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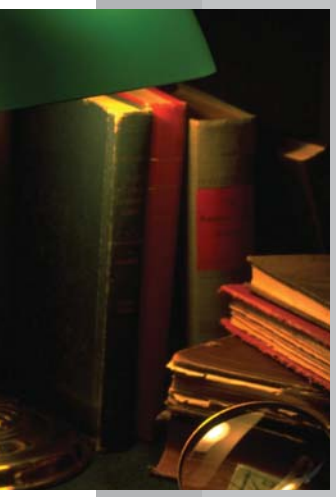
FROM THE Incoming Chair's Desk

USLAW began 15 years ago in an office in Chicago with the simple goal of offering our clients direct and personal access to lawyers who know their clients' needs, problems and aspirations, and share mutual values and service expectations. As the incoming Chair of USLAW I am honored to share that this same goal is ever present today as we strive to exceed your expectations at every turn.

We listen to what you need and bring the expertise to you. As you flip through the pages of ***USLAW Magazine***, you will see articles on antitrust laws, ADA compliance, cybersecurity, copyright infringement, insurance regulations and more. **LawMobile** offers you the unique opportunity to have members of USLAW come to your offices and educate your team on a wide variety of topics which are relevant to your business demands and industry. We create full service **Compendiums of Law**, and **USLAW OnCall** allows you to roundtable an issue, case or concern with experienced attorneys from firms around the NETWORK promptly, efficiently and without cost. Take advantage of these and the many other USLAW resources and contact your relationship attorney at USLAW, USLAW CEO Roger Yaffe or me for more information.



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The education we offer you is interactive and cutting edge. To date this year, our **Exchanges** have focused on topics in employment law, transportation and unfair trade practices. Later in 2016 we will focus on risk management, the construction and retail industries, and for the first time cross border transactions, data privacy and security in partnership with TELFA. These programs are driven by your needs and requests as well as our commitment to delivering innovative, interactive programs on issues that matter most to you and your business.

As I begin my term as Chair of USLAW, I would like to thank my predecessor, Tom Oliver of Carr Allison in Alabama, for his friendship, efforts and leadership over the past year. He has championed your needs and made USLAW's ability to serve you stronger and more comprehensive. With USLAW's 15th anniversary upon us, I'd also like to acknowledge our founders, past Chairs, Board members, practice area and program leaders, and professional staff for their service. Thank you for giving us this opportunity and enabling us to continue delivering the highest quality legal representation and seamless cross-jurisdictional service to our clients and communities.

Stay in touch. Let us know how we are doing and how we can help you. If you ever have any questions about USLAW, please do not hesitate to contact me. We value and appreciate the relationships we have developed, look forward to those that will occur in the future, and value your insight and candor.

Best,
Lew R.C. Bricker
USLAW NETWORK Incoming Chair
SmithAmundsen LLC | Chicago, Illinois

'LIAR LIAR, PANTS ON FIRE'

PUBLIC DENIALS OF WRONGDOING CAN CARRY RISKS FOR DEFENDANTS

Leslie Paul Machado LeClairRyan

Imagine this: you, or your company, have been named as a defendant in a lawsuit. The complaint has gotten press attention – perhaps because of salacious allegations about your alleged conduct – and you have now started receiving calls from the media, seeking comment on the allegations. While you would typically respond with a terse "no comment," you'd like to say more to refute the allegations or, at a minimum, tell the public that they are categorically false.

In this circumstance, some parties or counsel will respond to inquiries by stating that "these allegations are meritless and we look forward to our day in court," "we look forward to disproving these frivolous allegations in court," or by making a similar "no-

comment plus" statement. Doing so, however, runs the risk of being sued for defamation, as two high-profile individuals have learned. Their cases are a cautionary tale for others.

Several years ago, Brian McNamee, a former baseball trainer, told federal authorities and baseball officials that he injected Roger Clemens with steroids and Human Growth Hormone. Clemens denied all allegations of drug use and, in a series of public comments to various media, essentially called McNamee a liar, by telling "60 Minutes" that the allegations were "totally false," issuing a YouTube statement denying the allegations and stating that they were "simply not true," and having his lawyer issue a statement that McNamee's statements were "absolutely false." McNamee responded by filing a defamation suit.

Clemens moved to dismiss the complaint, alleging, among other things, that his statements (or those made on his behalf) were protected opinion made defensively, in response to the serious allegations made by McNamee. The court denied Clemens' motion to dismiss, concluding that the "liar" statements were capable of being proven true or false by a determination of whether or not McNamee, in fact, injected Clemens with steroids. While the court acknowledged that Clemens's general denials of accusations were not actionable, the court found that the denials, coupled with accusations that McNamee would be proven a liar and had lied in front of members of Congress, crossed the line from general denial to specific accusations reasonably susceptible of defamatory meaning, at least at the motion to dismiss stage:

> *The statements that brand McNamee a liar and suggest that there are unknown facts that when disclosed will support Clemens' denials… go beyond general denials of accusations or rhetorical name calling. The statements were direct and often forcefully made, there was nothing loose or vague about them. If McNamee's accusations are proven, Clemens will have knowingly lied when he called McNamee a liar and his statements defamatory. These statements impugning his integrity can form the basis of a defamation action. While it is always possible that a jury will decide that an ordinary listener would consider the statements opinion, the words convey an air of truth sufficient to survive a motion to dismiss.*

More recently, in late 2014, several women came forward to claim that Bill Cosby sexually assaulted them years, or even decades, earlier. In November 2014, Cosby's attorney released a statement to numerous media outlets in which he stated, among other things, the "new, never-before-heard claims from women who have come forward in the past two weeks with unsubstantiated, fantastical stories about things they say occurred 30, 40, or even 50 years ago have escalated far past the point of absurdity. These brand new claims about alleged decades-old events are becoming increasingly ridiculous… Lawsuits are filed against people in the public eye every day. There has never been a shortage of lawyers willing to represent people with claims against rich, powerful men…".

Two of the women sued Cosby for defamation, alleging that the statement by Cosby's attorney defamed them by branding them liars and extortionists. Cosby responded to both lawsuits by arguing that, among other things, the statements were covered by a "self-defense" privilege, because they were Cosby's response to the claims brought against him.

Late last year, a Massachusetts federal district court rejected these arguments. It found that the statements were capable of being construed as facts, and not opinions: "the statement is capable of being understood as asserting not just that the allegations made during the previous two weeks were unsubstantiated, but also as implying they were false and entirely without merit. The court cannot predict whether a jury will actually conclude the statement implied that fact and, if so, whether the assertion of fact was false, but there is a sufficient factual question as to the meaning readers would have given to the statement to preclude dismissal at this stage."

The Massachusetts court also rejected Cosby's argument that the statement was necessary to respond to the claims being asserted against him. While it recognized that some jurisdictions had adopted this "self-defense" privilege to allow "individuals, in certain circumstances, to publish defamatory responsive statements necessary to defend their reputations," it held that the "privilege does not permit a defendant to knowingly publish false statements of fact." Because the complaint alleged the statement was false, the Massachusetts court rejected the motion to dismiss.

Remarkably, three months later, another federal court reached a different conclusion, based upon the same statement. In January 2016, a federal court in Pennsylvania granted a motion to dismiss filed by Cosby, concluding that the same statement made by his attorney was protected opinion. Like the Massachusetts plaintiff, the Pennsylvania plaintiff argued that the attorney's statement essentially called her a liar and extortionist, and was thus defamatory. The Pennsylvania court disagreed:

> *The Martin Singer Statement is pure opinion. Per Plaintiff's Complaint, the Martin Singer Statement was made "in response" to Plaintiff's interview wherein she accused Defendant of sexually abusing and raping her… It was a statement, made by Defendant's attorney, in response to serious allegation concerning Defendant's alleged criminal behavior.*
>
> *Any attorney for any defendant must advance a position contrary to that of the plaintiff. Here, plaintiff publicly claimed she was sexually abused and raped by Defendant – which is her position; and Defendant, through his attorney, publicly denied those claims by saying the "claims" are unsubstantiated and absurd – which is his legal position. This sort of purely opinionated speech articulated by Defendant's attorney is protected and not actionable as defamatory speech.*

While the Pennsylvania decision might provide comfort to those individuals who want to vigorously respond in the press to allegations of improper conduct, the Massachusetts decision, and the Clemens decision, show that some courts view these denials differently, exposing the client (and the attorney) to a claim for defamation. Said another way, while a defendant/counsel might believe these statements are an *opinion* about contested claims, and would be understood as such by a reader/listener, not all courts would agree with this argument, as shown above.

The bottom line. Whether you are the defendant, the PR representative or the attorney, be wary of your public statements denying accusations against you (or your client). If you must comment on the allegations, take pains to avoid branding the plaintiff a liar. Better still – let your legal response be the only response.

Leslie Paul Machado is a shareholder in the Alexandria, VA, office of LeClairRyan. The veteran litigator leads the firm's media, internet and ecommerce team, in addition to counseling and advising a diverse range of clients on a variety of issues.

PROTECTING AGAINST FRIVOLOUS ALLEGATIONS OF BAD FAITH

Kent M. Bevan Dysart Taylor Cotter McMonigle & Montemore, PC

Frivolous bad faith allegations are always a concern for insurers. Plaintiffs and their lawyers have an obvious financial incentive to assert bad faith claims because of the possibility that they can recover a far greater amount than what policy limits provide. Unfortunately, the mere perception of bad faith can lead to problems for insurers, even in the absence of genuine bad faith.

Part of the problem is the "David vs. Goliath" mentality that sometimes motivates jurors to find in favor of whom they consider to be the "underdog." When they see a plaintiff, often a lone individual who has been hurt in some unfortunate event, take on an insurance company for denying the claim, their sympathies naturally lie with the plaintiff.

WHAT IS "BAD FAITH" AND WHY DOES IT MATTER?

There are conflicting opinions in various jurisdictions about what constitutes bad faith by insurers and what remedies may be available to policyholders. It isn't enough for insurers not to act in bad faith – they must also be able to demonstrate that they acted in good faith.

Some states prohibit bad faith generally whereas others have enacted laws that specifically define prohibited bad faith conduct. A growing number of states have sought to protect policyholders by creating statutory causes of action for bad faith, and some have created policyholder bills of rights. Even if there is no coverage, the manner in which a claim is handled can still result in a bad faith claim against an insurer.

Generally speaking, when an insurer fails to pay a claim without a reasonable basis for doing so, or fails to investigate the claim in a timely manner, a case can be made that they are acting in bad faith. Some of the ways that plaintiffs frame their arguments to show bad faith include:

- Deliberately deceptive or abusive practices to avoid paying claims;
- Not communicating with claimants in a timely manner;
- Unreasonable conduct in litigation involving a claim;
- Unreasonable or inappropriate demands;

- Either not following or not having company procedures to investigate claims;
- Not disclosing policy limits or policy provisions and exclusions;
- Attempting to enforce provisions that are inherently unenforceable; and
- Directly advising a claimant not to obtain the services of an attorney.

Here are some real-life examples of successful bad faith claims leading to damages against insurers:

- *A plaintiff sought representation through his homeowner's policy after he was sued in connection with a collision. Plaintiff claimed that the default judgment entered against him after defendant refused to defend him caused emotional distress. Jury returned a verdict of $300,000 for pain and suffering, over $500,000 for the default judgment and $25,000,000 in punitive damages for insurance bad faith.*

- *A jury returned a verdict of $400,000 for refusal to defend and indemnify in a series of lawsuits, including $386 million in punitive damages which the trial court later lowered to $71 million.*

- *A refusal to pay a $1,000 claim for burial expenses of a deceased child under a life insurance policy with no reasonable basis for denial resulted in a $750,000 punitive damage award for bad faith. This amount was affirmed on appeal. The court suggested that the fact the policy was so small was a reason to impose severe punitive damages because insureds would have a difficult time obtaining an attorney to take a case with such a small policy at issue.*

- *Plaintiff alleged that defendant misrepresented the policy deductible of her health insurance. Plaintiff claimed past medical expenses of $14,000, but defendant offered $6,000 prior to trial. The jury returned a verdict of $14,000 and $1,000,000 in punitive damages.*

- *A state supreme court found that an excess judgment is not required to maintain an action against an insurance company's bad faith refusal to settle. The insurer's duty is to protect the insured's financial interests and put its well-being above that of the insurance company. The court ruled that an insured's premiums pay, in part, for the insurance company's obligation to act in good faith when settling a third-party claim. An insurer can be held liable over and above its policy limits if it acts in bad faith in refusing to settle a claim against its insured within its policy limits when it has the chance to do so. Here, there were several opportunities for the insurance company to settle within policy limits, but the carrier waited until after the family in a wrongful death case was no longer willing to accept the policy limits offer. Therefore, the carrier's payment up to policy limits did not make its insured whole or put the insured in the same position it would have been in had the insurance company performed its obligations in good faith in a timely manner.*

BEST PRACTICES FOR AVOIDING BAD FAITH ALLEGATIONS AND HOW TO HANDLE THEM

First, make sure to fully investigate claims according to statutes and your internal policies. Investigations need to take place in a timely manner following the claim, and they need to be documented without editorial comments. If coverage will be denied, then that decision must be made in a timely manner as well. Keep date-stamped, detailed, and accurate records of all claim investigation activity, and preserve them because litigation can occur years after a claim is made.

The importance of good record-keeping cannot be overstated. You can assume that everything in the claims file will be discovered in litigation, which can either be detrimental or helpful depending on how well you keep and organize records. Another thing to keep in mind is that disparaging comments about insureds in the claim file such as "this person is such a liar" will only hurt you. They may even give rise to a claim of defamation.

When you do deny a claim, it is important to clearly state all the bases for which the claim is being denied. You should cite the specific language in the policy you're referencing as the reason the claim is being denied and do not paraphrase. If you do paraphrase the reason, then it could look like you are acting in bad faith when you are not. It is a good idea to have legal counsel review any denial letter before it is sent out.

If you deny a claim based on the medical opinion of a doctor you hired, the insured and his or her attorney will view the doctor as being in your "camp," as opposed to being independent. As a result, they may attempt to show that you and the doctor are in cahoots to conspire against them. This means that correspondence with doctors or other experts you hire should only concern the facts of the claim. You should keep doctors and any other experts you hire at arm's length in your correspondence about the claim.

Policy provisions and exclusions must be enforceable according to the law. The insurer is generally thought to be the one with knowledge of the laws that apply to their insurance policies. If coverage is denied because of a provision or exclusion that is not enforceable, this looks like bad faith in action. Genuine ignorance of the law won't be an effective defense.

The insured and their attorney will also be looking for opportunities to convey to judges and juries that you and your company are "bad" and deserve to be punished. As a result, plaintiff's lawyers will seek to discover information about your company that they can frame as being supporting of a culture of bad faith. This can include, but is not limited to, claims handling procedures, claims payment goals and incentives, quotas, and correspondence with insurance rating companies as well as training manuals for new employees, management conference materials, and operations reports.

Finally, pay attention to the insured's actions during the claims process that may show them to be uncooperative or in violation of their "duties" set out in the policy. These factors can play into your ultimate liability in a bad faith claim against you, and may even protect you from it completely. Did the insured obfuscate or misrepresent relevant information on their paperwork? Did they act in an abusive way or fail to cooperate during the claims process? Keep detailed records of this behavior in the claim file as well.

Unfortunately, there is no way for insurers to protect themselves completely from the specter of bad faith allegations. This means you should take every precaution to not only follow every rule and procedure, but to document every step you take as well – if it's not in writing in the file, it didn't happen. This way, if a bad faith allegation is made, it can't be supported by the evidence. Following these best practices should help protect you and mitigate the damage that can be done by an allegation of bad faith.

Kent M. Bevan is a director and shareholder at Dysart Taylor in Kansas City, Missouri. His practice focuses on insurance law and litigation. Kent regularly writes alerts with analyses of recent court decisions involving insurance litigation which you can view at http://dysarttaylor.com/news-events/alerts. You can view his expanded bio at http://dysarttaylor.com/our-people/kent-m-bevan or contact him at kbevan@dysarttaylor.com.

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THE NEW FEDERAL DEFEND TRADE SECRETS ACT OF 2016

Henry M. Sneath and Robert L. Wagner Picadio Sneath Miller & Norton, P.C.

The law governing the misappropriation of trade secrets has traditionally been left to the states. But, that all changed on May 11, 2016, when the President signed the Defend Trade Secrets Act of 2016 (DTSA), a bipartisan bill that almost unanimously passed Congress and created a new federal civil cause of action for misappropriating trade secrets. This new law is expected to usher in a new resurgence in the importance of trade secrets, create a more uniform and national approach to trade secret protection, and open the door to federal courthouses for trade secret owners.

In general, every state recognizes that certain kinds of valuable information (such as formulas, drawings, methods, techniques, and processes) that are not well-known and that a company takes reasonable steps to keep secret can be protected from being taken, disclosed, or used by others who use improper means to learn of the information (such as by theft, bribery, espionage, or inducing others to breach their duty of loyalty or confidentiality).

Forty-seven states and the District of Columbia enacted a version of the Uniform Trade Secret Act (UTSA), which was first published in 1979 and later amended in 1985. The UTSA came out of a desire to create uniformity among the states in light of the recognition of the national and interstate realities of commerce in the United States. These efforts were extremely successful, and only three states to date (Massachusetts, New York and North Carolina) have trade secret misappropriation laws that are not based on the UTSA.

Despite the fact that every state has its own trade secret misappropriation laws and that these laws are mostly based on the UTSA, there still remained a growing need for a national law providing civil protections for trade secrets. There continue to be subtle and sometimes important differences between the states' laws. For instance, there are differences in what information can potentially qualify as a trade secret, what steps are necessary to reasonably protect a trade secret, and the limitations that can be placed on former employees when they leave a company. Moreover, the case law is not well-developed in many states. Together, these factors created uncertainties and ambiguities for companies that wanted to protect their confidential information that have not been solved by the UTSA. It was in this context that Congress passed the DTSA, primarily as an amendment to the Economic Espionage Act of 1996 (18 U.S.C. § 1830 et al.).

WHAT IS THE SAME BETWEEN THE DTSA AND UTSA?

Congress did not start from whole cloth when drafting the DTSA. Instead, it heavily borrowed from the UTSA and its provisions. As a result, there are far more similarities between the DTSA and UTSA than differences. For example, the definitions of what constitutes misappropriation and what are improper means of obtaining a trade secret are the same. The DTSA and UTSA are also consistent in allowing reverse engineering and independent development as "proper means" of obtaining information

or knowledge that would otherwise be a trade secret.

Both laws also provide for the same general types of remedies for those whose trade secrets have been misappropriated: injunctive relief, compensatory damages, unjust enrichment damages, reasonable royalties, exemplary damages (up to twice the compensatory amounts), and attorney's fees. Finally, both laws provide for a three-year statute of limitations from when a company discovered or should have discovered the misappropriation.

Therefore, much of the DTSA will be familiar to those who have dealt with any of the various UTSA-based state trade secret misappropriation laws, and because the DTSA does not preempt state trade secret laws, the state laws will continue to be meaningful even with the passage of the DTSA.

WHAT IS DIFFERENT BETWEEN THE DTSA AND THE UTSA?

Despite these similarities, there are still some important differences between the DTSA and the UTSA. First, because the DTSA is a federal law, it requires that the trade secret must relate to a product or service used in interstate or foreign commerce. State laws do not have this requirement, and, therefore, potentially can protect a broader range of trade secrets than the DTSA can. For many companies, this interstate commerce requirement will not be a meaningful barrier, but there may be instances where it could be important, such as where the products and services are purely intrastate in nature.

Both the DTSA and UTSA limit what information can qualify for trade secret protection by requiring that the owner take reasonable measures to keep the information secret and that the information be independently valuable to the company because it is not well known. But, what types of information can constitute trade secrets are different (although it will be interesting to see if the differences are meaningful in practice).

The UTSA limits the type of information that can potentially qualify as a trade secret to "information, including a formula, pattern, compilation, program, device, method, technique, or process." The DTSA, on the other hand, defines the types of information that could qualify as a trade secret as being "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing." The DTSA definition is obviously longer and more detailed than the one found in the UTSA, but, again, it will be interesting to see if these differences are meaningful in practice.

Regardless, the end result for both the DTSA and the UTSA is the same – only certain kinds of information that a company reasonably keeps secret and that are not generally well known can qualify for protection as a trade secret.

Another difference between the DTSA and many states' trade secret laws involves whether a continuing misappropriation constitutes a single act that triggers the start of the statute of limitations period or is a series of separate and distinct acts that resets the limitations period. Both the DTSA and the UTSA explicitly state that continuing misappropriations form a single claim, but not all states adopted that portion of the UTSA, so this difference can be very meaningful in certain situations and can be a potential bar to claims under the DTSA that would otherwise be available under some states' trade secret laws.

NOTABLE PROVISIONS OF THE DTSA

One of the more interesting and talked-about provisions in the DTSA is the availability of an *ex parte* civil seizure order from a court in order to prevent the dissemination or propagation of a misappropriated trade secret. Not unexpectedly, the requirements to get an ex parte seizure order are fairly strict. A company must show that it would suffer immediate and irreparable harm if the order is not granted, post a significant bond, identify with particularity what is to be seized, and not publicize the seizure attempt or order, among other things. If the court grants the seizure order, federal law enforcement officers will carry out the seizure without the participation of the applicant and then maintain possession of the seized items in a location that the applicant cannot access. The court must then hold a hearing within seven days of the issuance of the seizure order to determine whether to maintain, modify, or dissolve the order. A cause of action against the applicant exists if the court later determines that the seizure was wrongful or excessive. The inclusion of this seizure provision was fairly controversial, and it will be interesting to see how often companies try to obtain a seizure order and how often (and under what circumstances) courts are willing to grant one.

Another important provision of the DTSA for businesses is that it provides civil and criminal immunity to whistleblowers who disclose trade secrets in confidence to law enforcement officials in order to report suspected violations of the law. Of particular relevance is the requirement that all agreements and other contracts with employees, independent contractors, and consultants relating to the use of trade secrets or confidential information must provide notice of this whistleblower immunity. A company that fails to provide this notification loses the ability to seek exemplary damages and attorney's fees against employees who did not receive the notice. So, companies should consider modifying their confidentiality and employee agreements to include the required notice provision.

Finally, the protections of the DTSA extend to conduct that occurs outside of the United States if either the offender is a U.S. citizen, permanent resident alien, or company, or if an act in furtherance of the misappropriation occurs within the United States. This potential global reach of the statute will give companies some additional tools to protect their trade secrets from foreign actors.

The DTSA seems poised to usher in a new era of trade secret protection that is more uniform, well-developed, and national in scope. It provides companies with another tool to protect their valuable intellectual property in this global age. For further information, see www.dtsalaw.com.

Henry Sneath is a business trial attorney with Picadio Sneath Miller & Norton, P.C. in Pittsburgh, Pa., focusing on business, intellectual property, insurance, energy sector, products liability, and tort litigation matters. He is listed in Pennsylvania Super Lawyers and Best Lawyers in the litigation fields of business, intellectual property, patent, personal injury defense, and legal malpractice defense. He is a past president of DRI-The Voice of the Defense Bar.

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WEIGHING THE RISKS OF A LIABILITY CLAIM VS. A WRONGFUL TERMINATION CLAIM WHEN TERMINATING AN EMPLOYEE, AND DOCUMENTING IT, AFTER AN ADVERSE INCIDENT.

E. Holland Howanitz and Shylie A. Bannon
Wicker Smith O'Hara McCoy & Ford P.A.

Imagine: A vacation resort employs an attendant to man the front gate, the sole point of public access, 24 hours per day. The attendant leaves her post at 2:15 a.m. to take a walk and make a phone call. While the attendant is away from her post, a guest is assaulted in her room. The resulting risk investigation discovers the attendant's violation of company policy, and direction is given to the human resources director to fire the attendant. Sounds like the problem is resolved…or is it?

The assaulted guest then sues the resort, and in the course of discovery, seeks a copy of the attendant's personnel file. In the file is the attendant's termination notice, which reads: "Attendant left her post without seeking relief; while away, guest assaulted in room by intruder." This type of documentation is tantamount to the resort's admission of guilt: its employee violated company policy, and as a result, there was an incident. Later, when the resort tries to argue that the objective evidence demonstrates the intruder snuck in to the property 12 hours earlier through an employee entrance, it will have to contend with this type of record.

