawyer of the Year, 2016, 2020; Denver Intellectual Property Litigation Lawyer of the Year, 2014; Bet-the-Company Litigation, 2008-2024, 2026; Commercial Litigation, 2008-2026; Intellectual Property Litigation, 2016-2026; Oil & Gas Law, 2022-2023; Personal Injury Litigation, 2018-2026; Product Liability Litigation, 2008-2026
- The Legal 500 United States - Litigation: Product Liability and Mass Tort Defense, 2009-2011
- Benchmark Litigation - Local Litigation Star, 2020-2025; Insurance Litigation - Colorado, 2016; Commercial Litigation - Colorado, 2011-2015, 2017-2018
- 5280 Magazine - Top Lawyer; Civil Litigation, 2020-2021, 2023; Commercial Litigation, 2025
- Colorado Super Lawyers - Super Lawyers, Business Litigation, 2006-2025; Top 10, 2018-2020; 2008, 2021; Top 50, 2009-2011; Top 100, 2012-2017, 2022-2023
- International Who's Who of Product Liability Defense Lawyers, 2010, 2016-2017
- Denver Business Journal Who's Who in Energy, 2015

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- University of Colorado Law School J.D., 1979 - University of Colorado Law Review, Articles Editor
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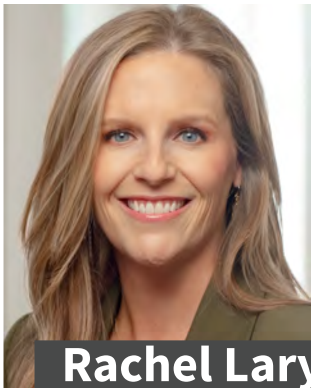

# Admit and Defend: Trying Cases When Liability Is Off the Table

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**Admit and Defend: Trying Cases When Liability Is Off the Table**

*Rachel M. Lary*

Admitting liability used to be a path to resolve a case on reasonable terms. Today, that play rarely ends the game. Litigation funding has poured capital into personal injury lawsuits, and coordinated medical referral networks have driven costs—and expectations—through the roof. The result: even when defendants take responsibility, more cases are still heading to trial with enormous demands. This paper offers a practical roadmap for defending admitted-liability cases from the first case assessment through verdict, with a focus on building credibility, jury selection, framing damages, and protecting the client's bottom line.

**How Did We Get Here?**

For years, case valuation followed a familiar arc: start with concrete compensatory damages (past/future medical bills and past/future lost wages), then use those as basis to determine non-economic damages for a reasonable settlement value. That's changed. Two forces now shape the landscape. First, third-party litigation funding and private equity have entered the scene, which has resulted in inflated compensatory damages sought by plaintiffs. Because third-party funding allows "financiers to invest in lawsuits in exchange for a percentage of any settlement or judgment,"[1] "[t]he dollar level of the claims" must be "sufficiently high to attract third-party funding."[2] Second, litigation liens with medical providers, in which doctors take "payment through liens tied to wins in court,"[3] have become more common. These "arrangements can mean higher fees for doctors than they would get from insurance companies."[4] Through medical referral networks, "[l]awyers can refer interested plaintiffs to specific lien doctors," and "[t]he fine print of typical contracts bar patients from submitting claims to insurance."[5] Thus, even insured plaintiffs are steered to select providers who bill at a multiple of market rates, secured by these contingent liens. Such liens may even explicitly state that payment is contingent on the litigation outcome.

Together, these inputs inflate "blackboard" damages and thereby plaintiffs' value of the case. Against the backdrop of the current nuclear verdict environment, plaintiffs' counsel are encouraged to remain unreasonable and hold out for a potential nuclear verdict. The good news: if you admit liability, you have removed some of the factors that drive nuclear verdicts, but you have to be prepared to try the case on damages.

**Why and When To Admit Liability**

Admitting liability can serve several strategic purposes. It can reduce the risk of a nuclear verdict, as jurors often punish non-accountability; owning the fault narrows the dispute to "what is fair." Admitting liability also shifts the spotlight from the defendant's admittedly bad conduct to plaintiff's inflated damages. This move can curtail evidence about the details of the accident or corporate conduct that would otherwise inflame the jury. Additionally, it allows you to anchor your theme to the law, as damages instructions almost always ask jurors to award amounts that are "fair," "reasonable," and "related to the injury." That language becomes the frame for the defense. Of course, be mindful of the plaintiff's story—a deeply sympathetic plaintiff makes the number harder to control.

Timing matters. It is crucial to decide early whether liability should be admitted. If so, make this decision before discovery hardens positions and ideally before any depositions of corporate representatives, which can result in the representative being boxed into defending the indefensible. If your representative spends hours

1 What You Need to Know About Third Party Litigation Funding, U.S. Chamber of Commerce Institute for Legal Reform (June 7, 2024), https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/.

