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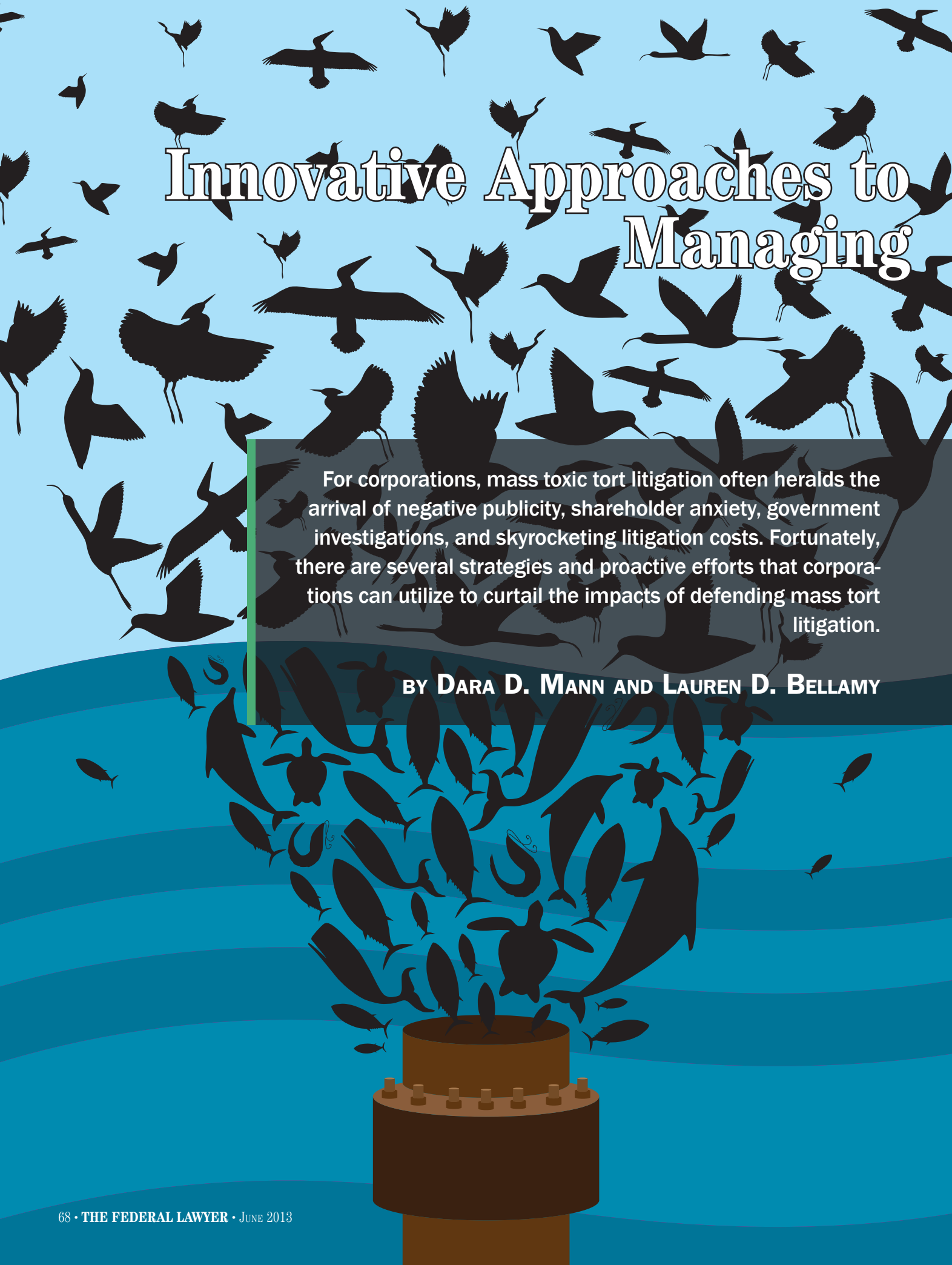
Innovative Approaches to Managing



For corporations, mass toxic tort litigation often heralds the arrival of negative publicity, shareholder anxiety, government investigations, and skyrocketing litigation costs. Fortunately, there are several strategies and proactive efforts that corporations can utilize to curtail the impacts of defending mass tort litigation.