The investigation and documentation of employee misconduct is a difficult balancing act for businesses. Employers must make sure they protect themselves from employment-related claims made by employees (e.g. discrimination claims) by adequately documenting an employee's actions and justifying the basis for such discipline. However, employers must also make sure that they do not create a paper trail for other types of claimants to use against them in court. While many businesses focus on the immediate risk of litigation resulting from an adverse incident, consideration must also be given to the impact that employment-related litigation may have on tort claims. For example, if an employee is terminated, then makes a discrimination-based claim, the business will be required to present evidence and give deposition testimony in the employment claim, likely well before any discovery is conducted in a tort claim. Without the proper protection in place, the tort lawyer will have a "sneak peek" at the evidence before filing suit and deciding on a strategy. Businesses can best minimize their risk for both types of claims by implementing consistent investigation, documentation and disciplinary practices by human resources, and maintaining sepa-

rate investigations by human resources and risk management.

Let's return to the resort. The risk management team directs HR to fire the attendant. However, this attendant has never had any prior disciplinary action, and has been a model employee. Several other attendants have received written warnings for leaving the gate unattended, but were not fired for the offense. There's no company policy advising attendants that leaving the gate unattended could result in immediate termination. If this attendant is fired, the employer must recognize the risk that this employee will argue she was disciplined differently because of her protected status in some class (race, gender, age, disability, etc.). "Similarly situated comparator" evidence is often the strongest evidence of disparate treatment claims in employment litigation, and employers must be cognizant not only of past precedent, but also of how current decisions may affect claims which arise in the future.

The resort should also recognize that the guest's attorney may try to argue the decision to fire this particular attendant for violating policy is an admission of wrong-doing. While many jurisdictions would find such evidence inadmissible as a subsequent remedial measure, employers should consider the fact that such information may be used to put pressure on them to resolve cases for fear of exposure to the media or additional invasive discovery into their employment practices. The lesson? Implement consistent disciplinary policies and when making employment decisions, focus more on the violation, rather than the outcome.

An employer should always investigate the circumstances of the employee's conduct when considering employee discipline. For example, what if the gate attendant left her post because she was a diabetic and she left her insulin in her car and needed it urgently? Should her discipline be the same as if she had left to meet some friends nearby and have a cigarette? If both circumstances were to result in immediate termination, the resort might face a claim of discrimination, or violation of the Americans with Disabilities Act, if it did not provide the attendant with an accommodation for her diabetes. On the other hand, if an employee engages in misconduct and remains employed, the employer must consider whether this decision may result in future exposure for a negligent retention claim.

It is important for employers to ensure that the steps of its investigation are appropriately documented and if necessary, would provide adequate support for whatever discipline is meted out to employees. Often, the timeline of the investigation is important, and careful notes should be kept regarding steps taken by the investigator to conduct a thorough investigation. Supporting documentation and investigation notes prepared in the context of an HR investigation should be kept separately from the employee's personnel file, and should not be produced as part of the personnel file in the course of discovery.

When documenting these investigations, HR personnel should be mindful not to document any legal conclusions, and to try and limit any references to adverse outcomes of employee misconduct. In our resort example, the HR investigation regarding the attendant leaving her post should not focus on the fact that a guest was assaulted while the attendant was away, and should not make any correlation between these two events. Investigation and disciplinary records in the HR context should also avoid using legal phrases such as "negligently," or "intentionally" if possible. Final disciplinary notices or termination letters should contain only enough detail to apprise the employee of the nature of the violation of the policy and the basis for the disciplinary action. Furthermore, if the business is engaged in work of a sensitive nature, (e.g. healthcare or the defense industry), HR personnel must pay careful attention not to maintain any protected or private information in its files.

It is often the case that HR investigation notes have less protection as "work-product" material because these investigations should be done in the routine course of business when disciplining employees, and not only when there is the threat of litigation. In instances where there is a high probability for significant exposure for a tort claim, businesses may wish to consider retaining outside counsel to perform the HR investigation and give guidance on employee termination. Investigations conducted by counsel maintain their privileged status in tort litigation, but the attorney may become a fact witness with regard to employment-related litigation.

Conversely, an investigation performed by the risk management department should focus on potential tort liability, and should also focus on determining whether there are ways to improve the safety of the facility.

Back at the resort: The risk manager's investigation should focus on trying to determine how the intruder gained access to the resort, whether the resort should have known, and whether the resort could have taken any steps to either foresee or prevent this type of incident from occurring. These types of investigations, conducted in the aftermath of an incident when litigation seems imminent, are protected by the work-product privilege, and would likely remain undiscoverable. Businesses can further protect themselves by ensuring that these two investigations remain separate, performed by different individuals, and the results maintained in separate locations. HR and Risk can discuss the potential impact of their decisions on future exposure to claims for negligent retention, negligent training, and negligent hiring, but the details and conclusions of each investigation should remain separate.

Businesses can also protect themselves from inadvertent disclosure of unfavorable information by choosing not to contest any claims for unemployment compensation made by employees who are terminated for misconduct associated with adverse outcomes. Audio recordings of unemployment compensation hearings are often matters of public record, and sworn testimony given during the proceedings can be used in future legal proceedings. With her testimony, a bitter former employee can cost a business far more than a few thousand dollars in unemployment compensation.

When faced with an adverse incident, businesses must work quickly to identify the potential exposures they face from a legal perspective. Businesses should keep in mind that exposure may not only come from outside the business, but also from within. Ensuring that investigations and personnel actions are conducted in a consistent and well-documented manner will reduce the risk and help bring good times back to the resort.

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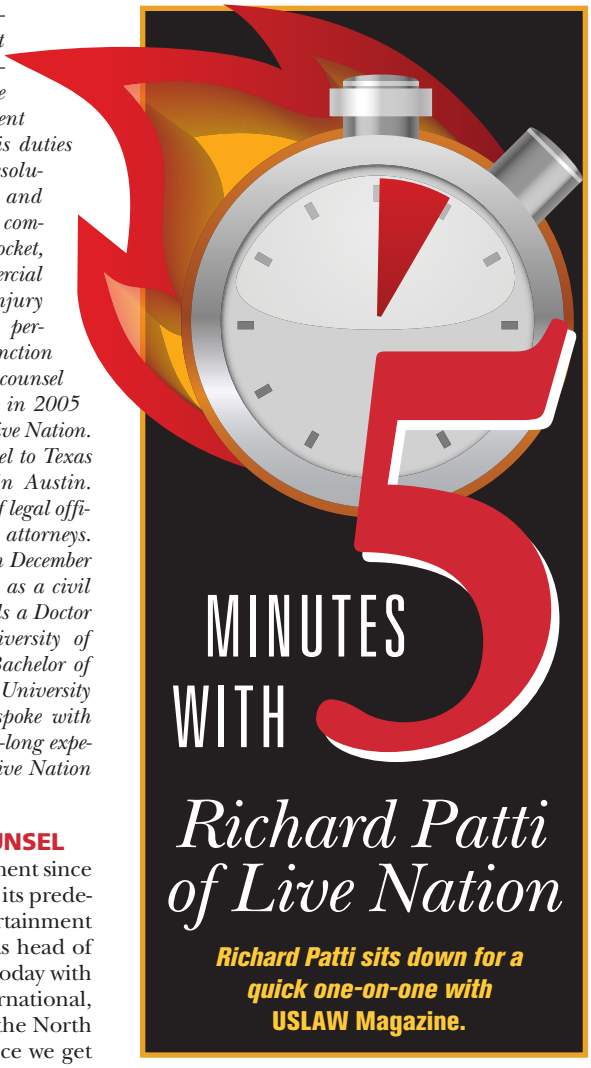
Richard Patti is senior vice president and associate general counsel at Live Nation Entertainment in Los Angeles. His duties focus on dispute resolution, compliance, and management of the company's litigation docket, including all commercial matters and injury claims. Mr. Patti performed this same function as assistant general counsel at Clear Channel Entertainment, which in 2005 spun off from Clear Channel to become Live Nation. Previously, Mr. Patti was general counsel to Texas Comptroller Carole Keeton Rylander in Austin. There, he served as the Comptroller's chief legal officer and supervisor of nearly 50 agency attorneys. Before joining the Comptroller's Office in December 1999, Mr. Patti was in private practice as a civil trial attorney since 1991. Mr. Patti holds a Doctor of Jurisprudence degree from the University of Houston Law Center (1991), and a Bachelor of Business Administration degree from the University of Texas at Austin (1988). Richard spoke with USLAW Magazine *to share his decades-long experience with USLAW and how he and Live Nation benefit from the NETWORK.*



COORDINATING OUTSIDE COUNSEL

I've been with Live Nation Entertainment since its inception (2005) and before that, its predecessor company, Clear Channel Entertainment (CCE); I started with CCE in 2002 as head of litigation and still serve in that role today with Live Nation. Our operations are international, but my focus has primarily been on the North American piece of that footprint since we get a high volume of civil litigation in most every jurisdiction in North America, including the provinces of Canada. When I started with the company and started to get my arms around our docket of litigation matters, I was tasked with streamlining operations and coordinating our use of outside counsel and the standards that we expected our attorneys to follow across the various jurisdictions. I took a fresh look at all local operations – from Buffalo to Tampa to Oakland and everywhere in between. I did market by market research – not just on our then-engaged defense counsel but also to see who were the best and brightest in the area where we needed coverage.

THE BEST AND THE BRIGHTEST

I started developing relationships with different firms in different cities around the continent where we got most of our lawsuits. Around 2005-06, Bert Randall of Franklin & Prokopik in Baltimore told me about his firm's association with USLAW. He started talking to me about the network and its benefits. I liked the idea. I had been in private practice in the 1990s – mostly at a firm with a dozen attorneys doing civil litigation – so I was sympathetic to what Bert was telling me about the benefits and goals of the network. He sent me information on USLAW, and as I started to check online and review the member firms, it turned out that many of the firms that I had identified from my earlier research as being the best and brightest in markets around the country were in fact USLAW member firms in those given markets! I knew then and there that this has to be a network that does a good job of quality control and in which I and my company could have confidence in the counsel and representation provided.

RELATIONSHIP BUILDING

Conference events are very helpful not only to connect with the firms and attorneys with whom I've already developed relationships, but additionally to get an idea of counsel who are available in places where I haven't yet gone or had a need to identify new counsel in that area. Our company's needs change – business is fluid – and USLAW events help me reconnect with existing counsel and establish new relationships that might be able to serve our business needs if and when matters arise in a particular area.

EXCELLENT LITIGATORS

In one particular market, we had a trial (and our company rarely goes to trial), and we received an unfavorable verdict … while working with a non-USLAW member firm. It was at that point that I looked for options to get new counsel on the case for the appeal process. I researched USLAW NETWORK and talked with other in-house counsel whom I knew used USLAW and asked for thoughts on member firms in that region. I identified and changed counsel to a USLAW member firm. Since I needed to participate in person in settlement negotiations in order to help turn around the direction of case, I had the opportunity to observe the new firm and its attorneys. We ended up getting out of the bad verdict and having our amount of liability significantly reduced through a settlement on appeal, which in turn was a success for our management. That was a significant success for us. We look for people who are excellent litigators but also who are exemplary with client communication, billing practices and other key areas that are appealing to us as a corporate client. This success reflected well not only on the firm but on USLAW in general for us.

SAFETY IS PARAMOUNT

While I have legal colleagues devoted to privacy risk, security, and more, and we have a department focused on a multitude of legal ramifications associated with our business, what keeps me and most all of Live Nation up at night is our collective work to ensuring that everyone has a good time and is safe at every single one of our shows. We are committed to doing everything we can to try and protect them during every show that we promote or hold in our venues.

LOCAL PRESENCE

Sitting at Live Nation HQ, I can't be everywhere, and I rely on the expertise and local presence of our firms as they get to know our operations in their area, as they see what's happening in a particular legal matter or case, and as they get to know our personnel. The firms give me insight into what they are seeing. They let us know what they see out there locally in the marketplace – what's being done right, what concerns them, and how what we do compares to what they see elsewhere in like operations and with other clients. Because of how USLAW vets and chooses its members, I have confidence that USLAW NETWORK attorneys will have that needed expertise and are willing to not just prepare a court paper, but more practically speak up when they see things as our legal counsel that we should know back at HQ that would be helpful to our operations and managing legal risk.

USLAW IS....

A network of law firms – U.S. and international – that have been chosen for providing expertise and competence in a set of areas that can serve businesses of all sizes and in all locations for their legal needs. USLAW gives those clients confidence that there has been quality control in the selection of member firms, there is accountability among the network, and there is an assurance in finding counsel to represent and advise us in particular areas as they come up.

BACKGROUND CHECK BACKLASH

EMPLOYERS SHOULD TAKE NOTE OF RECENT FCRA CLASS ACTION LITIGATION

Christopher K. Loftus Simmons Perrine Moyer Bergman PLC

The rise of consumer class action litigation has grown over the past several years with plaintiffs' counsel finding a new home in the Fair Credit Reporting Act ("FCRA"). While the FCRA's requirements can be simple and straightforward when properly followed, employers are finding themselves trapped in class action litigation simply because they overlooked the FCRA's requirements or cut corners in order to save on time and cost. With the number of FCRA-related cases on the rise, employers should conduct a review of their policies and procedures to ensure they are in compliance.

The FCRA governs a third party's use of "consumer reports." While a consumer report is traditionally thought of as a person's credit report received from a credit reporting agency, the definition of a consumer report is much broader under the FCRA and includes any information compiled in regard to a consumer's personal history (e.g., investigative reports). Under the FCRA, employers are allowed to obtain a consumer report provided it is for an "employment purpose." An "employment purpose" is not limited to the hiring process, but can also include post-hiring employment decisions (e.g., promotions). As employers have traditionally found, consumer reports provide an important tool in making hiring and management decisions.

While some employers use the more thorough investigative report in reviewing an applicant's candidacy, a credit report is more readily available to the employer and cost effective. The credit report supplements the consumer's resume, employment application, and employment file, and provides the employer with an unbiased review of the consumer's past. The report provides insight into whether the consumer has filed for bankruptcy, has any delinquent accounts, or has any judgments or tax liens entered against him or her. While the consumer's credit score is not disclosed to the employer, the information that is provided is valuable to those employers seeking to fill positions that require good credit. Traditionally, credit reports are used when an employer is filling a position that handles a significant amount of cash (e.g. bookkeeper) or for positions that require a certain security clearance (e.g. TSA agent). With the use of credit reports, employers are better able to mitigate the risk of loss by broadening their insight into an applicant or employee.

Employers have three key areas for which they must ensure compliance: notice and disclosure to the consumer; authorization from the consumer; and adverse action notices.

First, before procuring the report, the employer must notify the consumer in writing that it may procure the report for employment purposes. Such notice must be "clear and conspicuous" and be a standalone document. Employers have found themselves in litigation when they have combined the disclosure with other information, such as state-required disclosures for consumer reports and other portions of the employer's job application. In combining the disclosure with other parts of the job application, the disclosure is no longer a standalone document, and thus results in an FCRA violation. Employers should review their FCRA disclosure form to ensure that it is a standalone document and free of extraneous information.

Second, in addition to notifying the consumer, the employer must obtain the consumer's authorization. Such approval must be in writing; however, it can be combined with the notice and disclosure (i.e. the notice will remain a standalone document even if it contains a signature line for the consumer). Consumers have the right to refuse authorization to the employer. In such instances, the FTC has issued an advisory opinion stating the employer is not prohibited under the FCRA from taking an adverse action against the employee or applicant. Nonetheless, the employer should consult with their legal counsel prior to taking such action to ensure compliance with other state or federal employment statutes.

Third, if, after reviewing the consumer report, the employer intends to take an adverse action against the consumer, the employer must deliver a "pre-adverse action" notice to the consumer. An adverse action is defined as a "denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." For example, if an employer denies a current employee a promotion based in part upon information contained in the employee's credit report, the employer must provide the employee with a pre-adverse action notice advising the consumer that the information within the report may cause the employer to take an adverse action against the consumer based upon, at least in part, the information contained within the report. The pre-adverse action notice must include a copy of the report along with a copy of the FCRA "Summary of Rights." While the title is self-explanatory, the "Summary of Rights" notice provides the consumer with a summary of the consumer's rights under the FCRA including, most importantly, the consumer's right to dispute incomplete or inaccurate information and the procedure a consumer reporting agency must follow in order to comply with the FCRA. A copy of the "Summary of Rights" notice is available through the CFPB's website.[1] The pre-adverse action must be provided to the consumer before a final decision is made and must allow the consumer "sufficient amount of time to respond" after receiving the report. Traditionally, employers wait five business days before taking the adverse action. However, as the FCRA does not specify a "sufficient amount of time," employers should consider waiting even longer in order to further insulate themselves from potential FCRA litigation.

If, after a sufficient amount of time has elapsed, the employer moves forward in taking the adverse action, the employer must provide the consumer with an adverse action notice within three business days of taking the action. The adverse action notice must include the following: a statement that an adverse action has been taken in whole or in part based upon the consumer report received from the credit reporting agency ("CRA"); the name, address and telephone number of the CRA that furnished the report; a statement that the CRA did not make the decision to take the adverse action and is unable to provide the consumer with specific reasons as to why the adverse action was taken; and a statement that the consumer may request a free copy of a report and may dispute with the CRA the accuracy of completeness of any information within the report.

If an employer fails to comply with the requirements of the FCRA, a consumer does have a right to bring a private cause of action, and the damages could be substantial if the action is brought as a class action. The FCRA provides that an employer can be held liable for willful or negligent noncompliance. Under the statute, an employer who is found in willful noncompliance of the FCRA is liable for the consumer's actual damages in an amount of at least $100 but no more than $1,000, attorney's fees, and, most importantly, punitive damages. If an employer is only found to be negligent, the employer is still required to pay the consumer's actual damages and attorney's fees; however, it is not liable for punitive damages. Unlike willful violations, the FCRA does not establish minimum and maximum amounts for a consumer's actual damages. The consumer must establish what damages, if any, they incurred as a result of the violator's actions. Clearly, when a case can be made, plaintiffs' counsel are eager to file suit for an employer's willful violation of the FCRA, in order to tap into the treasure trove made available through statutory and punitive damages.

In order to be found in "willful" violation of the FCRA, the U.S. Supreme Court in *Safeco Ins. v. Burr* held that the violator must have acted with an intentional or reckless disregard of its statutory duty. The defendant in *Safeco* had adopted procedures relating to its adverse action notices, which were based upon the defendant's erroneous interpretation of the FCRA. The Supreme Court held the defendant's interpretation of the statute was not "objectively unreasonable" and therefore fell short of reckless disregard. District courts have adopted this "objectively unreasonable" standard in evaluating whether an employer's actions comply with the FCRA. For example, district courts have analyzed alleged violations of the requirement that the notice and authorization be set forth in a standalone document. A New York district court denied an employer's motion to dismiss a willfulness claim after finding that the employer's inclusion of a liability waiver within the notice was an "objectively unreasonable" interpretation of the FCRA. Conversely, in another opinion addressing the standalone requirement, a Minnesota district court found the employer's inclusion of a state-required disclosure on the notice was an objectively reasonable interpretation of the FCRA. Accordingly, the court granted the employer's motion to dismiss.

To summarize these recent developments in FCRA litigation, although an employer can certainly hang its hat on the "objectively reasonable" standard if it finds itself in litigation, the more cautious approach would be to ensure its policies and procedures comply with the FCRA under a strict interpretation of the statute.

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[1] Available at: http://www.consumerfinance.gov/learnmore

YOUR COMMUNICATIONS AREN'T PRIVILEGED AFTER ALL

Alex E. Gude and Meaghan K. Haller Bingham Greenebaum Doll LLP

DISCOVERY IS EXPENSIVE

Some estimates place the annual cost of the discovery phase in litigation at more than $42 billion a year. Many large companies report annual discovery costs of over $2 million. A large portion of such discovery costs are attributable to discovery disputes – for example, over whether documents or testimony should be provided to an opposing party despite the assertion of the attorney-client privilege. Many discovery disputes concerning claims of privilege can be avoided, however, by a clearer understanding of the times when it is, and more importantly, is not, appropriate to assert the privilege. Similarly, a better understanding of the attorney-client privilege will help you, and your attorney, win a discovery fight should you be forced into one.

BASICS OF ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege exists to enable a client to give complete and honest information to her attorney so the attorney can be fully advised in providing advice to the client. To invoke the privilege, one must establish (1) the existence of an attorney-client relationship; and (2) that a confidential communication was involved. Stated differently, one must establish that the communication occurred in the course of an effort to obtain legal advice or aid, on the subject of the client's rights or liabilities, from a professional legal advisor.

WHAT THE ATTORNEY-CLIENT PRIVILEGE IS NOT

Attorneys and clients alike often make broad, blanket claims of privilege, in an attempt to protect information they do not want disclosed, to gain an upper hand in litigation, or to simply save time and attempt to cut costs in producing documents and creating a privilege log. However, not every communication between an attorney and client is a confidential communication entitled to protection from disclosure. Rather, the attorney-client privilege is often strictly confined to its narrowest possible limits by courts, which often conclude that communications are privileged only if the statements do in fact reveal, directly or indirectly, the *substance* of a confidential communication by a client or the *legal advice* provided by the attorney.

Understanding the breadth of the privilege requires an understanding of what is not privileged. For example, Courts have concluded that the following are not protected by the attorney-client privilege:

- the underlying facts relevant to a dispute, even if relayed in the course of a communication with counsel;
- the subjects discussed with counsel;
- communications made by an agent of the client to the attorney concerning the client's business;
- communications from attorney to the client relating the date, place, and time of a court appearance or deposition;
- communications from attorney to the client relaying a court ruling, filing of a pleading, or discovery responses or requests;
- communications regarding attorneys' fees and a client's identity; and
- communications between an attorney and a third party at a client's request.

Attorneys often wrongly assert the attorney-client privilege to prevent the disclosure of information and communications cov-

ered by these topics. For example, in depositions, attorneys often ask deponents what facts they discussed with their attorneys in deciding to take a particular action. In many cases, this kind of question draws an objection and instruction not to answer the question on the basis of the attorney-client privilege. It is likely, however, the privilege would not apply to a question such as this because it asks for facts, not communications.

Likewise, parties often serve what are frequently referred to as "contention interrogatories," which ask for all the facts supporting a party's particular claim or defense. For example, a serving party may seek all the facts and supporting basis for the responding party's claim that a complaint is barred by waiver. In response, many attorneys object and indicate that the interrogatory seeks information protected by the attorney-client privilege when in fact it does not.

To keep discovery costs low, parties must avoid such sweeping and overbroad privilege objections. Making such objections puts the client at risk of being the subject of a discovery dispute and incurring additional fees, including potentially having to pay the attorneys' fees of the opposing party who obtains a court order invalidating a claim of privilege. Similarly, it is important that clients understand that information in the categories addressed above is not protected from disclosure. This sets proper expectations, and avoids surprises in litigation when clients are required to produce documents or provide testimony they believed would always be protected by the privilege.

TO WHOM DOES THE PRIVILEGE APPLY?

In order to determine whether or not a communication is privileged, one not only needs to analyze the content of the communication but also the parties involved in the communication. In the era of emails and text messages, privileged communications are often forwarded to colleagues, subordinates, or other individuals outside the scope of the attorney-client relationship in an organization. Such actions may waive the privilege.

The scope of the attorney-client privilege inside an organization varies somewhat from state to state, but typically if (1) the communication was made for the purposes of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who need to know its contents, the communication will be privileged and therefore protected from disclosure to opposing parties.

Issues concerning the scope of the attorney-client privilege within an organization often arise in the context of communications with corporate or in-house counsel. Communications with these attorneys must be analyzed carefully to determine if the reason for the communication was to seek legal advice or simply to keep counsel up to date on a developing matter or business issue, for example. Courts also typically require that the matters discussed with corporate counsel fall within the compass of the employees' corporate duties. Likewise, many corporate attorneys wear more than one hat – engaging in some attorney work and some non-attorney work. Communications with individuals who have dual roles are rarely considered privileged because the prerequisites necessary to form an attorney-client relationship between an employee and corporate counsel are typically lacking.