2 David Silver, Practicing Law In The Era Of 3rd-Party Litigation Funding, Law360 Expert Analysis (Aug. 28, 2017), https://www.law360.com/articles/957645/practicing-law-in-the-era-of-3rd-party-litigation-funding (internal citation omitted).

3 Ciara Chambers & Liz LaFoe, Legality and Ethics of Lien Uses in Medicine, Missouri Medicine vol. 117, 4 (2020), at 313, https://pmc.ncbi.nlm.nih.gov/articles/PMC7431059/.

4 Sara Randazzo, Who Wins in a Personal-Injury Lawsuit? It Can Be the Doctor., The Wall Street Journal (Jan. 8, 2020), https://www.wsj.com/articles/who-wins-in-a-personal-injury-lawsuit-it-can-be-the-doctor-11578479400.

5 Id.

defending marginal conduct and you later admit fault, you've surrendered credibility and created soundbites that can haunt you at trial. Commit to an early analysis of whether you will admit liability, and let that decision drive the themes that are then developed through testimony of your corporate representatives and witnesses.

Litigation liens and funding. Obtain the medical liens, and read each lien carefully, looking for contingent language such as payment due only upon recovery, as this language matters for bias and reasonableness. Fight for discovery relating to the third-party funding, including the agreements and correspondence between the funding entity and plaintiff's counsel—a potential treasure trove of information regarding the "real" value of the case.

Offers of Judgment. Consider making an offer of judgment. Once you come to the decision to admit liability, put a fair number on the case early and serve an offer of judgment. While some states allow for recovery of fees, costs or interest if the verdict is some percentage below the offer, the real value is the pressure on the plaintiff. There is value in putting the number you are going to ask the jury to return for the plaintiff in black and white for both counsel and plaintiff. While most jurisdictions do not allow evidence of the offer of settlement to reach the jury, it most likely reaches the judge. It can be valuable for the judge to know that a fair and reasonable number has been offered and rejected.

**How to Frame the Defense**

The core message of your defense should be clear: you accept responsibility, you are here to make the plaintiff whole—fairly and reasonably—and the law asks for compensation that is fair, reasonable, and related to the injury. Tone is everything. Be humble about causation. If there is a contributory fault issue, approach it gently, allowing jurors to reach that conclusion themselves rather than appearing to blame the plaintiff. Pick your battles, as jurors punish nitpicking and overreach by either side. Identify a few clean, principled issues on which you can carry the "reasonableness" high ground, and concede the small stuff.

Jury Instructions are Your Blueprint. Pattern jury instructions on damages are the foundation to your defense. Most jurisdictions instruct jurors to award damages that are fair and reasonable, proximately caused by the incident, and supported by the evidence. Build your opening, cross, and closing around those words. Align your concessions with that framework, then show where plaintiff's ask departs from it.

Jury Selection: Who Fits Your Frame? In admitted-liability cases, voir dire is less about "who hates defendants" and more about "who embraces fairness over perfection or punishment." Focus your questions on whether jurors believe companies should be perfect, or if they understand that the law requires reasonable care, not perfection. Explore whether jurors think people or companies who admit a mistake should still be punished, and who can separate accountability from punishment. Ask who can commit to awarding only what is fair, reasonable, and related to the injury.

Evidence: Collateral source rule. Evaluate the boundaries of the collateral-source rule in your jurisdiction. Just over one-third of states permit the introduction of collateral source evidence in certain circumstances. In some jurisdictions, you can introduce evidence of amounts actually paid or the reasonable value of services[6]; in others, you cannot reference insurance but can still challenge the "reasonableness and necessity" of services.[7]

Proof on Damages: Reasonableness, Necessity, and Causation. You cannot (and should not) fight everything. But you must create a disciplined record on three fronts. First, address the reasonable value of medical services. Even in strict collateral-source jurisdictions, you can usually challenge the reasonableness of charges without mentioning insurance. Use billing experts to compare charges to market rates and demonstrate where charges are out of step. Second, address medical necessity by retaining a qualified medical expert to separate necessary treatment from litigation-driven care, and to explain treatment pathways a reasonable provider would follow. Third, address causation by carefully, and without overreaching, distinguishing preexisting conditions or unrelated episodes (such as prior wrecks or subsequent injuries). Jurors are wary of "blame the patient," so present clean, objective records and neutral expert analysis.

Opening: "Why Are We Here?" In your opening statement, lead with accountability: acknowledge your fault, acknowledge plaintiff is entitled to damages, and let the jury know you will be asking them to return a verdict in plaintiff's favor. With that framework, you can ask the rhetorical question that they are already asking themselves: why are we here? Because the parties cannot agree on what is reasonable and fair compensation to the plaintiff for her injuries.