BY DARA D. MANN AND LAUREN D. BELLAMY

Mass Toxic Tort Cases

Of the legal challenges faced by the corporate world, mass tort litigation is one of the most problematic. Stemming from a single event, problem, or course of conduct that similarly impacts numerous individuals, the sheer number of claims and the costs associated with resolving them can quickly overwhelm corporate resources. The recent litigation against British Petroleum (BP) related to the April 2010 explosion aboard its Deepwater Horizon oil rig stands as one stark example of the substantial impacts of mass tort claims. From that explosion, BP faced multiple wrongful death claims by rig workers allegedly killed in the incident, environmental claims allegedly arising from the loss of millions of barrels of oil into the Gulf of Mexico, and tort claims by individuals and entities alleging that the oil spill disrupted the economies of several Gulf Coast states. The financial impact to BP from that single incident is estimated to be well into the billions of dollars. *See* John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill,* N.Y. Times, Mar. 2, 2012, available at www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html?_r=0.

As the Deepwater Horizon experience demonstrates, mass tort litigation presents a substantial area of risk for companies. This paper will explore some novel tools that companies can use to manage those risks.

Proactive Efforts at Litigation Prevention

We all know that the best offense is a good defense. It is therefore important to try to curb mass tort litigation before it even is commenced. By expanding due diligence efforts, sharpening internal business processes and proactively addressing key legislative, regulatory, and tort reform developments, companies can reduce the threat of embroilment in lengthy and expensive mass tort litigation.

Although it is impossible to completely eliminate the element of risk from any product or situation, through the smart exercise of due diligence companies can identify and responsibly manage potential risks. Due diligence in the acquisition, sale, or dissolution of businesses can uncover legacy issues that might result in litigation for a company under state successor liability laws. Diligence in the launch of new products or services can also circumvent future claims. Through design reviews, risk assessments, and sensible product testing, companies may identify potential defects or issues and undertake proactive measures to address them. Importantly, in addition to staying abreast of key industry and scientific developments, in this age of media and the Internet, the concept of diligence should also encompass monitoring such outlets as the broadcast media, the Internet, and social media to help a company stay abreast of potential issues with products or services.

Strengthening key internal practices can also help diminish litigation risk. Any information intended for public consumption, particularly with regard to the purchase and use of a product, should be true and accurate. While businesses always strive to satisfy this requirement, circumstances sometimes arise which result in the miscommunication of information. Companies should employ internal checks, including required review procedures and audits, to defray the risk of disseminating information that is false or misleading. Additionally, companies should consider implementing policies, procedures and plans, including employee training, to protect against lapses, mistakes, or errors in the design, manufacture, and sale of its products. Key to successful training is the implementation of communications protocols that permit employees to seek and receive feedback and to have ready access to reference materials and guidelines relevant to the nature of their work. Disciplined email use should be encouraged, especially when an issue might lead to litigation and electronic

discovery is a foreseeable concern. Similarly, implementing and educating employees on document retention policies, including any applicable legal holds, should be a routine business practice.

Finally, companies should become actively engaged in the development of the laws, regulations, and rules impacting their business and litigation profiles. Tasking an employee with the important job of monitoring key developments in legislative, regulatory, and tort reform efforts, and then educating relevant individuals within the business and legal structure on those developments can go a long way in reducing or eliminating liability. Further, because reform efforts at both the state and federal level can shape the profile of litigation, companies should consider lobbying efforts on issues that are particularly impactful to business interests or especially susceptible to manipulation by the plaintiffs' bar.

Creative Management Techniques: When Litigation is Unavoidable

Once mass tort litigation ensues, companies must move quickly. The essential task of corporate and defense counsel is to best position the company to aggressively defend its products and services against its critics while simultaneously pursuing cost-effective litigation strategies.

Developing a Defense Team

As soon as a company receives credible information that mass tort litigation is on the horizon, it should initiate a thorough analysis of the threat presented by the litigation. This process includes:

- Assessing the company's internal knowledge of product and injuries at issue;
- Identifying key corporate employees and documents;
- Evaluating plaintiffs and their counsel;
- Considering the impact of jurisdiction and venue, particularly as it impacts applicable claims, legal defenses and financial risk; and
- Addressing insurance coverage, if any.

All of this information will play an important role in developing a holistic defense strategy which addresses not just the immediate litigation needs but also potential impacts to business reputation and corporate stakeholders.