Maintenance of the privilege within an organization is further complicated by the fact that the presence of a third party to a communication often waives the privilege. For example, the presence of an independent contractor can invalidate a claim for privilege. However, some courts have sustained privilege claims even when a third party is present or becomes a party to the communication, if that third party's presence is necessary for the client to obtain informed legal advice. Under such circumstances, courts are increasingly likely to uphold the privilege if the party seeking to invoke it can justify the need for the third party on the communication.

CREATING A PROPER PRIVILEGE LOG

Once privileged documents have been properly identified, a privilege log must be created. The cost incurred in creating a privilege log in complex litigation is often substantial. Despite the cost, it is imperative for companies to take this obligation seriously – failure to create a proper privilege log at the outset will only lead to costs multiplying as attorneys review for a second, third, fourth, or fifth time the same documents and attempt to defend their claims of privilege.

A valid privilege log must assert privilege claims on a document-by-document or conversation-by-conversation basis. The log should also contain the grounds for claiming privilege as well as the date, author, recipients, and type of document. Additionally, the log must contain a description of the communication with counsel sufficient to enable opposing counsel and the court to determine that the communication is privileged without actually revealing the confidential and privileged information. It is this last requirement that creates the largest landmine for parties.

Many courts have held that it is insufficient to describe a communication simply as "communication between attorney and client for the purposes of receiving or giving advice." Such descriptions are provided routinely, however. This description is invalid because it tells the reader nothing about the underlying conversation. Vague descriptions invite further disputes, and therefore, increase litigation costs. Detailed descriptions indicating the subject matter discussed avoid such disputes, reduce costs, and accordingly should be encouraged.

CONCLUSION

Attorneys and clients must avoid overbroad assertions of privilege. Narrowly tailoring privilege objections to protect against the disclosure of the substance of privileged communications avoids unnecessary discovery fights, promotes cooperation and resolution of lawsuits, and most importantly, decreases the costs of litigation. Further, recognition of improper privilege claims enables attorneys to readily defeat baseless claims of privilege, which can serve to increase leverage and efficiency in litigation.

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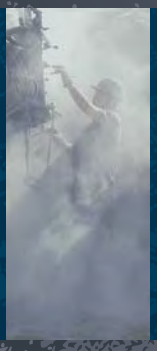

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WHERE IS THERE COVERAGE FOR THE EMERGING TRANSGENDERED CLAIM?

Amy Neathery and Jacqueline McCormick Pierce Couch Hendrickson Baysinger & Green, L.L.P.

We knew the claims were coming, and for months (if not years) we have prepared our clients and insureds for how to accommodate transgendered employees and customers. With the very public transformation of Caitlyn Jenner, the controversy over bathroom designations, and the outcry over the Orlando nightclub shooting, it is clear that transgendered persons are no longer hiding behind themselves.

In 2011, the National Transgender Discrimination Study found that 41% of transgendered individuals attempted suicide, compared with 1.6% for the general population. The Study is currently being repeated in the hopes of finding more acceptance and less discrimination among transgendered persons. In the claims world, we can expect that transgendered individuals are no longer going to hide and will assert their claims when they feel their rights are trampled. Similarly, the bathroom controversy demonstrates there is still significant prejudice towards the transgendered person. With this controversy, non-transgendered persons may bring claims if they feel violated or non-transgendered persons may bring harm to a transgendered person, creating liability for our clients.

There are generally four types of policies under which one may try to assert a claim involving a transgendered person: Commercial General Liability ("CGL"), Employers Professional Liability Insurance ("EPLI"), Professional Liability, and Health Insurance. However, before examining the

coverage types, it is important to understand how the law defines a transgendered person and what protections exist.

The Americans with Disabilities Act ("ADA") explicitly excludes transgendered as a disability, even though the American Psychiatric Association recognizes gender identity disorders as an actual mental disorder. However, the Affordable Care Act ("ACA") does prohibit transgendered individuals from being denied benefits or subject to discrimination if any part of a heath program or activity is receiving federal financial assistance. The differences in these Acts reflect the emerging trend among law makers to protect transgendered individuals and an awareness of transgendered individuals that did not exist 20 years ago. Even the Military just announced the open acceptance of transgendered persons into the armed forces, something unheard of during the "don't ask, don't tell" era.

Although, historically, courts have varied as to whether a transgendered person is a member of a protected class, the trend, particularly following the 2013 United States Supreme Court case of *U.S. v Windsor* is to categorize, label, define, and evaluate discrimination against a transgendered person in the same manner as discrimination against a homosexual person. The logic is that the four factors used by the Court in Windsor to identify a homosexual person as being entitled to protection (i.e., history of persecution, sexual orientation has no relation to ability to contribute to society, part of a discernible group, and the group remains politically weakened) also apply to a transgendered person.

Similarly, most jurisdictions are accepting transgendered discrimination as "sex" discrimination, which encompasses (1) the biological differences between men and women and (2) gender discrimination, defined as discrimination based on a failure to conform to stereotypical gender norms. To the extent there is still contrary legal authority, it is doubtful it will remain controlling, or even persuasive, much longer.

COMMERCIAL GENERAL LIABILITY (CGL)

Claims falling under CGL policies, at least at this stage, are largely limited to a few situations. One such example is when a transgendered customer (e.g., shopper at a retail store) is subjected to discrimination by employees while trying to use the public accommodations and suffers an injury because of the treatment and/or claims the employees negligently denied him the advantages and privileges of the facility solely because of his transsexuality. When Toys R Us employees discriminated against a transgendered shopper, the result was a verdict for $64,519.

The other example will likely involve the controversial bathroom policies and a claim by a customer of harm associated with sharing a bathroom with a transgendered or transitioning individual. While many of the harms that may be alleged (e.g., assault, battery, rape) may be excluded as intentional torts, the claim against the insurer will likely be negligence in ensuring that all bathroom users were kept sufficiently safe (similar to a claim that an insured was negligent by not having a security guard or enough lighting in the parking lot when a customer is assaulted on the way to his car).

It is expected that as transgendered persons become more accepted, these claims will subside. However, think back to any number of decades when there was a rise in claims for discrimination against African Americans, homosexuals, or even, at least for a few years, Muslims. These claims are not expected to be a long-term trend, but underwriters and claims adjusters should be prepared for them for at least the next five to 10 years.

EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI)

The EPLI policy is going to be the most affected by transgendered claims. A transgendered individual will be able to sue employers for discrimination or retaliation in the same vein as racial minorities, pregnant women, or elderly employees. Most of the claims are (and will) arise out of complaints that the employer disallowed a transitioning employee to use the bathroom of his/her choosing, refusing to call the employee by his/her preferred name or gender designation (e.g., he/she or Mr./Ms.), allowing for a hostile work environment, failing to hire or promote, or forcing the transgendered employee to conform to a particular dress code (e.g., refusing to allow a male transitioning to female to wear earrings or a dress when company policy does not prevent women from wearing dresses). Underwriters should also be considering the potential for these types of claims when setting premiums, particularly until there is local, settled law guiding employers.

PROFESSIONAL LIABILITY

This type of policy is least likely to be implicated. However, there are cases, particularly involving medical professionals, where a transgendered person sued for failure to treat solely because the patient was transgendered. There could also be claims of malpractice for treating without understanding unique medical issues (e.g., hormones) of the transgendered patient. It is worth noting that the American Medical Association (and other professional organizations) has rules to prevent discrimination, including as it relates to gender identity, for any medical professional that opens one's practice to the public. While, at this point, the known cases are in the medical field, similar claims against any professional open to the public but refusing service to transgendered clients could emerge.

HEALTH INSURANCE POLICY

These policies are primarily governed by policy language and the plan documents. However, there is a New York case against Aetna in which the court found that gender reassignment surgery was not "cosmetic surgery" and the surgical expenses were covered under the policy. If they have not done so already, health insurers need to carefully examine their policy language to determine whether gender reassignment surgery is intended to be covered. Even if the policy language is clear, carriers should expect claims alleging the language is discriminatory for not addressing a diagnosable medical condition.

Hopefully, recent efforts to prepare clients and insureds for emerging transgendered issues will pay off in reduced claims. However, the likely reality is that there will be a surge in claims involving transgendered discrimination which will require the attention of counsel, claims handlers, and underwriters.

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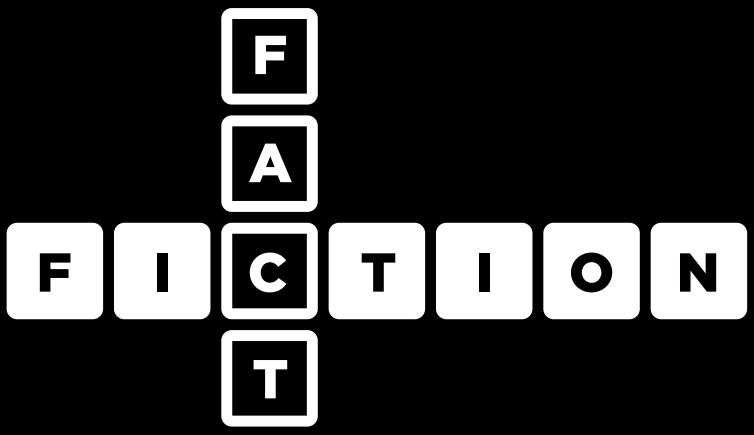

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Stephanie Latona is the claims manager for Kirkland's, Inc., a specialty retailer of home décor and gifts. She is a Certified Insurance Service Representative, licensed in Property and Casualty Insurance and currently pursuing a Certified Risk Manager designation. Stephanie's responsibilities at Kirkland's, Inc. include working closely with the TPA to resolve all general liability and worker's compensation claims, assisting legal counsel to research worker's compensation and general liability cases, assisting with the renewal of the P & C insurance program, assist with developing safety programs to decrease frequency of claims, managing property damage recovery, OSHA compliance and auditing process, generating reports and tracking of claim issues. Stephanie recently spoke with USLAW Magazine *to share her experiences with USLAW and how she and her business benefit from the NETWORK.*

AND IN THE BEGINNING...

My first introduction to USLAW came through Tom Thornton of Carr Allison about 15 years ago while I was working at O'Charley's. At that time Tommy was working a matter for us – and while I really didn't know too much about USLAW at the time, Tommy was introducing me to several attorneys around the country. He was connecting me with attorneys from USLAW NETWORK in jurisdictions where I needed local counsel. Fast forward to today, the friendships and business relationships I have built over the years with so many attorneys and firms throughout the NETWORK help me in my role at Kirkland's.

TRUST LEADS THE WAY

It's all about a friendship. That's what USLAW is to me. I never feel pressured (to hire someone). Unlike at so many other industry events, USLAW events give me the opportunity to have the important one-on-one time to really speak with someone. I get to create relationships.

It's a trust. When you have a friendship with someone you are going to trust that person; if I trust someone as a friend I'll trust them as a business partner as well. I see that spirit of partnership extend throughout the NETWORK. When Tommy (Thornton) puts me in touch with someone at Carr Allison, for example, he is copied on everything to make sure I am taken care of. Whether it is he who is representing my file, someone else in his firm or another USLAW member firm taking care of my matter, I am confident that they are looking out for my and my company's best interest. That is the trust I have in the NETWORK and trust in the people.

WHERE WE NEED THEM TO BE

USLAW offers coverage all across the country and that's probably one of the biggest bonuses for us since we are in 36 states.

TELL ME WHAT I DON'T WANT TO HEAR

For us, success can mean different things in different cases. Obviously a trial win is a success, but we're not always going to take something to trial. A reasonable settlement can be a win. There are so many ways to win. I feel like USLAW firms are truly looking out for our best interest. I always tell them to tell me things I may not want to hear – to be honest with me – and we'll determine the best plan of action. For me, when someone I'm working with is honest and even if they tell me what they know I don't want to hear – that is a win as well. That's what builds that trust. That's a win to me.

IT'S "NOT IF, IT'S WHEN"

Cyber certainly is top of mind. Headlines everyday reinforce that. Everyone is saying it's "not if, it's when" you're going to have a cyber breach so that definitely keeps me up at night. The education that USLAW provides, however, has been important and helpful as I get to hear some of the latest issues from top industry and legal professionals who share resources and risk management steps to consider. Of course, they also just reinforce the "it's not if, it's when" view, but the education is key to me.

CONNECTIONS COUNT

There is nothing like the Women's Connection. I'm not about *women's power*, but it's wonderful to meet so many strong, intelligent, accomplished women who work hard, and who succeed and excel in their companies, firms and industries. Not that I am eager for some form of litigation, but having made many important personal connections through USLAW's Women's Connection, I am confident in and look forward to being able to reach out to some of these amazing women should business needs arise.

A while back, my husband and I met Kevin Gardner – of Connell Foley in New Jersey – and his wife, Lisa, at a USLAW event. We spent several hours with them, getting to know them and learning more about Kevin's firm and practice. That's the kind of important connection I am able to meet and make with USLAW that helps me and my company. I really enjoyed getting to know Kevin and I hoped that at some point I would be able to utilize his firm. And I did; I just recently assigned a case to the firm.

WHY IS USLAW GOOD FOR BUSINESS?

USLAW is a terrific go-to resource for me. If I don't have a relationship already built with a firm in a specific jurisdiction in the NETWORK, I know I can reach out to anyone I'm already working with at USLAW and ask for a recommendation and referral. These are attorneys who know our business and they know who can help me. I have confidence in how they serve as a resource for me. While the USLAW Member Directory is my bible for USLAW, I still always reach out to someone I'm currently working with at USLAW – often times Tommy Thornton is that person – and he'll make that introduction for me. That is a great benefit.

USLAW IS....

USLAW is a network of law firms, a one-stop shop. Whatever form of litigation I have I can find who and what I need. It's all about relationship-building and when the time arises when you are going to need that business partnership I feel comfortable reaching out to anyone within the USLAW NETWORK.

ACCIDENT INVESTIGATION: AVOIDING THE CREATION OF PLAINTIFF'S EXHIBIT "A"

J. Michael Kunsch Sweeney & Sheehan, P.C.

Timely documentation of an incident and conducting an initial investigation into the surrounding circumstances are critical first steps in managing risk. When done correctly, such assessments preserve evidence, lock in the plaintiff's version of the facts, identify witnesses and documents, and serve as a road map for defending potential claims. Without proper controls in place, however, documents prepared during the investigation may be discoverable and used by the plaintiff as powerful evidence of liability and undermine the defense. Planning ahead for such investigations minimizes the danger of that occurring.

Understanding how to gather and protect information learned during an investigation requires an understanding of the types of data gathered during the process. Generally, the two classes of information gathered during an investigation are (1) information from clients and their employees, and (2) information gathered from non-clients. Safeguarding this information from discovery is possible through either the attorney-client privilege or the work product doctrine, which occasionally overlap but have differing purposes and requirements for preserving the privilege. In light of the policy favoring liberal discovery, protections are easily waived.

In the federal courts, the scope of discovery is set forth in Federal Rule of Civil Procedure 26(b)(1):

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs the likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Although the recent amendments to the rule mandate that discovery must be proportional to the case, the first wall of defense to discovery of investigative materials is privilege. Protection of information is typically sought under the protection of the attorney-client privilege, and information from non-clients may be protected by the work product doctrine.

THE ATTORNEY-CLIENT PRIVILEGE

A full exploration of the attorney-client privilege would require a separate and lengthy article. For purposes of this discussion, four essential elements are typically required in order to fall under the protection of the privilege: (1) the person who sought or received the legal advice is or sought to become a client; (2) the person to whom the communication was made was an attorney or a subordinate acting on the attorney's behalf; (3) the communication related to the securing or rendering of legal advice, and (4) the communication was confiden-

tial. Determining who constitutes a client requires an assessment of the rules of your particular jurisdiction.

In general terms, the privilege protects the entirety of communications from clients made for the purpose of obtaining legal advice. Its purpose is to promote adherence to law by encouraging clients to seek legal advice and to foster full and frank discussions between attorney and client. Therefore, it may protect internal investigations of specific incidents but cannot shield generic internal investigations required by standing corporate policies. In addition, merely sending an investigative report to an attorney does not cause it to become privileged.

In order to preserve the privilege, the attorney and client should ensure the following: (1) including a statement in the client's policies and procedures that all internal investigations are to be conducted for the purpose of obtaining legal advice; (2) requiring an attorney (in-house or external) to initiate and direct every internal investigation - work can be done by non-attorneys provided an attorney is directing and overseeing work; (3) documenting in writing that the investigation is being done for the purpose of obtaining legal advice and communicating this to witnesses and non-attorneys assisting the directing attorney, and (4) marking all written materials "Privileged and Confidential" and restricting the distribution of investigative materials to persons within the scope of the privilege.

THE WORK PRODUCT DOCTRINE

The work product doctrine provides a vehicle to conduct an investigation in anticipation of litigation and protect the results of that investigation from disclosure. Although information from clients may also be protected from discovery pursuant to the work product doctrine, it is most often used to shield information learned from non-clients and reports of investigation to the extent they contain summaries and evaluations of claims, witnesses and documents or other defense or trial preparation.

The basis for claiming privilege under the work product doctrine in the Federal Rules of Civil Procedure is set forth in Rule 26(b)(3) as follows:

A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
   (i) they are otherwise discoverable under Rule 26(b)(1); and
   (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and under Rule 37(a)(5) applies to the award of expenses. A previous statement is either:
   (i) a written statement that the person has signed or otherwise adopted or approved; or
   (ii) a contemporaneous stenographic, mechanical, electrical, or other recording – or a transcription of it – that recites substantially verbatim the person's oral statement.

The burden to establish that materials fall within its protections falls on the party asserting same. While jurisdictions apply different standards to determining the scope of this privilege, in general the initial requirement is that the document(s) must have been prepared in anticipation of litigation and not simply in the ordinary course of business. This does not require litigation to be certain, but the document must be prepared with an eye toward specific litigation.

Unlike the absolute protection from disclosure offered by the attorney-client privilege, however, the work product protections may be limited. For example, the privilege may be pierced by the opposition demonstrating a substantial need for the document and undue difficulty obtaining the information independently. In addition, the privilege does not typically apply to statements or documents prepared for routine business purposes. In many jurisdictions, this would include routine accident reports. However, if discovery is mandated, the mental impressions, conclusions, opinions and legal theories of the party and its representatives and attorneys remain protected.

MINIMIZING THE RISK OF DISCOVERY

In light of the uncertainty regarding discoverability of investigative materials, care must be taken in undertaking such investigations with an eye toward the possibility that documents generated may be produced to the opposition. Most businesses, for example, have procedures in place for preparing accident reports when incidents are reported. Consideration must be given to which employees respond to the report and who are authorized to speak for the business and prepare the report. In creating the report form, it should be limited to factual information and statements and avoid seeking the employee to analyze the facts and determine cause or assign fault. This minimizes the risk of an employee admitting liability before a full investigation is complete.

If further fact gathering and analysis is required, any such investigation should be initiated and directed by an attorney. Reports should only be prepared at the attorney's direction, or by the attorney. All documents should be designated "confidential," with applicable privileges specifically noted, and distribution should be limited to persons included within the privilege to avoid a waiver claim. Once litigation is commenced and discovery is sought, any investigative documents to be withheld must be identified in a timely privilege log pursuant to applicable rules.

With an understanding of the rules regarding privilege and adherence to these best practices, your opposition will have to find its own best exhibit and won't be able to use your investigation against you.

J. Michael Kunsch is a shareholder in the Philadelphia office of Sweeney & Sheehan. He concentrates his practice in the areas of product liability defense and general litigation, including the defense of liability matters for retailers, concert promoters, entertainment venues and movie theaters. He is AV-Preeminent rated and has been recognized from 2011-2016 as a Pennsylvania Super Lawyer®. He can be reached at michael.kunsch@sweeneyfirm.com.

EUROPE AT THE CROSSROADS

Edward Craft Wedlake Bell LLP

In June 2016 a thin majority of United Kingdom (UK) voters expressed that the UK should leave the European Union (EU). The Brexit vote was non-binding and the effect of this is now being worked through.

THE EUROPEAN UNION: A QUICK SUMMARY

The EU is a treaty-based organization of 28 European member states which comprises the largest single market area in the world. Nineteen member states have also taken a further step towards economic integration by adopting a single currency, the euro.

The EU was developed in the aftermath of the Second World War, deploying economic integration to deliver political and cultural change, rendering another destructive war in Western Europe not only unthinkable, but impossible. It all started with a 1951 treaty between France, West Germany, the Netherlands, Belgium, Luxembourg and Italy to integrate their coal and steel industries, the raw materials of early 20th century warfare. Over time, this project developed and now embraces 28 member states and the treaties have been expanded to provide for much broader EU competencies.

Much EU-derived law also applies to the wider European Economic Area (EEA).

One early proponent of European structural integration was the half-American British statesman, Sir Winston Churchill. In his famous speech at the University of Zürich in 1946 he challenged us to "build a kind of United States of Europe" "to make all Europe ... free and ... happy," describing it as "a structure under which it can dwell in peace, in safety and in freedom." The principal architects of realizing the vision shared by many dreamers and thinkers in Europe in the 1950s were two French nationals, the economist Jean Monnet and the foreign minister Robert Schuman.

The free market upon which the EU is founded comprises a customs union with common import/export arrangements from outside of it and a contractual requirement on each member state to allow those in other member states ***the four fundamental freedoms of movement of: goods, services, capital and persons.***

In summary, nothing within the single market must prevent a business established in one member state from establishing operations in another, raising capital from a third and selling to a fourth, drawing employees drawn from each of them. However, the process of harmonization of laws across the member states to realize this remains slow, complex and bureaucratic.

THE REACTION IN THE UK

The immediate response in the UK was political chaos and an implosion of effective government and opposition. However, after the earthquake, a quieter period lies ahead to start to understand what has taken place, what has stood firm and what needs to be done to rebuild relationships within a re-constructed European settlement.

How the situation will play out is a matter of politics more than law. The EU treaties set out a mechanism (known as Article 50 of the Lisbon Treaty) whereby any member state can indicate its intention to leave and, following that, there must be a negotiation of exit arrangements and the terms of a future relationship. It is for the British government to invoke this article and, until that is done and exit arrangements are finalized, the UK remains a full member of the EU with all concomitant rights and obligations. Significantly, the UK will have to continue to implement in full all EU law with no ability to cherry pick.

There remains considerable speculation about exactly how and when formal exit negotiations will commence, but Theresa May, the new British Prime Minister, has already said that she does not expect to serve notice to commence formal exit negotiations until 2017. Once that happens, detailed and tense negotiations will follow and, in parallel, others will be swiftly contemplating a new reality with proposals such as the introduction to Congress of the United Kingdom Trade Continuity Act just one week after the UK's leave vote.

THE REFERENDUM COULD BE TREATED AS LITTLE OTHER THAN AN OPINION POLL

The referendum result itself has no legal effect. It is only advisory in nature. The UK continues to be a member of the EU and

THE KEY EUROPEAN INSTITUTIONS

The competencies of the EU are limited by treaty. The treaty structure of the EU has created a number of institutions, the key ones are summarized below.

EUROPEAN COMMISSION

- The civil service of the EU, which has an ability to propose law, but the making of law is then negotiated and made by the Council of Ministers and the European Parliament.
- 28 commissioners under President Jean-Claude Juncker

COUNCIL OF MINISTERS

- The forum in which the ministers of each member state meets to determine which initiatives of the Commission will be pursued and other matters of policy.
- Each member state chairs the Council of Ministers on a rotating six-month basis.
- 2016: the Netherlands, Slovakia
- 2017: Malta, the UK
- 28 ministers plus one president (Donald Tusk)

EUROPEAN PARLIAMENT

- Directly elected parliament of 751 members from across all member states, involved in the development of most EU law.

COURT OF JUSTICE OF THE EUROPEAN UNION

- The forum in which the primacy of EU law is upheld.

EUROPEAN CENTRAL BANK

- The central bank for the eurozone (19 of 28 member states), which has the common currency of the euro.

will remain so until the end of exit negotiations. The vote has no legal effect, but it clearly influences the actions of politicians.

The UK remains bound by the EU Treaties and subject to the jurisdiction of the Court of Justice of the European Union. The European Communities Act 1972, which gives domestic legal effect to the UK's membership of the EU, including giving EU law precedence over UK law in the UK courts, remains in force.

HOW MIGHT INWARD INVESTORS TO EUROPEAN BUSINESSES BE IMPACTED?