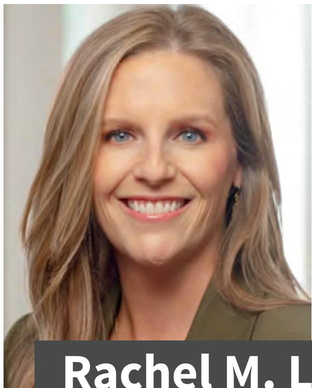
6 For example, the Kansas Supreme Court held that the collateral source rule did not apply and that the jury could consider both the charges billed by the provider and the amounts actually accepted as payment to determine the reasonable value of medical services. Martinez v. Milburn Enters., 290 Kan. 572, 233 P.3d 205 (2010). The court emphasized that the actual charges were not conclusive as to their reasonable value. Id.

7 For example, the Massachusetts Supreme Judicial Court held that medical bills were admissible to establish the reasonable value of services rendered, but evidence of amounts actually paid by insurers was not. Law v. Griffith, 457 Mass. 349, 930 N.E.2d 126 (2010). The court allowed evidence of the range of payments accepted by providers for similar services, emphasizing that such evidence did not violate the collateral source rule. Id.

If You Give a number, Don't Nickle and Dime. The jury's task is to award damages that are fair, reasonable, and related to the injury—nothing more, nothing less. Set expectations by making it clear that you will not fight over every line item, but you will show where the plaintiff's demand departs from the evidence and from what is reasonable. Establish your credibility by identifying concessions upfront to show you're not here to nickel-and-dime. While admitting liability builds credibility with the jury, being stingy with the plaintiff's damages does not. If you own the liability, you must own the reasonable and related damages.

Why This Works. Jurors want to do the right thing. When a defendant accepts responsibility and asks the jury to follow the court's instructions—to award only what is fair, reasonable, and related to the injury—most jurors will try to meet that task. Plaintiffs' nuclear strategies thrive on outrage and punishment; removing those oxygen sources and replacing them with credibility and law-focused framing changes the trial's gravity.

Ultimately, in today's environment, admitting liability has become a trial strategy. Done right—and done early—it builds credibility, narrows the issues, and positions you to win the only fight that matters: the number. Ground your case in the language jurors are sworn to apply; concede what is fair; expose what is not; and protect the bottom line through disciplined offers, smart discovery, and a humble posture. You can't stop every case from going to verdict, but you can keep a fair case fair—even when liability is off the table.



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Rachel Lary has built a reputation as a go-to trial lawyer for some of the country's biggest companies — but she remains deeply connected to her roots in Alabama. Known for her focus, strategy and trusted advocacy, Rachel serves as national litigation counsel for several Fortune 500 corporations, including a global truck manufacturer, a multinational automaker and a national rental equipment company.

An engaging communicator, Rachel commands attention in any setting, whether she's in front of a jury, a boardroom of executives, or a room of young professionals she's mentoring. She has defended high-stakes product liability and medical malpractice cases, and she also handles complex trust, estate and business disputes in courts across the country.

Her track record of success speaks for itself: securing a trial win in Washington, D.C., that slashed a plaintiff's multimillion-dollar demand in an admitted liability case to just 10 percent; defeating wrongful death claims against an Alabama cardiologist before the jury even deliberated; and winning multimillion-dollar summary judgments and settlements in business and fiduciary disputes.

Rachel's approach is as strategic as it is personal. She believes every case has a story — and her strength lies in uncovering the details that persuade courts and juries to see it her clients' way.

**Practice Areas**

- Automotive
- Commercial Litigation
- Pharma & Medical Device
- Medical Malpractice
- Product Liability
- Trust & Estate Disputes
- White-Collar Criminal Defense & Corporate Investigations

**Honors**

- The Best Lawyers in America© by BL Rankings — Commercial Litigation, Corporate Compliance Law, Trusts and Estates, Personal Injury Litigation, Product Liability Litigation (2018-2026)
- The Best Lawyers in America© by BL Rankings, "Lawyer of the Year" for Birmingham (2026)
- Benchmark Litigation, "Future Star" (2024)
- B-Metro magazine, "Top Women Attorneys" (2020)
- Birmingham Business Journal, "NextGenBHM Award" (2020)
- Birmingham Business Journal, "Rising Star in Law" (2019)
- Birmingham Business Journal, "Top Birmingham Women" (2024)
- Birmingham Business Journal, "Women to Watch" Award (2021)
- Mid-South Super Lawyers by Thomson Reuters, "Rising Star" — Business Litigation (2014-20)
- Mid-South Super Lawyers by Thomson Reuters — Product Liability (2024)
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