When assembling their defense team, companies should focus not just on their outside counsel needs, but also on the appropriate management of internal business concerns. In this way the "defense team" becomes a partnership in which the company works collaboratively with outside counsel to achieve the desired litigation result. Involvement of internal corporate strategists can be particularly important in cases involving high levels of media exposure and reputational risk. Individuals who should be considered for the internal defense team include upper-management business leaders with personal knowledge of the products or issues at play. Former or retired employees may also be useful resources for the defense team. In cases with substantial media exposure, a communications or public relations team should be assembled, consisting of corporate spokespersons and, where necessary, professional media strategists. The communications team should be proactive and not reactive in crafting its message. In situations where "No Comment" is inadequate, the communications team must ensure that any official statement or position is accurate and truthful, an issue that can be difficult to discern in "breaking news" situations. When litigation gives rise to reporting responsibilities under SEC regulations or poses a significant peril to a business asset, integration of the company CEO and CFO in high-level defense planning can be vital. Finally, it may be advisable to involve the company's human resources department if the litigation raises specific concerns of employee misconduct or wrongdoing.

Many factors also play into the company's selection of the external portion of its defense team. For repetitive litigation or mass torts spanning multiple jurisdictions, the company may desire to retain national counsel who will be responsible for coordinating a uniform defense for the company. National counsel should be qualified and have experience in defending mass tort litigation or class actions (if applicable), as well as possess the time and resources to devote to the case. The selected firm should have ample associate, paralegal, and IT support, and should be well-respected in the market. National counsel should know the case inside and out, be familiar with the company and the specific business practices and products at issue, and actively involved in all areas of the defense from identification and vetting of experts and corporate witnesses to jury selection and trial presentation strategy.

The company should further carefully select its local counsel. Local counsel serves the important function of being the company's "eyes and ears on the ground" in the areas where the litigation is venued. Not only should local counsel be thoroughly familiar with the courts, applicable laws, local plaintiffs' lawyers, and regional experts, local counsel also should be familiar with the company's local assets (e.g., facilities and employees) and knowledgeable of potential local "influencers" on the litigation such as political or environmental activists and local media.

Involvement of internal corporate strategists can be particularly important in cases involving high levels of media exposure and reputational risk. Individuals who should be considered for the internal defense team include upper-management business leaders with personal knowledge of the products or issues at play.

The interplay between national counsel and local counsel is important. Both should work together as one defense team, and the strengths of each should be brought to bear. Counsel should work together on discovery matters, document production, expert issues, briefing, oral arguments and trial. Significantly, the trial team should "play well" in jurisdictions in which the company is sued. Diversity of the trial team can be important: the trial team should "fit" the jurisdiction where the company is trying the case. Above all, juries should respond favorably to the members of the defense team, both as to style and content of information delivered at trial.

Depending on the nature of the litigation and the relative

strengths of national and local counsel, the company might also consider adding a third layer to its outside counsel roster. Companies can use specialty counsel to further strengthen its defense bench in a particular area, such as trial or appellate expertise. Or, companies may employ specialty counsel to address more cost-effectively an area of the litigation that recurs across the company's litigation docket, such as discovery, expert retention or settlement.

Cost Control Through Budgeting and Alternative Fee Structures

Given the scope and duration of most mass tort litigation, cost control will be a high priority for the company. Detailed budgeting is one method for managing legal costs. Successful budgeting requires the company and its outside counsel to work together in specifying budget inputs and periodically monitoring budget compliance. One new tool companies may find useful in this regard is the implementation of third-party invoice analytics on appropriate matters. Companies may engage vendors to compile summaries of outside counsel invoices which can sort the information by firm, attorney, task and cycle time, offering a better view of the factors that might be driving fees. These factors can include such things as overstaffing, too many attorneys moving "in-and-out" of a case, or tasks requiring an inordinate amount of time for completion. Each of these issues can also be compared to performance statistics of similarly situated firms engaged in compatible litigation for the company. By assessing outside counsel invoices analytically, companies can better identify cost-drivers and proactively work with their outside counsel to correct the issues inflating defense costs.