For understandable reasons of culture, language, commerce and approach many U.S. and Canadian businesses use the UK as a gateway to the world's largest single market and the wider region. Recent events will have caused understandable concerns and raised questions as to what should be done to ensure business is not unnecessarily interrupted by politics. Many are now commenting that it will become prudent to hedge one's position and establish parallel structures within leading international eurozone jurisdictions such as Ireland, the Netherlands, Germany or France whilst at the same time remaining in the UK, with access to the deep international capital markets of London.

Whatever arrangements are put in place, the nature of the relationship between the UK and the other 27 EU member states has altered very significantly. The vote has given oxygen to those across Europe seeking to roll back the process of integration and internationalization in a number of EU member states, not just the UK.

POTENTIAL CONTRACTUAL ISSUES

The impact of the referendum vote on commercial contracts is yet to be worked through. It may be prudent to consider whether the performance of an obligation under a contract might be frustrated. It is unlikely that the vote is, of itself, sufficient to trigger a material adverse effect clause. Negotiation between governments will determine the eventual landscape and the extent to which the common EU/EEA framework continues to apply to the UK.

On data protection issues, the Privacy Shield is due to be adopted between the EU and the U.S. Following a Brexit, to benefit from such arrangements the UK will need to commit to apply EU standards, in the same way as Switzerland. At the current time, it would be prudent to incorporate contractual assurances from UK counterparties in this regard.

CONTINUED ACCESS TO THE SINGLE MARKET

The fundamental issue which will determine the ultimate direction of travel will be the issue of access to the European single market. Many commentators in Britain have suggested that being out of the EU will allow the UK new flexibility.

However, other member states and economic theorists have been very clear that any access to the single markets can only be on the basis of continued adherence to the four fundamental freedoms upon which it has been built. The logic remains undeniable: a single market can only operate if all enjoy the same rights, obligations and access.

PERCEPTIONS IN RELATION TO MIGRATION

Recent trends in population movement have presented themselves differently in the UK than to many other parts of the EU. The UK has experienced an increase of population resulting from net inflows of people wanting to come to the UK to live and work, both from the EU and elsewhere. Certain other EU countries are dealing with the opposite of this demographic shift with falling populations as many of the brightest and best leave.

Issues of migration became the focus of much of the Brexit debate. Many U.S. commentators believe the U.S. border with Mexico to be "soft"; in the same way, there is a view that the borders of Europe are too porous. It must be appreciated that – unlike most of its European friends and allies, the UK is an island nation. The UK's only land border is with Ireland. That border has almost always been open and the introduction of border controls with Ireland would likely prove to be both difficult and contentious.

Much of continental Europe is part of the Schengen zone (being a treaty arrangement comprising many EU member states, plus Norway, Iceland and Switzerland) which allows unrestricted free movement of all persons across borders once within the zone. For other nationals, a Schengen visa issued by any Schengen state allows access to all. Add instability beyond the borders of the EU and there has developed a perception that too many people can enter the UK and that responsibility for this lies with the EU.

The reality is rather different. The UK has secure borders, a very effective border force and control over both its physical borders and points of entry. The vast majority of people coming to the UK arrive from the U.S., India and China as a result of decisions of the UK Home Office, nothing to do with the EU. The UK has more job vacancies than persons claiming unemployment benefit but there remains a group within UK society which claims that it is not working and this has fed a perception that population increase is a cause of many of the challenges currently faced by UK society.

Yes, Europe is now at a crossroads. Before any sweeping change takes effect, politicians need to ensure that they are all looking at the same map with a common destination in mind.

TELFA IN EUROPE

Whilst the politicians of Europe seek to navigate their way through uncertain and, indeed, uncharted waters, the law firms within the Trans European Law Firms Alliance (TELFA) and USLAW NETWORK remain equipped, eager and prepared to serve your business into all parts of Europe.

Diversity has long been, and will always remain, a key characteristic of a European continent where a lot is squeezed into a small area. Wherever the politics leads us, Europe will remain the largest single market in the world and a place where international clients cannot fail to be.

A new political, contractual and trading reality will unfold over the coming months and years and the TELFA lawyers already possess all of the skills necessary to support your engagement with this trading area. This diverse set of skills and experience include firms across most EU member states and beyond, both within and beyond the eurozone, Norway and Switzerland (each of which has negotiated arrangements with the EU), Turkey, China and Australia.

Your TELFA partner firms share a common vision, but maintain individual identity and are therefore able to draw upon the best that each has to offer, focusing on quality and client service.

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Edward also wishes to express his thanks to Hugh Kane of Kane Tuohy, USLAW's partner firm in Ireland and a member of TELFA, in the preparation of this article.

TYING ARRANGEMENTS:

DO YOUR PRICING POLICIES PASS MUSTER UNDER THE ANTITRUST LAWS?

Diane R. Hazel Lewis Roca Rothgerber Christie LLP

Businesses commonly offer discounts if customers purchase products or services together. Not only can such discounts be an effective marketing tool, but they also benefit consumers. Nevertheless, tying or linking the purchase of products or services together may in some instances violate federal or state antitrust laws. In 2015, the Sixth Circuit Court of Appeals was the first federal appellate court to apply a cost-based standard in analyzing the legality of such an arrangement in *Collins Inket Corp. v. Eastman Kodak Co.*[1] This opinion is significant because it offers businesses guidance and insight as to when tying the purchase of products or services together may violate the antitrust laws.

OVERVIEW OF TYING ARRANGEMENTS

In antitrust law, a "tying" arrangement is an agreement by a seller to sell one product (the "tying" product) only on the condition that the buyer also purchase a second, different product (the "tied" product). Tying has a sister theory of antitrust liability called "bundling" or bundled discounts. A bundled discount is when a firm sells a package of goods or services for a lower price than it would charge if selling those same goods or services individually. Bundled discounts are ubiquitous and may include season tickets, fast food value meals, and all-in-one home theater systems.[2]

Although seemingly innocent, tying arrangements may attract antitrust scrutiny if they foreclose competitors in the market for the tied product or service. The Supreme Court has found "that the essential characteristic of an *invalid* tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."[3] Similarly, although bundled discounts generally benefit consumers, they also may raise antitrust concerns when used to exclude an equally or more efficient competitor.

CHALLENGES TO TYING ARRANGEMENTS

A party seeking to challenge a tying arrangement involving services may do so under Section 1 of the Sherman Act, 15 U.S.C. § 1, while challenges involving goods may be brought under either Sherman Section 1 or Section 3 of the Clayton Act, 15 U.S.C. § 14.[4] Regardless of the statutory basis for the claim, courts generally apply the same analysis.[5]

Under federal antitrust law, courts apply one of three possible levels of analysis depending on the conduct alleged. For example, certain conduct is considered facially anticompetitive because it is seen as always restricting competition and reducing output (e.g., price fixing). In such cases, courts apply the "*per se*" standard, under which the plaintiff must only prove that the alleged conduct occurred. On the other end of the

spectrum, courts apply a "rule of reason" analysis to conduct that is not facially anticompetitive and may benefit consumers. The rule of reason requires courts to assess whether the challenged conduct restrains competition, which involves defining a relevant product and geographic market and weighing evidence of anticompetitive effects. If the plaintiff meets his burden in showing a likelihood of anticompetitive effects, the defendant may then present procompetitive justifications for the challenged conduct. In some instances, courts have applied a "quick look" standard to conduct that falls between the spectrums.

Although courts originally analyzed tying arrangements under the per se standard, the Supreme Court has backed away from this characterization and is moving the standard towards a rule of reason. The current tying analysis – established by the Supreme Court in *Eastman Kodak Co. v. Image Technical Services, Inc.* – does not have a formal title, but it has been called a presumptive illegality standard or a quasi *per se* rule. Under this standard, a tying arrangement may violate the federal antitrust laws if (1) the tying and tied items are separate and distinct products and services; (2) the availability or purchase of the tying item has been conditioned on the purchase of the tied item; (3) the defendant has appreciable market power in the tying item; and (4) the arrangement affects a substantial volume of interstate commerce. But even if these elements are met, the defendant may still offer procompetitive justifications.

Collins Inkjet Corp. v. Eastman Kodak Co.

The paradigmatic example of tying involves explicitly conditioning a customer's purchase of one product on the purchase of another product. But tying can be more subtle. In 2015, the Sixth Circuit in *Collins Inkjet Corp. v. Eastman Kodak Co.* established a test for determining whether the conditioning, or coercion, prong of the tying analysis has been met for non-explicit ties. The *Collins Inkjet* Court addressed a "differential pricing" arrangement, which some label as "de facto" tying. In differential pricing, the seller charges more for the tying product when the customer does not also purchase the tied product. Because the seller offers its product in this way, the pricing policy has the potential to remove meaningful consumer choice, making the tied purchase the only economically viable option from the consumer's perspective. The *Collins Inkjet* Court clarified that informal constraints on pricing policies may violate federal antitrust laws even if the tie is not an explicit contractual provision. According to the Court, such pricing policies are typically unlawful only when the price differential in effect discounts the tied product below the seller's cost.

The facts of *Collins Inkjet* are instructive. Kodak sold Versamark printers, refurbished printheads for those printers, and ink. Collins also sold ink for Versamark printers, but Kodak was the only source for refurbished printheads. Kodak adopted a pricing policy that raised the cost of Versamark printheads but only if the customer did not also purchase Kodak ink. Collins sued Kodak, alleging an unlawful tying arrangement in violation of Section 1. The district court granted Collins's motion for a preliminary injunction, which required Kodak to cease charging customers different rates for refurbished printer components, and Kodak appealed. Although the Sixth Circuit determined the district court applied the wrong standard – whether the pricing policy made it likely that all or almost all customers would switch to Kodak ink – the Sixth Circuit concluded that the evidence suggested that Kodak was worse off when customers bought both products. In other words, Kodak appeared to be making the tied sale at a loss.

In reaching this conclusion, the Court applied the "discount attribution" standard that the Ninth Circuit applied to bundled discounts in *Cascade Health Solutions v. PeaceHealth*. Under this standard, a tie enforced solely through differential pricing is unlawful only if it is the economic equivalent of selling the tied product below the defendant's cost. The court emphasized that the concern is forcing efficient competitors out of the tied product market (here, the ink market). Thus, even if Collins manufactured ink more efficiently and could sell it at a lower price, a consumer would still find it in its economic interest to purchase both the printhead and ink from Kodak.

Under the *Collins Inkjet* test, differential pricing is the equivalent of unlawful tying when the price discount, as applied to the original price of the tied product, in effect lowers the price of the tied product below the seller's costs. For example, say Kodak sold the refurbished printheads for $200 on their own. But if a customer also purchased Kodak ink (sold at $75, cost of $30), then Kodak would sell the printhead for $150 – a price discount of $50. Applying that discount to the price of the *tied* product, the ink, would result in lowering the price below Kodak's cost. According to the court, "[i]n that case, differential pricing becomes a predatory investment of monopoly profits from one market aimed at creating a monopoly in another."

The appropriate measure of cost has been a focal point for the discount attribution standard. The *Collins Inkjet* Court rejected Kodak's argument that the appropriate measure of costs would be the plaintiff's costs. According to the Court, not only is reference to the defendant's costs necessary to determine if the goal is recoupment, but relying on plaintiff's costs would also produce an unclear standard. The Court emphasized the importance of providing businesses clear guidelines for assessing their risks, and businesses know the costs of their own products but generally not those of their competitors.

Although the Court determined the evidence before it was not conclusive, it found that Kodak's profits appeared to decrease whenever a customer switched to Kodak ink, suggesting that the pricing was predatory. Thus, because there was also a likelihood of Kodak having sufficient market power under the Supreme Court's *Eastman Kodak* tying analysis, the Court concluded that Kodak could be in violation of the antitrust laws.

The *Collins Inkjet* decision is important not only because it is the first appellate court to apply the discount attribution standard in the tying context, but also because it provides businesses guidance in how to assess their pricing policies. Although a different circuit may apply a different standard to determine if a differential pricing policy violates the antitrust laws, firms now at least have some indication of steps they can take to ensure that they minimize their risk of antitrust challenge and liability.

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1 781 F.3d 264 (6th Cir. 2015).
2 *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008).
3 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006) (emphasis added).
4 In some cases, a plaintiff may bring a monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. § 2. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992).
5 *See, e.g., Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th Cir. 2008) (Posner, J.).

BEYOND THE BASICS OF FEDERAL REMOVAL

NUANCES TO KNOW

Lindsey M. Saad Flaherty Sensabaugh Bonasso PLLC

Removing a case to federal court can be fraught with opportunities to make a mistake even for the experienced attorney. Whether you are frequently in federal court or removing a case for the first time, these practice tips should aid in navigating some of the less-known or commonly-forgotten nuances of federal removal.

DIVERSITY JURISDICTION – GETTING TO KNOW YOUR LPS AND LLCS

It is a well-known tenet of federal removal that if you are removing based upon diversity jurisdiction pursuant to 28 U.S.C § 1332, the plaintiffs must be citizens of different states than the defendants. If you are dealing with limited partnerships ("LP") or limited liability corporations ("LLC"), this basic task may not be so simple. In *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), the Supreme Court held that a federal court must look to the citizenship of a partnership's limited partners as well as its general partners to determine whether there is complete diversity. The Court found that a limited partnership did not possess citizenship independent of its members and that the citizenship of each of its members must be considered for purposes of diversity jurisdiction. *Id.* at 196-97. This same principal applies to limited liability corporations. If a LLC has a complicated corporate structure, this analysis can begin to resemble a Russian nested doll with LLCs within LLCs. Be sure to carefully examine the members of each LLC or LP and note the citizenship of each when removing. Failure to describe the citizenship of each party or member may also result in remand.

TIMELY REMOVAL BASED ON "OTHER PAPER"

A case must be removed to federal court within 30 days after receipt of a document from which the defendant could first ascertain that the case is removable. Oftentimes, a case appears to have a value that exceeds the amount in controversy required to remove (i.e., a wrongful death claim with clear liability), even though evidence of those damages in the form of medical bills or a settlement demand is yet to be established. This may make a practitioner anxious to remove immediately. However, pursuant to 28 U.S.C. § 1446(b)(3), if the case is not removable based upon the initial pleading, a notice of removal may be filed within 30 days after the defendant receives copy of an amended pleading, motion, order or *other paper* from which it may first be determined that the case is or has become removable. From a practical perspective, if the case is not removable based upon the Complaint because it fails to state damages that reflect the amount in controversy, requesting supporting documentation for damages informally or serving jurisdictional discovery is a good way to obtain the information that can be relied upon as "other paper" to support removal. As tempting as it may be, it is crucially important not to prematurely remove and risk losing your one bite at the apple on that basis of removal.

AVOIDING INADVERTENT WAIVER OF THE RIGHT TO REMOVE

Once a case becomes removable, substantive action taken in state court seeking affirmative relief may be interpreted by some courts as a waiver of the right to remove to federal court. For instance, federal district courts within the Tenth Circuit have found waiver to exist where a defendant filed a third-party complaint before seeking removal, *see Knudsen v. Samuels*, 715 F. Supp. 1505 (D. Kan. 1989), and where a defendant served the plaintiff with discovery requests, filed a motion to dismiss, and scheduled a hearing on the motion to dismiss prior to removal, *see Chavez v. Kincaid*, 15 F. Supp. 2d 1118, 1125 (D.N.M. 1998). The Fourth Circuit has stated that the right to remove is not lost by participating in state court proceedings short of seeking an adjudication on the merits. *Aqualon Co. v. Mac Equip.*, 149 F.3d 262, 264 (4th Cir. 1998) However, it acknowledged that filling permissive defenses may waive the right to remove. *Id.*

Courts are split as to whether filing a motion to dismiss results in a waiver of removal, but if the motion seeks dismissal on the merits, most courts find the motion waives the right to remove. *See Johnson v. Heublein Inc.*, 227 F.3d 236, 244 (5th Cir. 2000); *Wolfe v. Wal-Mart Corp.*, 133 F. Supp. 2d 889, 893 (N.D.W. Va. 2001); *Heafitz v. Interfirst Bank of Dallas*, 711 F. Supp. 92, 96 (S.D.N.Y. 1989). There are some well-reasoned opinions that find that a motion to dismiss will not result in a waiver if it was necessary to preserve a defendant's rights, such as when the deadline to file an Answer in state court expires prior to the deadline to remove the case to federal court. *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244, 1246-1247 (11th Cir. 2004). However, the 11th Circuit is an outlier in this holding. Because of the specific waiver rules in each jurisdiction, it is necessary to tread carefully with any state court action if the ultimate goal is to remove the case.

REMOVAL AND THE FORUM DEFENDANT RULE

28 U.S.C. § 1441(b)(2) provides that an action "may not be removed if any of the parties in interest properly joined *and served* as defendants is a citizen of the State in which such action is brought" (emphasis added). Even if a forum defendant would defeat diversity, in many jurisdictions, removal is proper if the forum defendant has not yet been served. "The purpose of the 'joined and served' requirement is to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve. Defendants are entitled to act to remove a case based on the circumstances at the time they are sued, and are not required to guess whether a named resident defendant will ever be served." *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003). Of course, timing is critical to ensure that the notice of removal is filed prior to service of the forum defendant. Although many jurisdictions will permit the removal if the forum defendant has not been served, some believe that this position is contrary to the congressional intent of the statute. Know your jurisdiction before removing a case under this exception to the "forum defendant" rule.

WHEN TO IGNORE A PARTY FOR PURPOSES OF REMOVAL

When trying to remove, it is important to do your research and due diligence before deciding whether a case is removable. Often there are parties that you can "ignore," or actually argue that the Court should ignore, for purposes of removal. For instance, a case may be brought naming a "John Doe" person or entity that is essentially a place-holder until the correct person or entity is identified and properly joined. For purposes of removal, these "John Doe" entities and persons are not considered when analyzing diversity of citizenship. 28 U.S.C. § 1441(b)(1) makes this abundantly clear: "In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title the citizenship of defendants sued under fictitious names shall be disregarded."

Another instance when you may disregard a party during removal is when that party is a "nominal party." Although the rule of unanimity requires that all defendants consent to removal, the Fourth Circuit held that a party is nominal and need not consent to removal when a party has no apparent stake in the litigation and the resolution of the suit will not affect it in any reasonably foreseeable way. *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 260 (4th Cir. 2013). Other circuits may analyze whether a party is a nominal party by determining whether the defendant is "indispensable" or "necessary" to a suit. *See Ryan v. State Bd. of Elections of Ill.*, 661 F.2d 1130, 1134 (7th Cir. 1981); *Farias v. Bexar Cnty. Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 871 (5th Cir. 1991).

One other scenario where a party may be disregarded for purposes of removal is when a party has been fraudulently joined. Contrary to its name, there is no requirement of "fraud" when arguing that a party has been fraudulently joined. S*ee Anderson v. Lehman Bros. Bank, FSB*, 528 Fed. Appx. 793, 795 (10th Cir. 2013). The Fourth Circuit has characterized the key to arguing fraudulent joinder as establishing that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court. *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 218 (4th Cir. 2015)

Although federal removal can be a technical and complicated process, hopefully, these tips will help you navigate federal removal to land safely in federal court.

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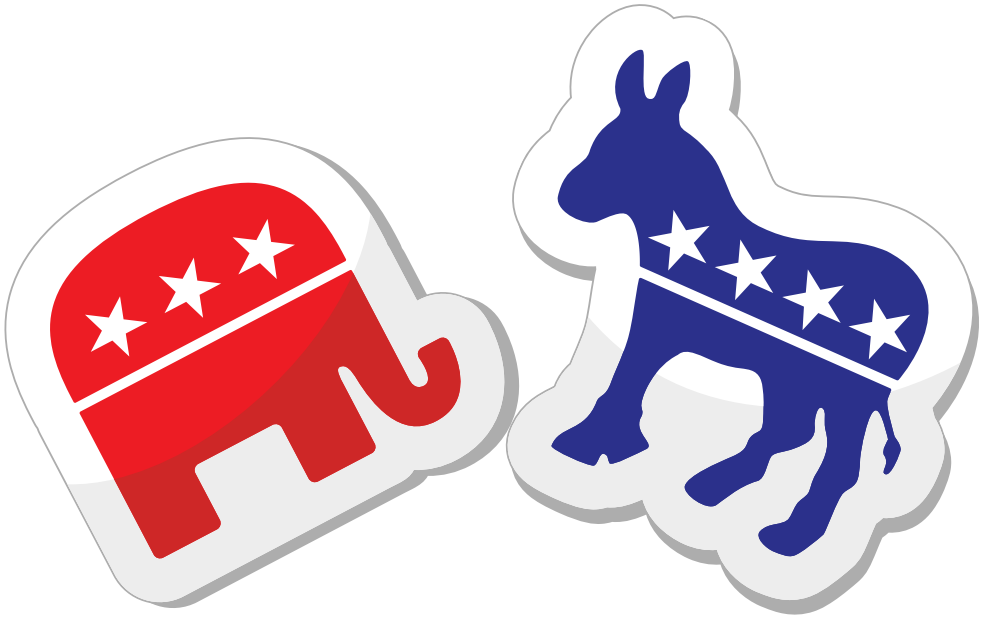

RED OR BLUE

WHAT THE PRESIDENTIAL ELECTION COULD MEAN FOR DEVELOPING EMPLOYMENT AND LABOR LAW ISSUES

Scott R. Green and Greg E. Mann Rivkin Radler LLP

As we head into the presidential election season, our thoughts turn to what a Republican or Democrat in the White House might mean for employers. On issues from the federal minimum wage to overtime eligibility and paid family leave, the two parties' differing stances could have broad implications for business owners and human resources professionals.

The following is an examination of how employment law may be affected by either a Donald J. Trump or Hillary Rodham Clinton presidency.

MINIMUM WAGE AND OVERTIME ELIGIBILITY

Since 2009, the federal statutory minimum wage, as set by the Fair Labor Standards Act ("FLSA"), has been $7.25 for covered non-exempt employees. With wages stagnating in many sectors, the minimum wage has taken on a prominent role this election year.

The official campaign website for Secretary Clinton states that "[s]he has supported raising the federal minimum wage to $12, and believes that we should go further than the federal minimum through state and local efforts, and workers organizing and bargaining for higher wages, such as the Fight for $15 and recent efforts in Los Angeles and New York to raise their minimum wage to $15."

During a November 2015 debate, Mr. Trump voiced opposition to raising the minimum wage, "Taxes too high, wages too high, we're not going to be able to compete against the world. I hate to say it, but we have to leave it the way it is. People have to go out, they have to work really hard and they have to get into that upper stratum. But we cannot do this if we are going to compete with the rest of the world." However, in a May 2016 interview, Mr. Trump told the host of NBC's "Meet the Press," Chuck Todd, "I don't know how people make it on $7.25 an hour," but "with that being said, I would like to see an increase of some magnitude. But I'd rather leave it to the states. Let the states decide."

Increases in the federal minimum wage have historically occurred in small increments, most recently to $5.85 in July 2007, $6.55 in July 2008 and to the present rate of $7.25 in July 2009. Thus, an increase in the federal minimum wage to $15 per hour would vastly expand the scope of potential liability for employers.

Similarly, the presidential election is likely to have a significant impact on overtime eligibility. On May 18, the Department of Labor ("DOL") announced the publication of its much-anticipated new overtime regulations. The new rule, which goes into effect December 1, substantially increases the minimum salary threshold above which covered employers may classify certain "white collar" workers as exempt from overtime pay requirements. This change raises the salary level from its previous amount of $455 per week (the equivalent of $23,660 per year) to a new level of $913 per week (or $47,476 per year).

Salaried white-collar employees paid below the new salary level will generally be entitled to overtime pay, while employees paid at or above the new level may be exempt from overtime pay if they primarily perform certain duties. As more employees are no longer exempt from overtime pay, the new overtime rule is likely to impose significant

regulatory compliance costs on employers.

On the same day the new overtime regulations were announced, Secretary Clinton released a statement in part: "I applaud President Obama and Secretary of Labor Perez for these final overtime rules, which will lift up workers nationwide and help get incomes rising again for working families. Within the first year these rules are in effect, millions more workers will be eligible for overtime, finally getting paid in full for the hours they are putting in on the job."

While Mr. Trump has not taken a position on the new overtime regulations, congressional Republicans have introduced legislation to nullify the new regulations. However, because any legislative measure would be subject to a presidential veto process, whether the next administration is led by a Republican or Democrat may determine the continued viability of the new overtime regulations (separate and apart from any legal challenges). Further, because the new overtime rules were enacted by an executive agency rather than through congressional action, a Republican administration could propose a rule eliminating the new overtime regulations, though it is more likely that a Republican administration would propose a rule eliminating only the provision which automatically updates the salary and compensation levels every three years.

PAID FAMILY LEAVE

Secretary Clinton has made the guarantee of paid family and medical leave a cornerstone of her campaign. While the Family and Medical Leave Act requires covered employers to provide employees job-protected and unpaid leave for qualified medical and family reasons, there is no federal law mandating paid leave. Secretary Clinton supports legislation guaranteeing up to 12 weeks of paid family leave and an additional 12 weeks of paid medical leave.

Mr. Trump has remained vague regarding paid family leave, stating in an interview on October 2015: "Well it's something being discussed. I think we have to keep our country very competitive, so you have to be careful of it. But certainly there are a lot of people discussing it."

Because there is no federal mandate for paid family leave, states will likely serve as laboratories for such legislation. Earlier this year, New York became the fourth state to pass legislation that provides partial pay to employees on family or medical leave, joining California, Rhode Island and New Jersey. In each of these four states, the paid family leave program is financed through payroll taxes that support existing temporary disability programs. Neither the California nor New Jersey law provides job protection for workers who take advantage of the program, but the Rhode Island law and the recently passed New York version do protect workers who take time off under the law from job loss or retaliation.

EEOC ENFORCEMENT

During President Obama's second term, the Equal Employment Opportunity Commission ("EEOC") has aggressively pursued alleged discriminatory employment practices on multiple fronts, including LGBT and transgender protections, criminal background checks and wellness programs. This EEOC activity has been in part a response to the Supreme Court's 2011 decision, *Wal-Mart v. Dukes*, which clarified the standards for class-action certification under Federal Rule of Civil Procedure 23. EEOC actions which seek class-wide remedies are not subject to Rule 23.

The EEOC enforcement priorities have met with some resistance by the courts. On May 19, the Supreme Court issued a decision in *CRST Van Expedited, Inc. v. EEOC*, which expanded when employers may recoup attorneys' fees in litigation against the EEOC. In 2015, in *EEOC v. Freeman*, the Fourth Circuit Court of Appeals, questioning the EEOC's expert testimony, affirmed the dismissal of a nationwide pattern or practice lawsuit alleging that an employer's reliance on credit and criminal background checks posed an unlawful disparate impact on minorities.

While Mr. Trump has not taken a position on EEOC enforcement priorities, a future Republican administration would likely initiate a rollback of President Obama's initiatives. By contrast, Secretary Clinton will also likely continue to rely on the EEOC as a governmental mechanism to combat alleged discrimination in the workplace.

THE FISSURED WORKPLACE: JOINT EMPLOYMENT AND INDEPENDENT CONTRACTORS

A topic gaining less attention, but which could have a significant impact on businesses going forward, is the federal government's response to continued changes in many industries to the traditional single employer-employee relationship.

For most of the 20th century, in the typical scenario, a single employer directly employed the people responsible for its products and thus the identity of the employer for regulatory purposes was relatively simple. Under the long-established "joint employer" doctrine, if two or more employers exercised control over an employee, they were considered joint employers under the FLSA and therefore could be held jointly and severally liable for unpaid wages and penalties.

In recent years, however, more and more businesses are experimenting with varying organizational and staffing models such as spinning off functions that were once managed internally to third-party subcontractors, vendors and franchises. David Weil, the current administrator of the Wage and Hour Division ("WHD") of the DOL, has been a vocal critic of the so-called "fissured workplace," which he has claimed makes enforcement of the FLSA more difficult.

On January 20, the WHD issued nonbinding guidance that aims to dramatically expand the scope of the "joint employer" doctrine to focus on the "economic realities" and interdependence of the alleged joint employers, rather than the degree of control the entities exercise over the relevant workers. The new guidance coincides with a decision by the National Labor Relations Board which took an expansive view of the joint employment and the NLRB's efforts to hold franchisors liable for the alleged unfair labor practices of its franchisees.

These are indeed uncertain times for employers. However, given the rapidly changing legal landscape in recent years, what is certain is that the outcome of this year's presidential election will mark an inflection point for how employers and businesses adapt going forward.

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GUIDANCE FOR EMPLOYERS DEALING WITH MENTAL ILLNESSES IN THE WORKPLACE

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Although you may not remember Andreas Lubitz by name, you undoubtedly remember his story. On March 24, 2015, Mr. Lubitz, the co-pilot of Germanwings Flight 9525, intentionally crashed an airplane carrying 144 passengers and six crew members into the side of a mountain. Mr. Lubitz reportedly suffered from suicidal tendencies and previously had been declared unfit to work. Maybe you also remember Vester Lee Flanagan II, the disgruntled former newscaster who, in August of 2015, killed a WDBJ-TV journalist and cameraman during a live morning broadcast. Prior to his termination from WDBJ, co-workers had complained that they felt threatened or uncomfortable working with Flanagan. Lest you think this is a recent trend, you may recall the series of incidents beginning in the mid-1980s which gave rise to the term "going postal." These include the story of Larry Jasion, the disgruntled postal mechanic who, in May of 1993, killed a coworker and shot a supervisor. According to a *New York Times* article regarding the incident, six weeks before the shooting, a coworker told supervisors that she was concerned about Mr. Jasion. As a result of this report, postal inspectors and postal management interviewed Mr. Jasion and determined that he did not pose a threat.

Events like these send chills down any employer's spine and prompt questions regarding what an employer can do to address mental health issues in the workplace. According to the National Alliance of Mental Illness, approximately 1 in 25 adults in the United States experiences a serious mental illness in a given year (i.e., one that substantially interferes with or limits one or more major life activities). Moreover, approximately 16 million adults in the United States had at least one major depressive episode in the past year (i.e., a period of two weeks or longer during which there is a depressed mood, loss of interest, loss of pleasure, plus additional symptoms such as problems with sleeping, eating, concentrating, energy or self-image). https://www.nami.org/Learn-More/Mental-Health-By-the-Numbers. As such, it is the rare employer who will not be affected by mental health issues in the workplace.

Employers are unquestionably in a dif-

ficult situation. Many mental illnesses are disabilities under the Americans with Disabilities Act (ADA), and an employer may not discriminate against a "qualified individual on the basis of disability..." 42 U.S.C. § 12112(a). Terminating an employee because of a mental illness could result in claims against the employer for discrimination under the ADA. Ignoring a mental illness could result in claims against the employer for, among other things, negligent retention or hiring. Recently, a United States District Judge for the Eastern District of Pennsylvania acknowledged the competing public interests between "the need for a safe workplace" and "the need to accommodate and treat mental illness." *Walton v. Spherion Staffing, LLC*, 2015 WL 171805, *1 (E.D.PA). The facts of Walton involved an employee who wrote a note to his supervisor advising her that he was having homicidal tendencies, "…I'm scared and angry. I don't know why but I wanna kill someone/anyone. Please have security accompany you if you want to talk to me…." *Id.* The employee was fired three weeks later and filed suit claiming the employer failed to accommodate his disability (depression), thereby violating the ADA.

In defending against Walton's claim, his former employer moved for judgment on the pleadings and argued, in part, that proclivities towards violence disqualify a disabled person from protection under the ADA. The employer argued that the decision to terminate the employee based on his threats was "not only lawful under the ADA…but when viewed through the eyes of [the employee's] potential victims, it was likely required." *Id.*, *3. In its brief, the employer also argued that the employee's threats of violence meant he was not qualified to perform the essential functions of his job and, therefore, no accommodation was needed. Finally, the employer cited multiple cases in which courts found that employees who made threats at work were not "qualified individuals" under the ADA and, thus, were not entitled to the protections of the ADA. *Id.*, *3.

Not persuaded, the court denied the motion to dismiss finding that "fear of the mentally-ill can skew an objective evaluation of risk." *Id.*, *3. The court noted there was no indication that the employee had a history of violent conduct and also stated that "termination of an employee is hardly a guarantee of safety. To the contrary, recent history is replete with incidents on which a disgruntled former employee returned to the worksite, with tragic results." *Id.* (citing examples from the media). The case settled a few months later.

As *Walton* shows, employers who take affirmative action to avoid potential threats from unstable employees face the real possibility of being sued for unlawful discrimination. Unfortunately, there is not always a clear line between complying with the ADA and protecting others. There are, however, some guidelines for dealing with an employee with a mental health issue.

THE ADA APPLIES IF THE EMPLOYER KNOWS OR REASONABLY SHOULD KNOW OF A MENTAL ILLNESS

Not all violent or threatening behavior is caused by a mental illness and, therefore, there is no automatic protection under the ADA for violent and dangerous employees. However, if an employer knows or has reason to know that an employee's improper behavior is caused by a mental illness, the protections of the ADA apply. Notably, courts do not necessarily require that an employer be directly notified by the employee that he has a mental illness. The employee's behavior may be so severe and obvious that it would be reasonable to infer that the employee was disabled. For example, last year in *Yarberry v. Gregg Appliances, Inc.*, 625 Fed. Appx. 729 (6th Cir. 2015), the Sixth Circuit found that an employer had reason to know that the employee was suffering from a mental illness – even though the employer had not been specifically notified of the condition. The employer terminated the employee after he exhibited bizarre behavior over the course of several hours such as wandering around the store in the middle of the night; sending a string of odd text messages to his regional manager including a message stating that his fiancée thought he was "nuts" and wanted to check him into a hospital; and, emailing corporate executives with strange and nearly incoherent "URGENT" messages. 625 Fed. Appx. at 731. The Sixth Circuit recognized that the onset of a mental illness may affect an employee's ability to communicate his disability to his employer; thus, when the facts support that an employer had reason to know of the disability, the ADA protections will apply. In *Yarberry*, the Sixth Circuit found that even though the employer did not have direct notice of the employee's mental illness, it had reason to know the employee was suffering from a disability because the employer knew (1) the employee's fiancée believed he needed to be hospitalized; (2) the employee had evidenced illogical and irrational thinking; (3) the employee had passed a drug test; and (4) was subsequently placed in a psychiatric hospital. *Id.*, 738. Based on these facts, the court found that the employee had met his prima facie case for discrimination under the ADA. *Id.*

THE EMPLOYER MAY OBTAIN AN EXAMINATION OF THE EMPLOYEE

Employers who suspect mental illness is affecting an employee's ability to perform his job safely (for himself and the safety of others) may require an examination of the employee provided the examination is "job-related and consistent with a business necessity." 42 U.S.C. § 12112(d)(4). An examination may be appropriate under this standard where the employer has objective evidence to suspect that the employee constitutes a direct threat. A "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). The EEOC identifies four criteria that may be considered when determining whether an individual would pose a direct threat: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." 29 C.F.R. § 1630.2(r). Sometimes, the conclusion that an employee constitutes a "direct threat" is an easy call. For example in *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941 (9th Cir. 2015), the Ninth Circuit affirmed summary judgment in favor of an employer who terminated an employee who had threated "to kill his co-workers in chilling detail and on multiple occasions (here, at least five times)." 795 F.3d at 944. Other times, like the example of *Walton* at the beginning of this article, the issue of whether an employee is a "direct threat" is more difficult to determine. Each situation must be evaluated based on the specific facts involved and an examination of the employee may help the employer determine the appropriate next steps.

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NO HARM, NO FOUL... NO CASE

CONSUMERS NEED INJURIES SET IN CONCRETE TO SUE

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It seems a simple premise: a person should not be allowed to ask a court to preside over a lawsuit unless she actually points to *an injury* she suffered. Yet, only recently, in *Spokeo v. Robins*, 578 U.S. __, 136 S. Ct. 1540 (2016), did the Supreme Court confirm that without a claim of actual harm you have no place being in federal court. Formulaic recitation of what a statute prohibits, coupled with the facts of your story, is insufficient: you need to allege a company actually harmed you in a concrete way.

Though the decision is favorable for companies, some may – perhaps rightly – consider it a soft victory. Indeed, the elusiveness of the Court's decision is perhaps best illustrated by the fact that, after the decision came down, both sides declared victory. Spokeo, Inc. viewed the decision as a win given the simple yet significant fact that the case was reversed and remanded to the Ninth Circuit to determine whether a "concrete" harm was alleged at all. On the other hand, Thomas Robins celebrated that the Supreme Court stopped short of outright rejection of the idea that "intangible harms" could constitute concrete injuries.

But what *Spokeo* did do, unquestionably, is take away an argument from plaintiffs that had been finding a foothold in district courts: namely, that alleging a company violated a statute is sufficient to confer standing to sue in federal court.

And, now that the Supreme Court has spoken, many federal district courts are taking a second look at plaintiffs with statutory claims. What has emerged in the short time since *Spokeo* is a willingness on the part of some federal judges to dig deeper to scrutinize whether allegations of concrete harm lie beneath the rudimentary claims of a statutory violation. Indeed, a handful of federal district courts have already tossed out class-action lawsuits, halting, at the outset, the attempted pursuit by some plaintiffs of a class action potentially worth millions.

Therefore, faced with a case anchored in the prohibitions of a federal statute (or regulation, even), brought inevitably as a class-action lawsuit, companies now have – and should use – this powerful tool to seek dismissal at the outset based on a no-injury case.

SPOKEO V. ROBINS

This recent Supreme Court case starts, as most do these days, with the internet. Spokeo, a self-described "people search engine," is in the business of compiling information about individuals from publically available sources in order to create a profile, of sorts, online. According to Thomas Robins, the problem with this, for him, was that most of the information reported on Spokeo's website in his profile was incorrect. This troubled Robins because he was

searching for a job and believed this inaccurate information hurt his chances of finding employment.

Robins brought suit against Spokeo under the Fair Credit Reporting Act (FCRA), which, as relevant here, requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. It imposes liability on any person who willfully fails to comply with any requirement of the Act with respect to any individual.

After filing suit, Spokeo moved to dismiss, arguing that Robins lacked standing under Article III of the Constitution because he did not suffer an injury. In response, Robins claimed that alleging a violation of a federal statute is sufficient to confer standing. The district court in California rejected this argument and held that Robins, at most, alleged a possible *future* injury, which is insufficient to satisfy the "injury-in-fact" requirement of Article III.

Robins appealed this decision, and the Ninth Circuit Court of Appeals reversed, finding an alleged violation of a statutory right that was particular to Robins. The Court noted that Congress has the power to create "legally cognizable injuries" and to make those injuries "concrete" via legislation that creates a statutory right. The Ninth Circuit held that because Robins alleged a violation of FCRA, and because Spokeo's actions specifically affected Robins, he suffered an "injury-in-fact" sufficient to satisfy Article III.

THE SUPREME COURT'S DECISION

The Supreme Court disagreed. In a 6-2 decision, the Court found the Ninth Circuit failed to consider whether Robins suffered a concrete injury beyond any alleged violation of his statutory rights. The Court explained that, although Congress has the ability to elevate "intangible harms" to the status of legally protected rights, it does not follow that every violation of a statutory right automatically results in an Article III injury.

Turning to Robin's claim, the Court explicitly rejected the idea that he could "satisfy the demands of Article III by alleging a bare procedural violation." The Court noted that not all inaccurate information that is published causes harm. For instance, reporting an incorrect zip code, by itself, would not constitute a "concrete harm." Though "concrete" is not necessarily synonymous with "tangible," the Supreme Court explained, a bare violation of a procedural requirement is not enough. In other words, even if Spokeo did not follow certain statutory procedures, Robins needed to plead an injury-*in-fact* as a result of Spokeo's wrongdoing. Accordingly, the Court reversed and remanded the case.

RIPPLE EFFECTS OF *SPOKEO*

Though the Court didn't reach the ultimate merits of Robins' allegations, since *Spokeo*, several district courts have considered, and rejected, statutory claims given the lack of a concrete injury.

Earlier this summer, in *Gubala v. Time Warner Cable*, a federal court in Wisconsin rejected the plaintiff's claims under the Cable Communications Policy Act, wherein the consumer claimed Time Warner unlawfully retained his personally identifiable information beyond the statutory time period. Viewing this as a technical violation of the statute, the court found that such a claim, alone, was not enough to constitute a "concrete" harm.

A week earlier, in *Smith v. Ohio State University*, an Ohio federal court similarly dismissed a plaintiff's case under FCRA in which the plaintiff alleged the defendant failed to make the proper statutory disclosures on authorizations to do credit checks. The court held that the plaintiff had not alleged how these improper disclosures harmed her in a concrete way.

And, in May, a Maryland federal court, in *Khan v. Children's National Health System*, noted the import of *Spokeo* in an alleged data breach case against a hospital system, explaining that a plaintiff's allegation of a violation of state law could not "manufacture Article III standing for a litigant who has not suffered a concrete injury."

Though not yet the subject of a significant court case, there are other statutes that may fall within *Spokeo*'s purview, including certain claims brought under the Telephone Consumer Protection Act, a favorite of the plaintiffs' bar due to the $500 liquidated damages provision. For instance, the TCPA requires prior express *written* consent for telemarketing phone calls, meaning that even if a plaintiff "consented" to calls – and thus did not suffer the annoyance or invasion of privacy occasioned by *unsolicited* phone calls – a company may still be on the hook for not following the procedural requirement of obtaining consent "in writing." 47 C.F.R. § 64.1200(a)(2). Under *Spokeo*, this "procedural" harm, by itself, may not be enough to constitute a concrete injury.

Moreover, a larger significance to these decisions, including *Spokeo*, should not be missed: in each instance, the plaintiffs had alleged that a class of persons, similarly situated, had also been harmed. Such class actions, if allowed, can take seemingly small, statutory claims and transform them into a bet-the-company scenario. But, if crafted properly and with the right statute, *Spokeo* may provide substantial advantages in opposing class certification should a plaintiff survive a motion to dismiss. For instance, whether each person in the class suffered a concrete injury as opposed to a procedural one may be something that can only be determined on a case-by-case basis, thus, making a class action untenable. It is unclear how successful such a position would be as certain courts, sitting in the Seventh Circuit, for instance, consider only whether the named plaintiff has standing, i.e., has suffered a concrete injury, and not whether absent class members do.

All-in-all, whether *Spokeo* will dramatically change the landscape in so-called "no harm" statutory causes of action or whether it is just a blip on the radar remains to be seen. Companies should take a close look at claims grounded in statutory violations and marshal arguments provided by *Spokeo* for a quick dismissal of a lawsuit. Since many of these cases are brought as class actions, *Spokeo* may provide a "silver bullet" defense in a multi-million dollar class action lawsuit based on a procedural statutory violation. At the same time, look for the plaintiffs' bar to advance increasingly creative arguments for what constitutes a "concrete" injury. In the right jurisdiction and with a critical mass of cases in their win column, consumers may tip the scale in the other direction. Only time will tell.

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CYBERSECURITY

THE NEW PROFESSIONAL RISK

PART 4 OF 4: LAW FIRMS – THE NEW SOFT UNDERBELLY OF AMERICAN CYBERSECURITY

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The legal profession is not immune from the threat of a costly cyber incident. In fact, the FBI has issued warnings and held meetings with nearly all of the top law firms in New York about the risk of a data breach and theft of confidential and proprietary client information. Since at least 2009, the FBI, the U.S. Secret Service, and other law enforcement agencies have warned law firms that their computer files were targets for cyber criminals and thieves looking for valuable confidential and proprietary information, including corporate mergers, patent and trade secrets, litigation strategy, and more. In March of this year, newspapers confirmed that a Russian hacker named "Oleras" targeted 48 law firms, most of which were AmLaw 100 firms. Oleras planned to hack these firms to secure confidential and highly valuable insider information regarding mergers and acquisitions that the hacker could then use on the market.

In order to take a proactive approach to cybersecurity, it is crucial that law firms understand the type of data targeted by hackers, as well as both the legal and ethical responsibilities owed to their clients. If nothing else, from a business standpoint, many clients are now demanding that their law firms do more to protect their sensitive information to ensure they do not become 'back doors' for hackers. As the last installment of a four-part cyber series touching on various professional, business and insurance sectors, this article will discuss the cyber liability threat facing law firms, the ethical obligations of law firms and key security steps to implement to protect against a costly cyber incident. Additionally, in-house counsel should take a leading role in advising their client on these cybersecurity issues to help minimize the risk of litigation and fines.

ETHICAL OBLIGATIONS

Law firms have an ethical and professional duty to protect their clients' information. Pursuant to the Rules of Professional Conduct, attorneys must take reasonable steps to protect their clients' information. Namely, RPC 1.6(a) requires an attorney not reveal confidential information, and RPC 4.4(b) discusses an attorney's duty to take reasonable steps in communicating with clients, as well as the duty to respect the privilege of others. Additionally, ABA Rule 1.1, Comment 8, makes clear that there is an ethical obligation related to competent representation that requires counsel to stay current on the risks posed by technology and take reasonable action to protect against those risks.

CYBERSECURITY LIABILITY

Besides the cost of remediation and reputational damage caused by a cyberattack, class action lawsuits alleging malpractice are starting to be filed against law firms for "lax" cybersecurity protections. Specifically, a complaint filed by the plaintiffs' class action law firm Edelson PC alleges that a Chicago-based regional law firm failed to maintain robust data security practices to effectively safeguard sensitive client data. Moreover, the complaint alleges that the unidentified law firm suffered from a "number of significant data security vulnerabilities," which resulted in "anyone with nefarious intent" – even if they were not a sophisticated hacker – likely being able to gain access to a "whole host of sensitive client data," including the law firm's line-item billing records and possibly email contents. Through the case, the plaintiffs' firm and its clients are seeking injunctive relief and damages, based on the theory that the unidentified regional law firm's clients have been overpaying for legal services because they have been paying, in part, to keep their data secure, and the law firm has failed to do so.

Aside from a claim for attorney malpractice, various state and federal regulatory agencies have taken the forefront in prosecuting claims against businesses that fail to have proper policies and procedures in place. For example, should general protected health information (PHI) be stolen, this would implicate the Health Information Technology for Economic and Clinical Health Act (HITECH). Although

one may question how this requirement applies to law firms, as defined under HITECH, 'business associates' expressly include entities providing legal services to HIPAA-covered entities.

Another regulatory body enforcing cybersecurity compliance is the Federal Trade Commission (FTC). On Aug. 24, 2015, the Third Circuit affirmed the District Court of New Jersey's ruling confirming the FTC's authority to investigate and prosecute breaches of consumers' privacy by businesses failing to maintain appropriate data security standards. While there have been no instances reported to date involving the FTC prosecuting a law firm for cybersecurity issues, a law firm should be prepared to face scrutiny from the FTC, as the number and scope of enforcement actions involving cybersecurity continues to increase.

STEPS TO INCREASE CYBERSECURITY

Many law firms are now taking steps to increase data security and ensure that proper policies and procedures are in place to protect against a cyberattack. First and foremost, preparation is vital to preventing any sort of attack. According to a study performed by Infinite Spada and ALM Legal Intelligence, nearly 30% of law firms surveyed stated that they have not performed a formal information, privacy, and security assessment. Thus, law firms should create a cross-organizational incident response team (IR Team), which includes not only management, but human resources, procurement, finance, internal and external cybersecurity counsel, and information technology (IT) to perform a cybersecurity risk assessment and remediation analysis. From there, the IR Team should implement risk management and an incident response plan in order to prepare for a cyberattack. Moreover, many law firms are now appointing a legal chief technology or privacy officer to management to oversee the firm's data security and privacy, as well as technology infrastructure, to ensure the policies and procedures are consistent with the security plan and technology.

Once an IR Team has been established, policies and procedures should be implemented regarding the privacy and security of the firm's data, keeping in mind the applicable industry standards. The proper use of encryption, remote access, mobile devices, laptops, email accounts, and social networking sites should all be covered. In addition, a law firm should conduct an inventory of the firm's hardware and software systems and data, to assign ownership and categorization of risk. (The higher the sensitivity of the information, the stronger the security protections and access control must be.) Furthermore, the IT department should conduct third-party vulnerability scans, penetration tests, and malware scans to protect against potential data breaches.

Most importantly, after setting the tone from the top, law firms must develop and facilitate training and testing exercises, including mock sessions so that staff is aware of the company's security protocol and measures are taken to protect against the potential for accidentally exposing a client's personal identifiable or protected health information with the click of a button. Creating strong and unique passwords to protect against unauthorized access to computers and mobile devices in conjunction with a password management utility should also be a critical part of information security training.