Another popular trend is to move away from the "purchase" of billable hours. Traditionally, companies have been in the business of "buying" billable hours. But, more and more, companies are moving away from this model and towards alternative fee arrangements (AFAs). Examples of AFAs include:

- *Contingent Fees*: A classic example of an AFA, the contingent fee is one in which a law firm collects its fee as a percentage of the money won at trial or on settlement. The client generally pays nothing unless the legal action is financially successful.
- *Fixed Fees*: This is an arrangement where the firm handles a single case (or a portion of a case) for a pre-specified, negotiated amount.
- *Flat Fees*: Here, the firm handles a set of cases (usually multiple, similar cases) for an agreed-upon negotiated total amount. There may be a specific number of cases, or the agreement may be for all cases of a specific type that occur during a set time period.
- *Success Fees/ or Bonus Arrangements*: In this arrangement, the client and the firm often negotiate a lower hourly billing rate with the opportunity for an additional bonus sum if certain goals are achieved. The bonus level may be quantified by success, speed of resolution, cost savings, or may be dependent on case resolution. Upon reaching this level, the firm then receives an extra payment.

AFAs can be useful in controlling legal costs because they place outside counsel's "skin in the game," thus aligning the financial interests of the company and its counsel.

Scoping of Issues Through Early Case Assessment

When faced with defending a mass tort action, companies must have a plan of attack in place and be prepared to make their best arguments in the courts, the media, and—if necessary—in front of government agencies. To do this, companies must carefully analyze the strengths and weakness of their potential defenses in the litigation.

Although it is tempting to jump directly into the factual and substantive issues involved, it is often prudent—and more cost effective—to first review the procedural issues. Counsel should consider such issues as jurisdiction (both personal and subject matter), venue, removability to federal court (if filed in state court), multi-district litigation (if in federal court), and facial sufficiency of the complaint as alleged.

The early case assessment should also analyze the elements of each cause of action and applicable defenses to help focus the case. A central strategy in the defense of mass tort litigation is to heighten the focus on individualized factors, such as exposure, injury, and causation, which might both deter class certification and reveal fallacies in plaintiffs' theory of the case.

Through engaging in the early case assessment, counsel should identify the facts and legal issues that potentially are dispositive of the litigation. Counsel should seek a case management order from the court that prioritizes discovery and motion practice on the identified dispositive issues. By addressing outcome determinative issues early and narrowing cases to only those claims that are potentially viable, companies not only control the flow of the litigation but also trim costs that would otherwise be associated with the defense of frivolous claims.

Resolution Through Settlement or Alternative Dispute Resolution

Despite strong legal or factual arguments, a company may decide to settle a matter for a variety of reasons: costs, negative publicity, impact on the business, employees, shareholders, or stock price, hostile jurisdiction, or an antagonistic judge. If the company does decide to settle, it should make sure the settlement is fair, adequate, and negotiated at arms-length. In the case of a class action, be sure that all of the requirements of Rule 23 are satisfied, particularly the notice provisions.

Outside the class action context, settlement of mass tort litigation can be especially complex. Parties may consider alternative dispute resolution, such as mediation or arbitration, for a variety of reasons: cost concerns, the confidentiality it affords, or displeasure with the venue or court. If parties agree to alternative dispute resolution, the defense team should thoroughly vet any mediator or arbitrator.

Regardless of the settlement vehicle ultimately utilized, companies must be wary of enticing the plaintiffs' bar into pursuing "tag along" lawsuits. One strategy for defraying this risk is to carefully delineate claims that are considered specious and non-compensable from the categories of compensable claims covered by the settlement. Some tools that might be useful in helping to draw these lines are preliminary motions seeking clarification from the court on legal issues that might be determinative, such as choice of law, or the use of science panels to address issues of general causation.

Taking Your Case to Trial

In some cases, trial is unavoidable. Sometimes, all the stars are aligned and this is the best course of action: good facts, favorable law, helpful deposition testimony, a defense-friendly judge, favor-

able pretrial rulings, or successful juror selection. Or, perhaps the company wants to go to trial to send a message to plaintiffs' counsel, other plaintiffs' attorneys, or to the public. If the company has a strong case, it may opt to have a bellwether trial, both to "test the waters" and to resolve key issues of liability that will serve as a pattern for the remaining tort cases. While there is some opportunity to course-correct after a failed bellwether trial, the optimum result is to carefully select the first test plaintiffs to enhance the likelihood of a defense verdict. An early win can send a message to the public and the plaintiffs' bar, and incentivize the favorable resolution of any remaining claims. ⊙

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[27]Fla. Stat. § 790.251.