Unfortunately, in the evolving technological world even the best security can be penetrated by sophisticated hackers from around the world. Attacks are expected to escalate and intensify, with law firms topping the target list. Thus, besides having policies and procedures and training in place to prevent a data breach, it is critical that a law firm be prepared to act quickly in the event a breach is detected.

Once a potential data breach has been identified, a law firm must act quickly and without unreasonable delay to identify the scope and type of information exposed, confer with internal and external experts to ensure control and containment of the incident, and preserve relevant evidence while also preserving the attorney-client privilege. Finally, remedial action must be taken to correct the cause of the incident.

CYBER INCIDENTS AND THE ROLE OF IN-HOUSE COUNSEL

A company's board of directors has a duty to oversee all aspects of the company's risk management efforts. This includes a duty to recognize and minimize the company's exposure to cyberattacks. In today's increasingly digital age, a company faces a variety of threats to its data, including confidential company information and sensitive customer information, from rogue employees to third-party hackers. Such attacks not only put valuable information at risk, but can also adversely affect a company's competitive positioning, stock price, good will, and shareholder value. Given the role the legal department should already play in advising and directing a company's efforts with regard to protecting its data and responding to a cyber incident, in-house counsel are in the best position to also help facilitate the board's oversight obligations.

CONCLUSION

According to most cyber experts, it is not a matter of if, but when. These warnings should be a wake-up call for law firm management – and companies the world over – to protect the enterprise's highly confidential crown jewels. Firms and businesses must be prepared for a cyber incident or face not only the costly operational, reputational, legal and regulatory ramifications that follow but also the loss of valuable clients. Moreover, in-house counsel must be prepared to guide a company in implementing a cybersecurity program, or face potential exposure.

Other articles in this cyber series can be found on USLAW.org:

- How to Be Secure in an Unsecure World
- Cyber Crime and The Vulnerability of the Healthcare Industry
- Will A Cyberattack On the Energy and Transportation Industries Become the Next Global Crisis?
- Keeping Customers' Data Close to the Vest – Cybersecurity Challenges in the Retail, Restaurant and Hospitality Industry

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THE ADVENT OF AUTONOMOUS VEHICLES

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Technology pervades our day-to-day lives more so than ever. From cell phones to wearable fitness tracking gadgets to cloud-based computing and data storage, the impact of technology all around us is impossible to ignore. However, in our rush to accept the latest and greatest are we appreciating the real world boots on the ground limitations of our technical equipment and programs and addressing those factors by way of appropriate legislation and regulations? As the use of semi-autonomous and autonomous vehicles expands across the country, what are the liability implications and how do we address the defense of novel claims? As it currently stands, variables such as significant mechanical failures and contributing factors such as outside passenger vehicle causes demand the human judgment and decision making abilities that autonomous vehicles do not possess. Accordingly, it will be difficult to fully replace the human driver with software-based equipment, particularly in high-density urban areas.

While not immediately apparent, the path toward autonomous vehicles has been a more gradual as opposed to punctuated evolution. The media tends to herald autonomous vehicles as a significant and immediate shift in the current state of transportation, however, the reality of the situation is more measured. In some form or another, the industry has been progressively implementing more computer-controlled safety mechanisms as far back as the anti-lock brake system. To be sure, after anti-lock brakes were widely incorporated into both commercial and passenger vehicles, the automotive industry pushed forward adding stability control, electronic control units and eventually collision mitigation systems. If we look at the adoption of semi-autonomous and autonomous vehicles as more of an extension of ever increasing safety equipment we realize that this technology is not as revolutionary as suggested but is rather a natural and anticipated evolution. In May of 2015, Daimler Trucks North America, LLC unveiled the semi-autonomous Freightliner Inspiration with the anticipation that the transportation industry market had room for autonomously driven trucks. Proponents of the "driverless" and "semi-driverless" technology argue that it is an important step towards the "safe, sustainable road freight transport of the future." However, state and national statutes and regulations are lagging behind the roll out of this machinery.

In 2013, the National Highway Traffic Safety Administration ("NHTSA") proposed a classification system of five levels within which to define autonomous and semi-autonomous vehicles. These classifications run from Level 0, which is a completely human-controlled vehicle, to Level 4, which is defined as a vehicle that performs "all safety-critical functions for [an] entire trip, with the driver not expected to control the vehicle at any time."[1] The NHTSA's classification system is categorized based on vehicle capabilities and primarily leaves a human driver as an afterthought. Further, the Society of Automotive Engineers ("SAE") has put forth a similar designation system that focuses on the level of human interaction needed to perform tasks. The SAE's classification commences at "no automation", level 0, and ends with "full automation," level 5. The SAE's analysis of the semi-autonomous and autonomous driving capabilities also examined these vehicles and the relevance of their capabilities and

limitations, from a legal perspective. In addition to setting forth the classifications themselves, the SAE also determined that for Level 3 systems up to Level 5 systems, the current traffic laws and vehicle regulations are likely insufficient to address their implementation and that liability issues including burden of proof problems are possible.

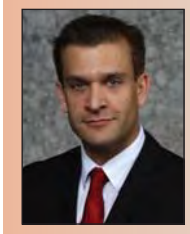
Nevada was the first state, in 2011, to enact legislation regarding the operation of autonomous vehicles. Since then, five additional states, including California, Florida, Michigan, North Dakota, Tennessee, plus Washington D.C., have passed a bill regulating autonomous vehicles and driving. This type of legislative trend is only increasing as 16 states introduced proposed legislation in 2015 alone. The breadth of these bills range widely from enactments like North Dakota's HB 1065 which provides for a study of autonomous vehicles to more substantive regulations like those in states such as Michigan or Nevada. Michigan's SB 663, for instance, limits the liability of a vehicle manufacturer or upfitter for damages in a product liability suit resulting from modifications made by a third party to an automated vehicle. Nevada SB 140 addresses the use of cell phones while driving and permits the use of such devices for persons in a legally operating autonomous vehicle, specifically noting that these persons are deemed not to be operating a motor vehicle for purposes of the law.

While there are varying degrees of legislation at work or in the pipeline on the state level, the fact remains that a significant number of states have yet to fully implement comprehensive legislation to address the impending use of autonomous and semi-autonomous trucks. This begs the question for the purposes of the interstate transportation industry, where does the federal government stand on the issue? As of February 9, 2016, the United States Department of Transportation has engaged in an "Automated Vehicle Research Program" which is coordinated by the Intelligent Transportation Systems Joint Program Office. This office then funds research regarding automated vehicles within the Federal Highway Administration, the Federal Motor Carrier Safety Administration, the Federal Transit Administration, and the NHTSA. Most recently, the NHTSA has conducted public meetings on April 8, 2016, and April 27, 2016, to develop "Guidelines for the Safe Deployment and Operation of Automated Vehicle Safety Technology."[2] These meetings welcomed public input on operational guidelines for automated vehicles, as well as those roadway situations and environments that highly automated vehicles will need to be prepared to address. As of the date of this article, while the DOT/NHTSA has not yet issued their finalized guidelines, they have received at least 67 comments and suggestions from a litany of automotive industry members including Ford Motor Company, the Association of Global Automakers, Daimler Trucks North America and General Motors, just to name a few. The hope being in the future that standardization of regulations provides some level of guidance for the implementation of this expanded technology.

That said, a standardization of legislative regulation of this technology may not take into consideration all of the facets of this developing technology. Realistically speaking, the current state of the environment does not focus on completely autonomous vehicles, but instead focuses on semi-autonomous vehicles that fall within the classifications of Levels 2 (Combined Function Automation) and 3 (Limited Self-Driving Automation). Therefore, we are faced with the prospect of vehicles that still have some element of human control and are still subject to the foibles of drivers around them. According to at least one study from the American Trucking Associations, approximately 70% of fatal crashes between a large truck and a passenger vehicle are caused by passenger motorist as opposed to the commercial driver. Additionally, according to FMCSA, in 91% of fatal head-on collisions between a large truck and a passenger vehicle, the passenger vehicle crossed the median into the truck's lane of travel.[3] Where does this leave us in connection with allocating fault for accidents between semi-autonomous trucks and passenger motorists from a liability perspective? The answer it seems is not very far from where we are now, just with different players being added to the mix.

Current products liability law is likely ready and able to allocate liability and damages due to manufacturing, design defect and failure to warn. There will almost certainly be theories of negligence raised by the plaintiff bar against the manufacturers of the technology. This will add a new element into the interaction among players in trucking accidents that will require the trucking defendant to add an understanding of products liability to their repertoire. Current tort law will take into consideration the interrelation between a driver who causes an accident when the vehicle is operating entirely independently, improperly assumes control of vehicle and causes an accident, or engages the autonomous mode in a negligent manner (for instance, at an inappropriate time such as during a detour in high volume traffic). Traditional concepts of contributory negligence and indemnity will most certainly be able to adequately address the allocation of liability in such situations. Similarly, one can quite easily imagine situations where new theories of liability will arise where claimants argue that a driver and company should be subject to damages due to improperly disengaging available autonomous technology, when a reasonable person would view it as unsafe to do so, or alternatively, failing to incorporate technology that could have avoided an accident into their existing fleet.

Ultimately there needs to be careful consideration to determine the need for extensive regulation and legislation and where the industry can most benefit from that regulation. Perhaps the answer lies with an Aristotelian approach focusing on moderation such that legislation should be limited to acknowledging the existence of the technology, promoting the safe incorporation of said technology but leaving the tort concepts to the Courts and common law.



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HOW THE CHANGE TO RULE 26 IS CHANGING DISCOVERY

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Litigants – especially defendants – have historically lamented the broad scope of discovery allowed by the Federal Rules of Civil Procedure. Discovery often is the most time-consuming and contentious aspect of litigation. In 2010, the Committee on Rules of Practice and Procedure met at the Duke University School of Law to develop strategies to "improve the disposition of civil cases by reducing the costs and delays in civil litigation … and furthering the goals of Rule 1 'to secure the just, speedy, and inexpensive determination of every action and proceeding.'" http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/st09-2014.pdf at 13.

The Committee decided to do this by promoting "cooperation, proportionality, and active judicial case management." http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/st09-2014.pdf at B-2. To further these goals, the Committee proposed changes to certain rules, including Rule 26, which governs discovery.

On December 1, 2015, those changes went into effect. These changes govern discovery in cases filed after that date, and most cases that were pending on December 1, 2015, so long as it is just and practicable. There is little evidence in the case law that courts are still applying the former Rule 26 to cases that were filed before that date.

Rule 26(b)(1) now provides, "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

The new Rule 26 has the potential to narrow the scope of discovery. As of April 2016, the editors of *The Federal Litigator* had located 54 district-court cases applying the proportionality provisions of Rule 26. Of those, approximately 60 percent found at least one discovery request to be disproportionate. *Federal Litigator*, Vol. 31, Issue 4 at 115 (April 2016). This author found many cases analyzing proportionality under Rule 26 that were published after April 2016, so it is very important to stay up-to-date in this area.

Additionally, many courts found the change in the language describing the scope of discoverable information to be important. *Id.* The rule previously stated, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Committee replaced that with the sentence, "Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

While it is still too early to know how every court will interpret the changes to Rule 26, the case law in this

area is developing quickly. As of the time this article was submitted, no federal appellate courts had specifically addressed the changes to Rule 26. A sample of the district-court opinions analyzing proportionality are discussed below, along with some practical tips.

NO BIG DEAL?

Some commentators speculated that the new Rule 26 would greatly reduce the scope of discovery. This has not occurred in some courts that have addressed the new language of Rule 26.

For example, a magistrate judge in the District of South Dakota wrote that most of the proportionality factors in Rule 26(b)(1) were previously in subsection (b)(2)(C), which "has been in effect for the last 33 years, since 1983, so it is hardly new." *Schultz v. Sentinel Insurance Co. Ltd.*, 4:15-CV-4160-LLP, 2016 WL 3149686 at *5 (South Dakota, June 3, 2016). The court went on to opine that "[t]he rule, and the caselaw that developed under the rule, have not been drastically altered." *Id.* at *7.

In contrast, courts in other jurisdictions have stated or implied that the changes to Rule 26 will require litigants and courts to modify their analysis of discovery disputes. A magistrate judge in Indianapolis wrote that the scope and limitations of discovery under Rule 26 "has evolved over the last thirty years or so" and those changes serve "to rein in popular notions that anything relevant should be produced and to emphasize the judge's role in controlling discovery." *Noble Roman's, Inc. v. Hattenhauer Distributing Co.*, 314 F.R.D. 304, 307 (S.D. Ind. 2016). The court granted a protective order to prevent "discovery run amok." *Id.* at 312.

THE STAKES ARE HIGH

Many courts have agreed that the issues at stake are incredibly important to the proportionality analysis.

This type of analysis is clear in the *Schultz* case, cited above. In that case, the plaintiff was suing an insurance company for bad faith, among other claims. The court held that the plaintiff was entitled to broad and expensive discovery, despite the fact that she was suing for only $17,000. The court supported this holding by stating that the plaintiff's claim "is about many victims of an unscrupulous claims-handling practice. … Plaintiff] has the potential to affect [the insurance company's] alleged business practices and to remedy the situation for many insureds, not just herself." *7.

SCOPING IT OUT

The proportionality factors can also define the scope of discovery. A court in the District of Utah, for example, held that defendants could seek broad discovery from the plaintiff. *Lifevantage Corp. v. Jason Domingo and Ovation Marketing Inc.*, 2:13-CV-1037, 2016 WL 913147 (D. Utah, Mar. 9, 2016). The discovery was "very broad and might be unduly burdensome in many cases," but it was held to be proportional because the plaintiff sought a large amount in damages, and the defendant needed to be able to perform a nuanced analysis to properly defend the case. *Id.* at * 2.

In contrast, when a plaintiff seeks broad and onerous discovery on a relatively minor claim, some courts will hold that the proportionality analysis demands restrictions on that discovery. *Willis v. Geico General Ins. Co.*, Civ. No. 13-280, 2016 WL 1749665, at *4 (D.N.M., Mar. 29, 2016).

PRACTICAL TIPS

Know how to defend requests and objections

Lawyers should be prepared to defend every discovery request and every objection. Many courts have noted that the litigants bear responsibility for ensuring that they only seek discovery that fits the requirements of Rule 26. *See, e.g., Capetillo v. Primecare Medical, Inc.*, Case No. 14-2715, 2016 WL 3551625 (E.D. Penn., June 29, 2016). Additionally, the scope of discovery under Rule 26 is still broad, and courts are trying to work through how to balance all the factors in the proportionality analysis.

It is also imperative that the client and counsel have a deep understanding of the universe of potentially responsive documents. Counsel will need to know all the factors in the proportionality analysis and how they apply to the particular case.

Read as much as possible

Many lawyers rely solely on the text of the rules. In the case of Rule 26, this is a mistake. The comments to Rule 26 are vital to a thorough understanding of the rule. For example, the Committee explains in the comments that computer-based searching could resolve a party's objections before asking the court to intervene in the dispute. The Committee also explains the relative weight of the proportionality factors. A careful review of the comments will give insights into the rule and its application.

Also, keep in mind that case law interpreting the changes to Rule 26 is developing quickly. Lawyers will need to check for new cases regularly and review developments in this area of law each time they are crafting objections, conferring with the other parties, or writing motions to compel.

Articulate your objections

Courts have already refused to consider unsupported objections that requests are not proportional. Likewise, the comments to Rule 26 explicitly forbid a party from simply making "a boilerplate objection that [the request] is not proportional." Counsel drafting responses must understand the new boundaries to discovery created by the proportionality analysis and how to articulate specifically why certain requests are outside the scope of discovery.

Support your position

The party resisting discovery has the burden of proving that the request is not proportional. *See, e.g., Waters v. Union Pac. R.R. Co.*, Case No. 15-1287, 2016 WL 3405173 (D. Kan., June 21, 2016). This can be done through affidavits, deposition testimony, or producing documents that show how onerous or disproportional the discovery requests are.

Go beyond the amount at stake

When drafting objections and responding to motions to compel, the responding party might be tempted to rely heavily on the "amount in controversy" factor to limit the scope of discovery. However, as it explains in the comments to Rule 26, the Committee deemphasized the importance of the amount in controversy by listing "the importance of the issues at stake" as the first proportionality factor. Although the amount in controversy should be considered in the proportionality analysis, the Committee deemphasized that factor to "avoid any implication that the amount in controversy is the most important concern." As the comments also note, many lawsuits "seek[] relatively small amounts of money, or no money at all, but … seek[] to vindicate vitally important personal or public values."

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ADA WEBSITE ACCESSIBILITY

THE TIME FOR COMPLIANCE IS NOW

Dove A.E. Burns, John J. Jablonski, and Hilary A. Dinkelspiel Goldberg Segalla

Now that just about all business entities and institutions, public and private alike, rely increasingly on their virtual presence to conduct their affairs and reach customers, the question of where an entity conducts business gets complicated and important. Most owners and administrators understand that their brick-and-mortar locations must be handicap-accessible pursuant to the American with Disabilities Act (ADA). But in a world that operates as much online as it does on the ground, what does that mean for websites?

Many decision-makers are unaware that their websites are under increasing scrutiny for compliance with the ADA – scrutiny that could land them in court. From Harvard to Netflix, litigation over website accessibility is on the rise. Retailers, universities, hospitals, financial institutions, municipalities, and service providers that do not want to get caught in this wave of lawsuits need to move toward compliance now.

COMPLIANCE WITHOUT CLEAR GUIDANCE?

The extent to which the ADA applies to websites is unclear. Nonetheless, the lack of clarity has not stopped plaintiffs from issuing demand letters and filing lawsuits alleging that websites and mobile applications do not comply with the ADA.

Advocates argue that not being able to see words or images or to hear audio on websites significantly disadvantages disabled individuals. This is made worse if a disability decreases the ability to leave the home, because the internet may be that person's only connection to the outside world. Without web accessibility, a person may not be able to access their medical records, educational resources, government services, or shop for goods.

Supporters of web accessibility argue that the ADA's promise of providing equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life can only be achieved if it is clear to state and local governments, businesses, and educators that websites must be accessible.

The U.S. Department of Justice, the entity charged with enforcing the ADA, has dragged its feet on enacting guidelines for websites to be ADA compliant. Nonetheless, the DOJ continues to enforce the ADA if websites do not include features that allow hearing-impaired or visually impaired individuals access to content. For example, websites must be compatible with screen-reading technology or include closed captions or audio descriptions of visual content. Courts are not hesitating to chart new paths to punish non-compliance, given the lack of clarity or regulations provided by the federal government. This creates a legal minefield for companies and organizations attempting to ensure that their websites are compliant under the ADA.

Under the current landscape, Web Content Accessibility Guidelines (WCAG) 2.0 Level AA is the de facto standard applicable to public entities, including state and local governments and agencies under Title II of the ADA. WCAG 2.0 AA is also the de facto standard for private businesses under Title III. As technology continues to advance, however, mere compliance with WCAG 2.0 AA is insufficient without further guidance from the DOJ. In 2010, the DOJ announced that in early 2016 it would publish rules to address website accessibility. But in November 2015, it stated it would table the long-awaited Title III proposed rules until at least 2018. The DOJ was expected to release new Title II guidance early this year, but instead withdrew its proposed rule-

making and issued a *Supplemental Advance Notice of Proposed Rulemaking* on April 28.

COURTS STEP IN

In spite of the DOJ's delays, courts have not shied away from deciding cases and setting new precedents, thus shaping and foreshadowing the future of website accessibility standards. Historically, private businesses typically relied on two primary defenses when faced with ADA website accessibility actions: (1) seeking a stay until the DOJ provides rules and regulations governing website accessibility and (2) arguing that the ADA does not apply to commercial websites based on a theory that their sites were not places of "public accommodation," since the ADA traditionally applied only to brick-and-mortar stores. Recent court rulings and recommendations, though, have made it very unlikely that either defense will be successful going forward.

In February 2016, a Massachusetts federal magistrate issued a report and recommendation denying two universities' requests for a stay until the DOJ issued proposed rules on website accessibility. The National Association of the Deaf brought suit on behalf of a class of deaf and hard-of-hearing individuals against Harvard University and MIT, alleging that the universities failed to provide closed captioning for thousands of videos on their websites. U.S. Magistrate Judge Robertson recommended denial of both universities' requests for a stay, stating that the suit may proceed forward while the DOJ continues to develop its proposed rules, especially given that the proposed rules are just that – proposed – and therefore of little aid to the court. See *National Association of the Deaf, et al. v. Harvard University, et al.*, Case No.: 3:15-cv-3 – 23-MGM, United States District Court, District of Massachusetts [Dkt. 50 and 51].

For a website to be subject to the ADA, a threshold requirement is that the website be considered a place of "public accommodation." Title III states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by an person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. §12182. The statute defines "public accommodation" to include a list of 12 categories of establishments, all of which are traditionally brick-and-mortar.

So far, the circuits have been split as to whether Title III should apply to websites. In March 2015, the District Court in Vermont held that the site of the sale is irrelevant when faced with an action brought by the National Federation of the Blind against Scribd, Inc., a digital library offering subscriptions on its website and applications for e-readers. Rather, the only thing that matters is whether the good or service is offered to the public. While no circuit court has addressed directly whether exclusively internet-based companies are subject to Title III of the ADA, we anticipate that the law will shift in this direction. The DOJ has even hinted to such a shift in this paradigm noting that "[t]he Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations." 75 Fed. Reg. 43460-01 (July 6, 2010). In addition, in a hearing before the House Subcommittee on applicability of the ADA to private internet sites, it was the "opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services." *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution on the Judiciary*, 106th Cong., 2d Sess. 65-010 (2000).

State courts have followed suit in extending the reach of Title III to online retailers. In March 2016, Edward Davis, a blind man, sued Colorado Bag 'n Baggage, claiming that he was unable to shop online at the retailer's site because it failed to provide accessible features, such as screen-reading software. In a landmark decision in California, Judge Foster in San Bernardino Superior Court granted Davis's motion for summary judgment, finding that he had presented sufficient evidence that he was denied full and equal enjoyment of the goods, services, privileges, and accommodations offered on the defendant's website.

In April, Netflix entered into a benchmark settlement agreement to provide audio description for many popular titles that it streams. The technology provides visually impaired users with an audio description of what is happening in scenes without dialogue or in scenes with significant visual elements.

Given that the DOJ has failed to implement a national standard for website accessibility, courts are forced to address the issue on a case-by-case basis. It is unlikely going forward that courts will be receptive to arguments that online retailers are exempt entirely from Title III ADA compliance.

PROACTIVE STEPS

Organizations with an online presence can take practical steps now, such as:

- Educate individuals responsible for creating and maintaining website;
- Determine to what extent the organization's current website complies with WCAG 2.0 Level AA as we anticipate that the law will move in the direction of the proposed rule;
- As new websites and features are created and content is added, consider incorporating technical specifications to make them more accessible; and
- Conduct an audit with the help of experienced legal and technical counsel.

On April 22, the ADA posted on its website a new *Technical Assistance* section. While it provides links to the proposed rulemaking, guidance, and enforcement actions, clear guidance on private sector compliance remains unchanged. Therefore, assessment and proactive improvement of your company's website accessibility is necessary to help avoid ADA enforcement and copycat private lawsuits in the future.

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CALIFORNIA ATTORNEY GENERAL SETS

NEW MINIMUM STANDARD OF CARE FOR DATA PRIVACY & SECURITY

Batya Forsyth, William Kellermann and Everett Monroe Hanson Bridgett LLP

INTRODUCTION

California is long recognized as at the forefront with the development of computer technology in all its forms. California took the lead with legislation to protect its citizens from identity theft and other cybercrimes when it enacted the first statutory definition of personally identifiable information and the first data breach notification law.

Nevertheless, with the exception of certain regulated industries, the Federal Trade Commission (FTC) has led in enforcing and encouraging good data security practices nationwide. Widely recognized as the top privacy cop in the United States, it approached data security as a consumer protection issue under its authority to prosecute unfair and deceptive practices. It has published documents discussing good data security practices, and has used its enforcement authority to obtain consent decrees requiring companies to implement comprehensive data security programs.

As more data breaches at major institutions garner national attention, states have been developing and increasing their role in enforcing data security laws, and have started providing or adopting guidelines that reflect their enforcement priorities, their missions, and their scope of authority.

Not to be left behind, and as a major recipient of data breach notifications, the California attorney general adopted a set of standards known as the *Critical Security Controls* (CSC) as minimum requirements to comply with California law. The CSC set a floor by which to evaluate the duty of care to which businesses who hold data of California residents will be held.

This article examines some of those motivations and compares the set of controls adopted by California's top law enforcement agency with other standards that have guided businesses in establishing their data security programs.

CALIFORNIA'S NEW STANDARD OF CARE

California law, along with a number of other states, requires that businesses maintain reasonable security to protect their customers' personal information. But the technologically neutral term, meant to reflect the "reasonableness" standard of tort law, does not define reasonable security.

The California attorney general, who has the authority to enforce the data security law, issued its most recent biennial Data Breach Report in February 2016. The report recommended that all companies should implement the Center for Internet Security's *Critical Security Controls*. More importantly, the recommendation expressed the attorney general's view that a failure to implement the CSC would be a failure to implement reasonable security procedures that California law requires.

The CSC are published by the Center for Internet Security (CIS) of the SANS Institute, and were developed as a collaborative effort by data security professionals. The CSC are numbered in order of priority: the first control is the most important to establish, the second control next, and so on. Each control includes sub-controls that companies can evaluate as potentially beneficial security measures. While the sub-controls suggest specific tasks that a business could take to implement the control, the CSC do not prescribe any particular practices.

The CSC provide detailed and technical descriptions of tasks to undertake compared to other standards that use broader, more procedural language. Given its data security expert origins, the CSC focus more on protecting data and networks on a technical level, with fewer controls addressing administrative measures for data security.

Many of the CSC come from the same industry wisdom around which other security frameworks and standards were created. Businesses that developed data security programs around other guidance and frameworks may find that they need to add or change little to fully implement the CSC.

COMPARING & CONTRASTING STANDARDS – THE NIST FRAMEWORK

The adoption of CSC and the increased regulation around data security provides an incentive for businesses to start building a data security program. But the CSC, while thorough, can be complex. Through the CSC, CIS does not provide much guidance on establishing and administering a data security program. For those starting out on the path to robust cyberse-

curity, other frameworks and guidance might be a better place to start.

In particular, the National Institute of Standards and Technology (NIST) published the Framework for Improving Critical Infrastructure Cybersecurity. The Framework provides step-by-step instructions for a company to create, develop, and assess a data security program in an organization of any size.

The Framework organizes a data security program into a set of five functions: Identify, Protect, Detect, Respond, and Recover. Each function contains a set of categories that a business should evaluate to determining its level of maturity in incorporating each function. Taken together, the functions move businesses through the process of protecting data from establishing a program to addressing data breaches.

Many of the CSC can be met through implementing the Framework. Many of the CSC controls are reflected in the Protect and Detect Functions. The Framework's thorough guidance in its Respond and Recover Functions corresponds to Control 19: Incident Response and Management. Once a program is on its way to development, a business can use the CSC to strengthen its technological controls in the Protect and Detect Functions.

A business that has built their cybersecurity program can then use the CSC to fill in certain gaps, come into compliance, or further mature their programs. But the CSC includes additional requirements not found in the Framework. The Framework would probably view Control 15: Wireless Access Control and Control 20: Penetration Tests and Red Team Exercises as a highly advanced implementation not necessary for all businesses.

HOW THE CSC COMPARE WITH THE FTC DATA SECURITY REQUIREMENTS

California companies that approach data security as a compliance issue typically look to guidance from the FTC. As one of the few legally enforceable standards, The FTC's data security guidance comes from a combination of enforcement actions and publications on best practices. The FTC's guidance, as an agency whose data security enforcement comes from its authority to protect consumers and their personal information, takes a broader, less technologically detailed approach than the CSC.

The most comprehensive document issued by the FTC, Protecting Personal Information: A Guide for Business, organizes its data security framework into five steps, each containing a number of tips and actions that businesses can implement. The guidance takes a more data-focused approach, placing an emphasis on limiting the collection of personal information to what is necessary for business use and protecting it. The FTC also provides specific guidance for technology that might go unnoticed, such as digital copiers, and incorporates federal legal requirements focused more on privacy than security.

Protecting Personal Information does not provide the same robust guidance of the CSC, and in many circumstances would only partially implement the CSC. For example, the FTC's guidance on password management and employee training barely touches on the appropriate use of administrator access to computer systems, which the CSC prioritize as a means of preventing unauthorized use of credentials.

For businesses who have been complying with the FTC that want to or need to comply with the CSC, the focus should be on implementing practices that are important to good data security, but may not be directly related to protecting the unauthorized use or disclosure of personal information. In particular, ensuring that your company can ensure data recovery in the event of a loss of access due to ransomware, and making sure that configurations for wireless access and network devices are properly secured to prevent unauthorized access should be priorities.

ADDING INTERNATIONAL FLAVOR: THE ISO STANDARDS

Companies that have a global footprint or have a need for a more universally recognized set of standards may be guided by publications from the International Organization for Standardization (ISO). ISO is an international body made up of the national standards setting bodies of 162 countries that issues standards on a wide range of topics. ISO standards 27001 and 27002 on data security have been widely adopted in the U.S. and globally, and are more comprehensive than the NIST Framework.

The ISO standards focus on data security from a management perspective. Most of the CSC are focused on a mere few of the ISO Standards. Properly implemented, an ISO compliant system of data security should cover all the CSC, though the technological implementations may not be as robust as focusing on the CSC exclusively. A company may be well served by following the ISO standards as a practical matter, but it may not be as useful when coming under the particular scrutiny of any given regulator.

CONCLUSION

Regardless of the standards that a company selects, there are common steps any business can take to establish or build their data security program. For businesses starting on the path, they should evaluate the framework best suited to their business needs and determine how they can best invest resources in providing better data security. Businesses should also make sure to adequately document their data security programs and be prepared to demonstrate compliance with the standards, should a state or federal agency come to call. Finally, businesses should view data security as a process – as the threats change, their data security practices will need to respond to the changes in risk.

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KNOW YOUR JUDGE:

THE SUPREME COURT GRANTS TRIAL COURTS GREATER DISCRETION IN AWARDS FOR ENHANCED DAMAGES FOR PATENT INFRINGEMENT AND ATTORNEY'S FEES FOR COPYRIGHT INFRINGEMENT

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The June 2016 rulings of the U.S. Supreme Court mark major changes in the award of enhanced damages in patent infringement cases and in the award of attorney's fees in copyright infringement cases. Previously, the Courts of Appeal had established objective standards governing when a district court could award enhanced damages under the Patent Act or attorney's fees to the prevailing party under the Copyright Act. This limited the circumstances in which a trial court could award enhanced damages or attorney's fees.

In June, the U.S. Supreme Court reminded the Courts of Appeals – and litigants – that the Patent Act and the Copyright Act impose no objective standards and give the trial courts discretion to make those decisions. These rulings vest far more latitude in the trial judge who hears the case. Any litigant confronted with this type of case should take into account the new standards and work closely with local counsel to assess the trial judge's predilections in these types of disputes.

ENHANCED DAMAGES IN PATENT INFRINGEMENT CASES

Before June of this year, the Federal Circuit, which hears all appeals in patent infringement cases, imposed an exacting standard for patent owners seeking enhanced damages from a patent infringer. Under its standard, the patent owner could recover enhanced damages only if the owner established that (1) "the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent" and (2) the risk of infringement "was either known or so obvious that is should have been known to the accused infringer." And, the patent owner had to make this showing by clear and convincing evidence rather than by a simple preponderance of the evidence.[1]

On June 13, 2016, the U.S. Supreme Court eliminated this exacting standard when it held in *Halo Electronics, Inc. v. Pulse Electronics, Inc.* that section 284 of the Patent Act "permits district courts to exercise their discretion" to award enhanced damages "in a manner free from the inelastic constraints" of the two-part test that had been applied by the Federal Circuit. 579 U.S. __ (slip op. at 11).

At 35 U.S.C. § 284, the Patent Act states that, in case of infringement, courts "may increase the damages up to three times the amount found or assessed." The Supreme Court held in *Halo Electronics* that the text of section 284 "contains no explicit limit or condition," and that its use of the word "'may' clearly connotes discretion." (Slip op. at 8).

The statute's grant of "discretion" does not, however, give trial courts carte blanche.

As the Supreme Court noted, "discretion is not whim": "[S]uch damages are generally reserved for egregious cases of culpable behavior." (Slip op. at 8-9). Trial courts should be mindful that "[t]he sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or – indeed – characteristic of a pirate." *Halo Electronics* (slip op. at 8). The trial court should use its discretion to determine whether the infringer's conduct rises to this level.

Equally if not more importantly, the Supreme Court held that the patent owner may show the infringer's pirate-like conduct by a preponderance of the evidence and not by clear and convincing evidence. The Supreme Court also eliminated the Federal Circuit's complex framework for appellate review in which it first reviewed *de novo* whether the infringer's conduct was objectively reckless, second reviewed for substantial evidence whether the infringer and subjective knowledge of the risk of infringement, and third reviewed the award itself for abuse of discretion. The Supreme Court ruled that the trial court's decision is reviewed only for abuse of discretion. *Halo Electronics* (slip op. at pp. 5, 12). Consequently, under the new standard the trial court's award of enhanced damages requires only that the judge believe it is more likely than not that the infringer's conduct was egregious, and the Federal Circuit may only reverse that decision based on an error of law or a clearly erroneous assessment of the evidence.

Bottom line: the Supreme Court substantially lowered the threshold for a trial court to award enhanced damages in patent infringement cases, and raised the standard that must be met to reverse the trial court's decision on the issue.

ATTORNEY'S FEES IN COPYRIGHT INFRINGEMENT CASES

Similarly, before June in copyright infringement cases, the U.S. Court of Appeals for the Second Circuit essentially imposed an objective standard before awarding attorney's fees to the prevailing party. It required the trial court to give substantial weight to the objective reasonableness of the losing party's position.[2] That meant attorney's fees should not be awarded if a losing party had a claim or defense that was reasonable to pursue under the law. In practice, no court in the Second Circuit awarded a prevailing party attorney's fees under the Copyright Act unless the losing party's claims had no reasonable basis.

On June 16, 2016, the Supreme Court – much like what it had done for patent cases in *Halo* – held in *Kirtsaeng v. John Wiley & Sons, Inc.*, that objective reasonableness should not be a dispositive factor. As in *Halo*, the Supreme Court first considered the statute, 17 U.S.C. § 505, which states simply that a district court "may … award a reasonable attorney's fee to the prevailing party." The Supreme Court discussed at length the utility of trial court's using the objective reasonableness of the losing party's position in determining whether to award attorney's fees. It concluded, however, that "[a]ll of that said, objective reasonableness can be only an important factor in assessing fee applications – not the controlling one." 579 U.S. __ (slip op. at 10). The statute "confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions." The Supreme Court cited two examples when an award of attorney's fees was appropriate to the prevailing party under the Copyright Act without regard to objective reasonableness: when an opposing party engaged in litigation misconduct, and when an opposing party used an overbroad legal theory against several alleged infringers in hundreds of suits. (Slip. op. at 11). As in *Halo*, the award is reserved for egregious cases, but the Supreme Court left it to the trial court, free of any one dispositive factor, to decide when the case warranted fee shifting.

POTENTIAL IMPACT

The likelihood of enhanced damages or an award for attorney's fees in patent and copyright cases should factor into a litigant's decision to pursue or defend litigation. For example, according to the American Intellectual Property Law Association's 2015 Report of the Economic Survey, a party involved in a copyright infringement case involving less than $1 million in controversy incurs, on average, $325,000 in litigation costs through trial. That party's risk may rise to $650,000 – not including damages – if the trial court orders one party to pay the other party's attorney's fees.

Furthermore, these decisions likely will have a relatively quick impact on enhanced damages awards in patent infringement cases and attorneys' fee awards in copyright infringement cases. Historically courts have quickly applied the newer standard in changing their practice of awarding this type of damages. That is what happened after the Supreme Court released its decision in *Octane Fitness*. There, the Supreme Court struck down the Federal Circuit's onerous standard on awards of attorney's fees in patent infringement cases and left the decision to the trial court's discretion. One researcher observed that, in the 10 months following the issuance of *Octane Fitness*, "district courts awarded fees in twenty-seven out of sixty-three cases," a rate that is "at least two times greater than the fee-shifting award rate in previous years."[3]

KNOW YOUR JUDGE

The new standards applied by the Supreme Court place increased emphasis on the discretion of the trial judge. In these cases, the admonition "know your judge" could not be more appropriate. Some judges have an affinity for awarding enhanced damages or attorney's fees, others do not. Every litigant must know as much as possible about the judge. That type of knowledge only comes from practicing before that judge and knowing that judge's reputation in the community. This is an area where having local counsel with judge-specific knowledge is critical. Ask local counsel pointed questions about your judge's reputation when it comes to enhanced damages or fee awards. Litigants should research and review the judge's previous rulings on enhanced damages or attorney's fee awards to gauge what circumstances your judge has deemed exceptional, or the types of cases that your judge has deemed frivolous. This information will be essential in determining strategy for any patent infringement or copyright infringement case.

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1 *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007).
2 *Matthew Bender & Co. v. West Publishing Co.*, 240 F.3d 116, 122 (2d Cir. 2001).
3 Hannah Jiam, *Emerging Trends Post-Octane Fitness*, PATENTLYO (May 13, 2015) (available at http://patentlyo.com/patent/2015/05/emerging-octane-fitness.html) (last visited June 13, 2016).

A DIAMOND IN THE ROUGH

2016 CORPORATE DECISION OFFERS PROTECTIONS TO DIRECTORS AND FINANCIAL ADVISORS IN PERILOUS REALM OF CHANGE OF CONTROL TRANSACTIONS

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In a case involving the merger of two major jewelry retailers, the Delaware Supreme Court recently issued a ruling that will offer significant protection to directors and financial advisors navigating change of control transactions. In *Singh v. Attenborough,* No. 645, 2015, 2016 Del. LEXIS 276 (May 6, 2016), the Court held that the highly deferential business judgment rule applies to breach of duty claims against a company's board of directors when a majority of a company's fully informed, uncoerced, and disinterested stockholders vote in favor of a merger. This decision affords protection to directors and, under certain circumstances, a company's investment bankers and financial advisors. As noted in the decision, application of the business judgment rule typically results in the dismissal of breach of duty claims against directors. This was the result in the *Singh* case. Significantly, the Court also concluded that a shareholder vote in this context will also result in the dismissal of claims against a company's financial advisors for allegedly aiding and abetting the directors' alleged breaches.

Since the landmark *Revlon* decision in 1986, corporate directors have been held to a heightened level of scrutiny when they initiate change of control transactions, such as mergers, reorganizations, and asset sales. These so-called "*Revlon* duties" represented

a judicial reaction to a series of high-profile corporate raids, leveraged buyouts, and hostile takeovers that made headlines during the 1980s. Under *Revlon*, directors are tasked with the responsibility of maximizing the company's value at a sale for the stockholders' benefit, and their actions are not entitled to the deferential business judgment rule. Thus, when *Revlon* applies, directors face a heavy burden in demonstrating that their actions were reasonable.

The *Singh* decision represents the most recent M&A decision in a long line of cases that can be traced back to *Revlon*. The case stems from the acquisition of jewelry retailer Zale Corporation ("Zale") by Signet Jewelers Ltd. ("Signet"), a Bermuda corporation and the largest specialty retail jeweler in the United States and the United Kingdom. Stockholders of Zale filed suit against members of Zale's board of directors, alleging that they breached their fiduciary duties of loyalty and care. *In re Zale Corp. Stockholders Litig.*, 2015 Del. Ch. LEXIS 249 (Ch. Oct. 1, 2015) ("*Zale I*"). The Zale stockholders also alleged that Merrill Lynch, the company's financial advisor, aided and abetted the directors in breaching their duties by undermining the Board's ability to maximize stockholder value. Specifically, the plaintiffs alleged that Merrill Lynch waited until after the public announcement of the acquisition to inform the board that it had previously given a presentation to Signet (the acquirer) on the potential acquisition of Zale. The board decided that this potential conflict was not material, and disclosed it to the shareholders in a proxy.

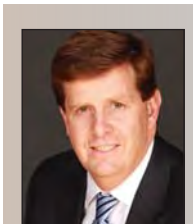
Despite finding that a majority of Zale's fully informed and disinterested stockholders voted to approve the transaction, the Delaware Court of Chancery reviewed the claims against the director defendants under the *Revlon* standard. While the court found that the stockholder plaintiffs stated a claim against the director defendants for breaching their respective duties of care by failing to handle the potential conflict properly, it ultimately dismissed the claims because they fell within the exculpation clause in the company's charter documents. However, the court denied Merrill Lynch's motion to dismiss, finding that the complaint adequately alleged that Merrill Lynch knowingly participated in the director defendants' breach by failing to disclose the potential conflict of interest.

One day after the Delaware Court of Chancery issued its opinion, the Delaware Supreme Court affirmed *Corwin v. KKR Financial Holdings LLC*. In *KKR*, the Court held that the fully informed vote of a majority of disinterested stockholders invokes the protection afforded by the business judgment rule in cases where *Revlon* would otherwise apply. Consequently, and in direct response, Merrill Lynch moved for reargument of its motion to dismiss, and the Court of Chancery in *In re Zale Corp. Stockholders Litig.*, 2015 Del. Ch. LEXIS 274 (Ch. Oct. 29, 2015) ("*Zale II*") ultimately dismissed the aiding and abetting claim. Specifically, the court held that the "cleansing effect" of the Zale stockholder vote triggered application of the business judgment rule, rather than *Revlon* enhanced scrutiny. The court further determined that the standard of review under the business judgment rule in this context was gross negligence, but that the plaintiffs failed to allege that the director defendants had acted grossly negligent. Since there was no basis for a breach of duty claim against the directors, the court dismissed the aiding and abetting claims against Merrill Lynch.

In a brief, but significant, opinion issued on May 6, 2016, the Delaware Supreme Court affirmed the dismissal of the claims against Zale's directors and Merrill Lynch, but with two important caveats that have implications for business lawyers and litigators. First, the Delaware Supreme Court held that the Chancery Court erred by considering whether the director defendants breached their duty of care under the gross negligence standard. Because there was a cleansing stockholder vote, the only possible claim against the directors would have been under the "vestigial" waste exception. This doctrine provides that a plaintiff may rebut the business judgment rule presumptions only if it can show that the transaction was "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.)*, 906 A.2d 27, 74 (Del. 2006). The Court noted that the waste exception "has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful." Second, the Court noted that the Chancery Court erred to the extent that it purported to hold that an advisor can only be held liable if it aids and abets a non-exculpated breach of fiduciary duty. The Court referred to its holding in *RBC Capital Markets, LLC v. Jervis* and clarified that "an advisor whose bad-faith actions cause its board clients to breach their situational fiduciary duties (e.g., the duties *Revlon* imposes in a change-of-control transaction) is liable for aiding and abetting." The Court ultimately concluded that the stockholder vote included a majority of the fully informed, disinterested stockholders, and that the Chancery Court properly dismissed the stockholder plaintiffs' claims against all defendants.

It seems clear that *Revlon* and its related progeny are still relevant today. The practical significance of the *Singh* decision is that a fully informed, uncoerced, and disinterested stockholder vote will significantly limit the liability of directors and financial advisors for post-closing claims related to their handling of M&A transactions. The decision also highlights the fact that financial advisors may still face liability for aiding and abetting duty breaches, even when there is no evidence that the directors engaged in gross negligence. Thus, as the court noted, an "advisor is not absolved from liability simply because its clients' actions were taken in good-faith reliance on misleading and incomplete advice tainted by the advisor's own knowing disloyalty." Perhaps most importantly, *Singh* underscores the value of full disclosure to stockholders in the context of M&A transactions.

Given the reliance many state court jurisdictions place on Delaware corporate law, business attorneys and litigators from other jurisdictions would be well served to counsel their clients to follow the recent guidance offered by the Delaware Supreme Court. Boards and financial advisors should work to disclose all potential issues during due diligence to ensure a fully informed board and shareholder vote.



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TO EACH HIS OWN: AN ANALYSIS OF LIBERTY INTERESTS IN RELIGIOUS FREEDOM RESTORATION ACTS AND THEIR IMPLICATIONS FOR BUSINESS OWNERS

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The notion of choice is endemic to our national identity, yet it has had a contradictory effect on the evolution of liberty in our social fabric. With the freedom to choose how to worship and how to live has come the freedom to choose how *not* to worship and how *not* to live. Recently, religious freedom laws, which allow citizens to refrain from acting in a way that violates their religious beliefs, have come into conflict with LGBT groups because such inaction can result in actual, or perceived, discrimination against them. This conflict has important implications in the business world because religious freedom laws may allow establishments to deny service to LGBT individuals. It is therefore important for business owners to understand the conflict of rights that Religious Freedom Restoration Acts ("RFRAs") can involve and the implications of operating in the context of RFRAs because the side of the debate that is chosen may, or may not, be good for business.

A BIT OF BACKGROUND

Pursuant to the federal Religious Freedom Restoration Act (RFRA), passed in 1993, the Government cannot "substantially burden" a person's exercise of religion. If it does, its interest has to be "compelling" and the means of furthering that interest "the least restrictive." However, in the 1997 case of *City of Boerne v. Flores*, the U.S. Supreme Court held that the federal RFRA did not apply to the states. Since 1993, twenty-one (21) states have enacted state RFRAs, and their actual, and potential, operation in the current context of LGBT rights is the battlefield upon which civil liberties have been clashing. The proponents of RFRAs claim that they safeguard the right of the individual to be free from compelled action that vi-

olates the individual's religious belief. Their opponents claim that RFRAs provide legalized discrimination against the LGBT community under the guise of religious belief. Interesting applications of these laws have manifested themselves in the business and medical fields. For example, a business may theoretically use an RFRA as justification for declining to serve a gay individual, as in Indiana. In Mississippi, doctors, psychologists, and counselors can opt out of any procedure, or even refuse a patient entirely, on the basis of their conscience being compromised. Tennessee has a similar law applicable to counselors.

JOHN STUART MILL AND THE LIMITS OF LIBERTY

It is clear that RFRAs implicate the significant interests of both religious adherents and members of the LGBT community, but perception blurs at the intersection of these interests. John Stuart Mill offers a simple answer to the complex question as to where to draw the line between competing interests. One of the principal propositions of his seminal work, *On Liberty,* is that the individual should be free to think and act as she/he wishes so long as it does not harm another. In Mill's words, "the principle [of human liberty] requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish, perverse, or wrong." According to Mill, "[t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it … But with regard to the merely contingent or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom."

Though RFRA advocates assert that, for example, serving individuals who engage in a lifestyle contrary to their religious beliefs would cause them harm, perhaps according to Mill, this harm is not concrete enough to restrict the freedom of an individual to obtain services where one wishes, regardless of whom one chooses as a partner. Though one's religion may teach that a particular lifestyle is "perverse" or "wrong," perhaps the injury that would be sustained by accommodating such an individual in one's business is of the "constructive" nature to which Mill alludes. For example, requiring a company to provide healthcare coverage for a practice its religion forbids, as in the *Hobby Lobby* case, would require that company to contravene its religious tenets by indirectly subsidizing the practice. However, requiring a business to serve an individual whose lifestyle is contrary to the owner's religious beliefs does not similarly require the owner to engage in a practice its religion directly forbids, which would render a definitive, perceptible harm. And maybe this is one of the reasons that RFRAs have become so increasingly controversial and their opposition so fierce. Religious adherents are not being forced to adopt a particular lifestyle, only to recognize another's right to do so.

WHAT THIS MEANS FOR BUSINESS

Whether or not one supports or opposes RFRAs – or the proposition that the "harm" RFRAs theoretically intend to guard against is not sufficiently concrete to justify certain restrictions or denial of services – business owners must be keenly aware of the consequences of their position in the debate. After determining whether or not an RFRA exists in a given state/sphere(s) of operation, the following considerations should be taken into account:

1. Transparency: Consumers in our digitally interconnected world are better informed than ever. Put simply, consumers do their research. They can readily uncover the reality of a business's position on any given social, environmental, or political issue, and what they find can influence their spending behavior. More importantly, it can also influence the opinions they share with other consumers, particularly on social media and other review-based platforms. The virtually unlimited reach of the Internet compounds the importance, and weight, of consumer opinion.