[28]*Id*.

[29]Ga. Code Ann. § 16-11-135.

[30]La. Rev. Stat. Ann. § 292.1.

[31]Ariz. Rev. Stat. § 12-781; Ind. Code § 10-14-3-33.5; Kan. Stat. Ann. § 75-7c11; Ky. Rev. Stat. Ann. § 527.020(4); Me. Rev. Stat. Ann. tit. 1.26, § 600; Mich. Comp. Laws Ann. § 28.425n; Minn. Stat. Ann. § 624.714; N.D. Cent. Code § 62.1-02; Tex. Lab. Code Ann. § 52.061; Utah Code § 34-45-101 *et seq*.; W. Va. Code Ann. § 61-7-14. *Cf.* Miss. Code § 45-9-55 (employer *can* prohibit firearms in *company* vehicles); Mo. Rev. Stat. § 571.107.1(15) (same); Neb. Rev. Stat. § 281202 (15)(2) (same).

[32]*ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282 (N.D. Okla. 2007).

[33]*Id*.

[34]*Florida Retail Ass'n v. Attorney Gen. of Fla.*, No. 4:08cv179-RH/WCS (N.D. Fla. Jul. 29, 2008).

[35]*Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1209-11 (10th Cir. 2009).

[36]*Id.* at 1205-06. (emphasis in original) (citations omitted).

[37]*See Mitchell v. Univ. of Ky.*, 366 S.W.3d 895 (Ky. 2012).

[38]*Mitchell*, 366 S.W.3d at 897.

[39]Soc. For Human Resource Mgmt., *Indiana's 'Take Your Gun to Work' Law to Be Tested in Lawsuit*, (Oct. 9, 2012), *at* www.shrm.org/hrdisciplines/safetysecurity/articles/Pages/Indiana-Workplace-Gun-Law-Lawsuit.aspx.

[40]*See, e.g.*, Simon Romero, *An Oklahoma Version of Guns vs. Butter*, N.Y. Times, Nov. 24, 2004, *available at* www.nytimes.com/2004/11/24/business/24guns.html; Stephanie Armour, *Companies that ban guns put on defensive*, U.S.A. Today, Dec. 9, 2004, *available at* usatoday30.usatoday.com/money/companies/management/2004-12-09-guns-cover_x.htm.

[41]The Second Amendment was never intended to allow citizens to carry firearms into their workplaces. Free speech is a cherished right protected by the First Amendment, yet it is well established that the Amendment does not cover private workplaces. *Los Angeles Teachers Union v. Los Angeles City Board of Education*, 71 Cal. 2d 551, 564-65 (1969).

[42]*See* Report of the United States Postal Service Commission of a Safe and Secure Workplace, August 2000, prepared by the National Center on Addiction and Substance Abuse at Columbia University.

[43]*See, e.g., Haddock v. City of New York*, 553 N.E.2d 987 (N.Y. 1990) (holding New York City liable for an employee's rape of a nine-year-old girl because employee was a violent offender convicted of rape and other violent crimes, and the City employed him as a utility worker for public parks, where the employee worked closely with children in playgrounds.)

[44]However, the EEOC has recently issued guidance documents discouraging employers from refusing to hire employees with criminal backgrounds, and identifying the potentially discriminatory impact that the use of criminal background checks may have on hiring practices.

[45]*See, e.g.*, *Randi W. v. Muroc Jt. Unified Sch. Dist,*, 929 P.2d 582 (Cal. 1997) (holding an employer liable for fraud and negligent misrepresentation for giving a former employee a positive reference that did not mention prior charges or complaints of sexual misconduct and impropriety with students, when the former employee sexually assaulted the plaintiff, a student at a school that hired the former employee based on the former employer's positive recommendation); *Herrick v. Quality Hotels, Inns and Resorts, Inc.*, 19 Cal. App. 4th 1608 (1993) (affirming the jury's award of $40,000 in general damages and $75,000 in punitive damages for intentional infliction of emotional injury to a former employee when the employee was threatened with a gun by another employee, and the employer knew the threatening employee kept guns on the work premises and was previously arrested for threatening another employee.)

[46] 554 U.S. 570 (2008).

[47]The Supreme Court generally held that the Second Amendment confers an individual the right to keep and bear arms and that statutes banning handgun possession in the home violated the Second Amendment.