2. Revenue: Consumers, and investors, voice their opinions in the manner in which they spend, and a business's ideological position can result in decreased, or increased, revenue, depending on the proclivities of the consumer base. Indiana's experience following the passage of its controversial RFRA illustrates the reality of this principle. Yelp, PayPal, and NCAA executives issued condemnations of the law, and cloud computing "juggernaut" Salesforce announced that it would be forced to dramatically reduce spending in the state. The Center for American Progress reported that Angie's List announced it would either eliminate or dramatically reduce spending in Indiana, halting a proposed $40 million expansion to its Indiana headquarters.

Georgia's experience offers another example of an RFRA's potential impact on revenue. When faced with its passage in the state, Marvel, Disney, and AMC threatened to take their business elsewhere if the bill passed. The impact of such a loss would have been enormous. One Marvel movie alone, *Ant-Man*, employed 3,579 Georgians, utilized 22,413 hotel rooms during filming, and spent more than $106 million in the state.

3. Supply and Demand: What one business refuses to provide, another will. Put simply, and in the words of Noel Bagwell writing for Executive Legal Professionals PLLC, "[f]or every bakery refusing to bake a cake for a couple which self-identifies as LGBT, there is at least one competitor which could bake that cake." Market forces will adjust to the withholding of services. An ideological position may deliver potential profit directly into a competitor's hands.

4. Talent Acquisition and Retention: Though some people can divorce their ideology from their work, others cannot. A business's position on the RFRA issue may affect an individual's decision to seek employment, or remain employed, by that company. Besides potentially decreasing applicant and/or workforce pools, the nature of the talent that a given company attracts and retains is affected. It could be either progressive or conservative, depending on the stance of the individuals a given policy attracts – or deters.

Business owners have a lot to think about when choosing a side in the RFRA debate. They should also carefully evaluate the concept of harm that Mill discusses because in attempting to protect the interests of one group, they may be harming their own.

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HOW JURORS' ATTITUDES ABOUT GENDER AND AGE DISCRIMINATION IN THE WORKPLACE AFFECT YOUR CASE

Jill Leibold, Ph.D., Alyssa Tedder-King, M.A., and Adam Bloomberg Litigation Insights

What matters more – jurors' discrimination experiences or their attitudes? Or are both critical? Imagine you are in jury selection and have a juror who directly experienced workplace discrimination. You have another juror who has witnessed others' experience with workplace discrimination. And yet another who harbors the belief that gender discrimination is ingrained in today's workplace. Clearly, it helps to know your case's risk factors going into settlement or trial. To that end, Litigation Insights' national survey of mock jurors' experiences in the workplace surrounding discrimination addresses jurors' familiarity with gender and age bias.

WOMEN'S DISCRIMINATION EXPERIENCE MATTERS

Our poll suggests that jurors may be more sympathetic to female plaintiffs. Almost half of jurors (49%) agree or strongly agree that women often reach a "glass ceiling" at work that makes it almost impossible for them to advance into upper management, as shown in the graph below.

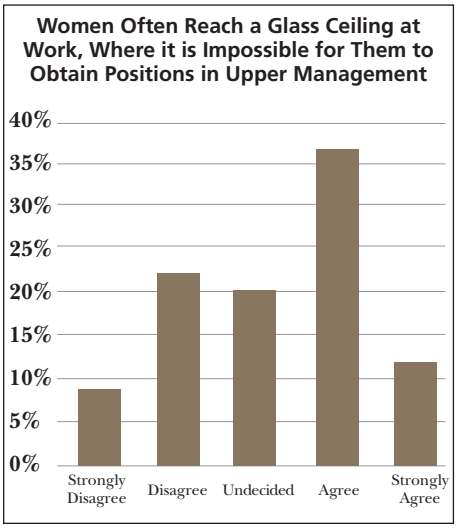
A recent Pew Research Center survey of women's and men's experiences with discrimination and attitudes about gender disparity at work was quite telling about the effect prior experiences with discrimination had on gender attitudes. Women who had experienced discrimination at work more strongly believed that the gender pay gap is due to differential treatment of women than of men, it is easier for men to get the top jobs, men earn more for the same job than women, and society favors men over women as compared to men's beliefs or their female counterparts who had not experienced discrimination. Direct experience with discrimination can give female jurors an insider's look at corporate hierarchy, human resources, and a changed view on the subtle ways that discrimination can affect a woman's career trajectory.

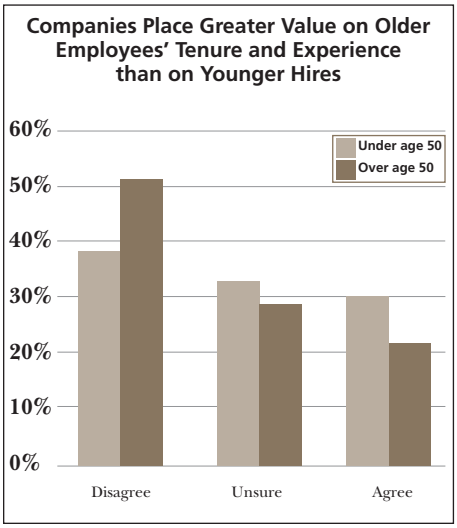
AGE BREEDS WISDOM, BUT ALSO BREEDS BIAS AT WORK

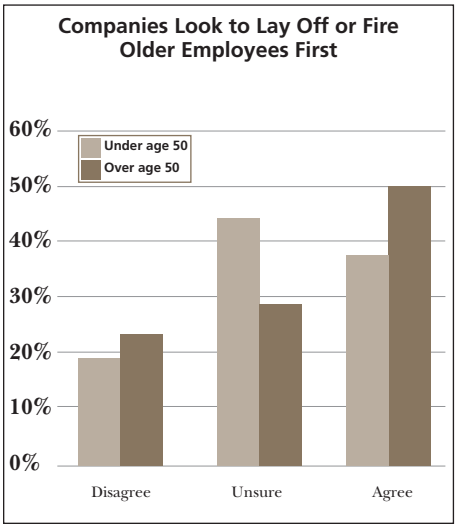
When it comes to age discrimination, juror opinions are mixed. Again, direct experience with age discrimination may come into play with juror attitudes. Specifically, older workers are more likely than younger workers to agree that employers discriminate against people because of their age. For older workers, the most common reported source of bias is in the hiring and firing process, as they feel overlooked in hiring decisions, but targeted in firing decisions.

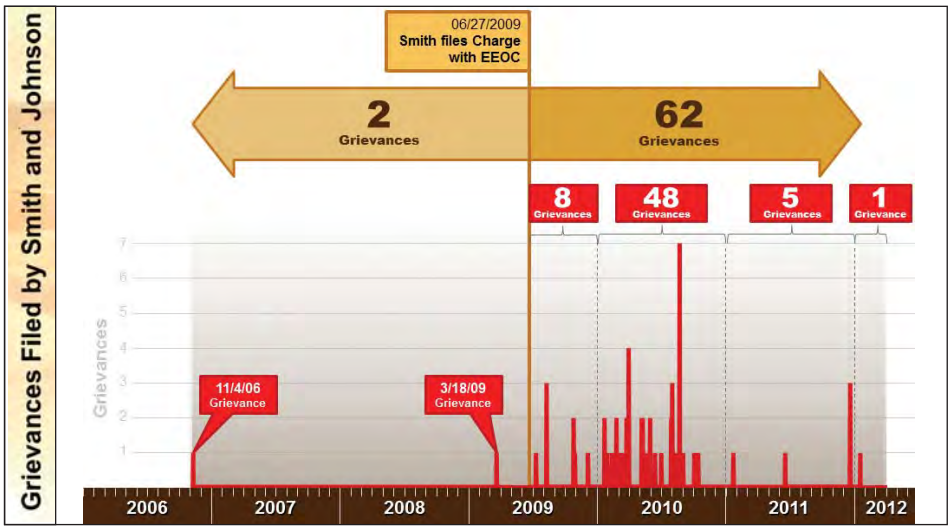
When it comes down to it, jurors' overall experiences with unemployment were extensive. Our findings indicate that nearly half (43%) of jurors have experienced unemployment at some point in their lives, with 36% of those respondents having been out of work for one year or more. In fact, 26% had been laid off from their job once, and 19% experienced a layoff more than once. Likely related to the recent recession, which was troubling for both businesses and employees alike, 29% of the layoffs were due to companies going out of business. The high volume of people who have experienced unemployment may be more sympathetic to a plaintiff who is out of work, whether or not they agree with the discrimination claim.

However, a majority of jurors (56%) across all age categories agree that one of the biggest hurdles for unemployed workers is their age, because they believe companies are biased against older workers. Indeed, jurors over age 50 were more inclined to agree than those under age 50. In fact, overall 44% of all respondents disagreed with the statement, "Companies place greater









value on older employees' tenure and experience than on younger hires." But when mock jurors were divided into an over-50 and under-50 age group, that number increased to 51% disagreement among jurors over age 50, as shown in the chart below.

Instead of age creating value for older workers, 43% of jurors across all age groups believed that older, experienced workers are the first targets of layoffs. Again, that number increased to 50% among jurors over 50, who agreed that they would be among the first targeted for layoffs.

USING GRAPHICS TO CLARIFY YOUR CASE & COMBAT BIAS

When it comes to jurors with predispositions that can threaten your case, juror deselection is a crucial strategic opportunity; however, to limit additional risk and present your best case, your trial visuals need to be as strong and as clear as possible. After all, gaps in clarity are often paved over with assumption and personal experience.

Unfortunately, clarity tends to be at odds with the very nature of an employment case. To establish a convincing path to rightful termination, there is no shortage of minute events to convey. For instance, we traditionally try to limit timeline graphics to between 12 and 15 data points (events) so as not to overwhelm our audience; but an employment case can include significantly more grievances than that, dispersed over a long period of time. So, the key is to adapt your graphics accordingly to present all that data in the best way possible.

Take this example: In the graphic above, 64 total grievances needed to be represented. But we also wanted to display them in a way that called out how dramatically the grievances intensified after the plaintiffs had filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC).

As you can see, we modified a standard timeline to accomplish our goals. Large-font numbers and rising red bars indicated the sharp increase in grievances, and made equally conspicuous the sparseness of such grievances *before* the EEOC filing. The bar graph format allowed us to present the large amount of data in a way that concisely and visually demonstrated our points. And, distinct arrows and a contrasting color (gold) highlighted the exact date of the EEOC charge, so jurors could see for themselves the suspicious turning point.

Another useful way to handle large data sets while telling a compelling story is to build up a timeline step-by-step for jurors, cutting or animating from each new timeline event to its corresponding piece of evidence. If you are trying to argue that a worker's poor performance led to his or her termination, you can match each notable fault, mistake, detrimental effect, warning or company response one-by-one to an email or document callout. With these methods, what feels like an overwhelming amount of data can be transformed into a linear story that jurors can appreciate.

CONCLUSION

Although jurors' experiences with discrimination in the workplace are ever-changing because of evolving social and employment policies, our recent survey confirms the continued patterns of risk factors over the years in employment discrimination litigation. Jurors with direct experience with discrimination may view a plaintiff's claims very differently than those who have never experienced bias. For gender and age, our results support the similarity-leniency effect, that those jurors with substantial similarity to the plaintiff are more likely to be predisposed toward the plaintiff's case. These attitudes are often firmly held and come into the courtroom with jurors, coloring the way they will view the case through those beliefs. This reality highlights the importance of identifying jurors in voir dire for de-selection who hold such strong convictions, before those jurors create a risk for your case in the jury room. It also demonstrates the need for trial graphics that are as clear as possible, and tailored in a way that promotes understanding and mitigates any potential remaining bias.

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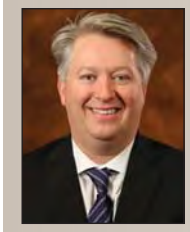
Pew Research Center survey, December 10, 2013. Gender Discrimination and Attitudes on Key Gender Issues. http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/sdt-gender-and-work-12-2013-4-05/

Jill M. Leibold, Ph.D. is director, jury research for Litigation Insights. With more than 10 years of trial consulting experience, Jill has applied her expertise in juror decision-making to hundreds of cases across all genres of litigation. She specializes in developing statistically based juror risk profiles to identify jurors for cause and peremptory strikes, and also applies the qualitative analyses to develop case stories and themes.

Alyssa Tedder-King has a Master of Science in counseling psychology from the University of Kansas where she gained valuable experience in social science research methodology and statistical analysis. Her background in the social sciences includes extensive writing and presentation skills along with experience in creating questionnaires. Her previous roles in teaching, research and counseling have provided Alyssa with a strong foundation for her work as a jury research consultant.



Adam Bloomberg is managing director, visual communications for Litigation Insights. With more than 21 years of experience, Adam has consulted with thousands of trial teams and corporate clients to develop communication strategies and presentations that educate, inform and persuade. He creates materials and exhibits for mock trials, focus groups, arbitrations and trials.

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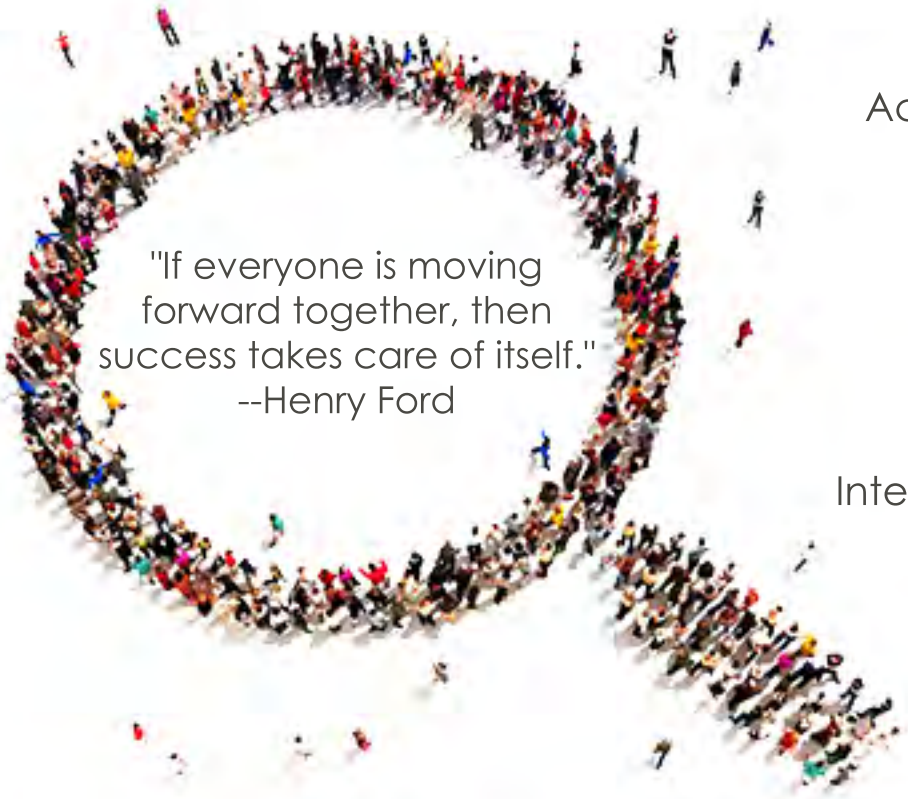

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INTERNET PRESENCE INVESTIGATIONS AND SURVEILLANCE

Doug Marshall and Thom Kramer Marshall Investigative Group, Inc.

In the Spring/Summer 2016 issue *USLAW Magazine*, we gave insight into the importance of using people's internet presence to help determine the merit of a claim and how to mitigate accordingly. We now are taking the power of the internet one step further in the investigative process. Video surveillance, along with traditional investigative techniques, are still effective tools in catching fraudulent claims, but the combination of these techniques in tandem with internet presence investigations create some of the most powerful tools in the investigator's arsenal that can effectively and efficiently detect fraud as well as aid in investigating questionable claims.

Developing information from an individual's internet presence can be a low-cost

alternative to traditional surveillance. Internet presence reviews create the opportunity to search hundreds of sites for potential information and evidence utilizing user names history, phone numbers and e-mail addresses.

Information from an individual's internet presence has been key in developing clues regarding activities and lifestyles. The key is to profile the individual for whom you are searching. Their geographic origin is a vital component to your search. Were they born in the United States or somewhere else? Do they have family overseas? If they came to the United States recently and are posting on Facebook, could they also be posting on VK or RenRen? These sites are similar to Facebook but they are popular in Europe, Asia and Africa. We all know the name Zuckerberg, but is anyone familiar with the name Pavel Durov? Pavel Durov created VK and is now an outcast from Russia after refusing to give President Putin access to all subscribers on the site. Remember that internet presence does not stop at our borders; it is global and must be treated as such.

If you are doing your own research and are screen printing content from social media, please be mindful to copy the entire URL and not just what is on your desktop. Many URLs are cut off on your desktop screen. To properly preserve social media, you need to have a reference as to where it was received. A full URL is mandatory in preserving evidence. If you are engaging an investigative company or attorney to do the research on your behalf, make sure that they are preserving the full URL. To avoid any issues regarding internet preservation for trial, an Internet Presence Audit is the best tool to preserve this evidence. An audit should include the metadata needed to establish full URL, geotagging, EXIF, date and time information.

After an internet presence review has been completed, we have a better understanding of the subject's activities, lifestyle and family makeup. We also develop the frequency of use on the internet and social media. This frequency is a vital indicator as to whether we should perform surveillance as well as whether or not we have the right person to monitor. Internet presence monitoring is a useful tool when the person of interest posts daily or up to 3-4 times a week. These avid users of social media can sometimes tip off our researchers to an upcoming event. In a recent monitoring case we identified that the subject was looking forward to a visit to Six Flags the next day. Having a neck and back injury, we thought this activity would prove not to be what the doctor ordered. The surveillance documented that the individual had achieved a full recovery and was back to an active lifestyle. This scenario has similarly played out with golf outings, ski trips, vacations and more. However, keep in mind that monitoring a case is only useful when the internet poster posts frequently. Make sure to do your due diligence and conduct an internet presence review ***before*** you assign someone to perform internet presence monitoring.

We have recently used Twitter and other similar blogs and social media channels to locate or follow a subject on surveillance. Fortunately for investigators, Twitter is a great place to tell the world what you're thinking before you've had a chance to think about it. Some people feel that they want the general public to know that they ordered a Whopper meal and are sitting at their local Burger King. Though rare, that has happened and has helped the investigator get the video documentation needed to better understand the claim and the accurate extent of an injury. When assigning surveillance, make sure that the investigative agency to which it is assigned is actively watching social media on the day the surveillance is performed.

CONCLUSION

Using social media in correlation with internet surveillance will provide the best results to gain a more complete picture of the individual or the matter in question.

1. Be diligent about social media. Make sure it is done early in the claim.
2. Think outside the box. Remember internet presence does not stop at our borders.
3. Ensure that when you find something on social media that will be helpful to your claim, you get the metadata.
4. Copy the full URL as full URL is mandatory in preserving evidence.

Doug is president of Marshall Investigative Group and has been involved in claims investigations for the last 30 years. Doug's philosophy in creating the highest-quality investigative techniques is to employ people not just from criminal justice backgrounds but various fields such as IT, Engineering, Marketing, Sociology and Psychology. Doug's degree is in Industrial Design and that background has helped him see the value of bringing people from various specialties to make a stronger company.

Thom Kramer is director of marketing and business development at Marshall Investigative Group and has been involved in the insurance investigative industry for more than 25 years. Thom has been a featured subject matter expert at trade conferences, association meetings and on national and syndication television shows including CBS's The Early Show and Real TV. Thom is also a professional photographer and his client list includes many Hollywood celebrities and studios.

RECENT CHANGES IN THE (NEW) BRAZILIAN ANTI-CORRUPTION LAW

LENIENCY PROGRAM AND THE DEBATE IN CONGRESS

Vinicius Ribeiro Mundie e Advogados

INTRODUCTION

Inspired by the international experience, Brazil has passed a legislation holding companies accountable for corruption acts (Law No. 12, 846/2011, the so-called Brazilian Anti-Corruption Law). One of the most controversial aspects of the Brazilian Anti-Corruption Law is its troubled compatibility with other existing legal frameworks such as the Competition Law and the Public Procurement Law. As a matter of fact, companies may be sued for the practice of a same conduct by more than one authority. Through Provisional Measure No. 703/2015 ("MP"), the Brazilian Government tried to address this issue by amending the leniency program provided for by the Anti-Corruption Law.

Although the MP lost its effects last May – when Congress failed to convert it into law as mandatory under Brazilian constitutional regime – the debate is still ongoing in several bills running before Congress. This is surely a matter for companies doing (or planning to do) business in Brazil to keep an eye on.

THE ANTI-CORRUPTION POLICY IN BRAZIL

Focus on the Individual: the Regime Prior to the Brazilian Anti-Corruption Law

Several tools have always been available when it comes to fighting corruption. In the criminal sphere, Brazilian Criminal Code prescribes the crime of active bribery (a special type for foreign officials was included in 2002). Relevant provisions related to public bids can also be found in the Public Procurement Law. These provisions, however, are applied only to individuals.

Both the Public Procurement Law and the Administrative Improbity Law provide for administrative and civil liabilities for corruption practices.

Therefore, although companies were subject to these laws with regard to civil and administrative liabilities, it is commonplace that anti-corruption enforcement in Brazil was individual-focused. That scenario changed, however, with the enactment of the Anti-Corruption Law.

Companies in Sight: the Enactment of the Brazilian Anti-Corruption Law

For a long time, the international community urged Brazil to hold companies accountable for corruption acts, straightening its policy on combating corruption. In fact, Brazilian focus on individuals was repeatedly reported by the Organisation for

Economic Co-operation and Development (OECD) as not consistent with the OECD Convention on the matter, mainly because the need to identify a single individual's culpability in a highly complex management chain could compromise the effectiveness of the enforcement of Anti-Corruption laws.

International concerns were addressed in 2013 by the enactment of the Brazilian Anti-Corruption Law. This Law provides both administrative and civil liability of legal entities for corruption and fraud acts against the Brazilian or foreign Public Administration.

Under the Law, companies are strictly liable for corruption acts on both civil and administrative spheres, which means that companies can be convicted regardless of evidences of fraudulent intent or negligence.

The wrongdoings provided for by the Law are drafted in a very comprehensive way. In fact, the concept of "act against the Public Administration" is used to refer to the violations provided for by the Law, and several different conducts fall within this concept. Among them, (i) to promise, offer or give, directly or indirectly, an undue advantage to a public official or to a third party related to him/her and (ii) to defraud, through an adjustment, the competitive nature of public bidding processes.

Companies held guilty for corruption acts are subject to the penalties in both administrative and civil spheres. On the administrative sphere, potential penalties involve fines ranging from 0.1% to 20% of the gross revenue or BRL 6,000-60,000,000 in cases which the gross revenue cannot be measured. Additionally, companies may be obliged to make the condemnation public through media vehicles of large circulation. On the civil sphere, among other penalties, companies are subject to (i) seizure of property, rights or amounts obtained from the violation and (ii) prohibition of receiving any kind of incentives from public agencies or entities and public financial institutions.

As mentioned above, it shall be noted that several wrongdoings provided for by this Law are very similar to other existing laws, such as the Competition Law and the Public Procurement Law. That gives room for *ne bis in idem* debates, given that a company must not be convicted twice for a same practice.

THE LENIENCY PROGRAM DEBATE

The Law also establishes a leniency program that allows companies that admit they committed corruption acts to plead guilty and then execute leniency agreements with the Public Administration. In advance, it is worth mentioning one of the most criticized aspects of the program – unlike the successful antitrust leniency program – individuals cannot be part of the leniency agreement provided for by the Anti-Corruption Law. As such, individuals will actually be opening themselves up to criminal prosecution when executing leniency agreements in name of the company. Considering corruption is also a criminal offense, this is surely a downside to the program as it drastically undermines one's incentives to adhere to a leniency agreement.

Although leniency agreements had yet to be executed by the time the Law was amended, several aspects of the program were changed by the Federal Government. Two of them should be highlighted: (i) who could execute a leniency program and (ii) the effects that should follow its execution.

Who Could Execute Leniency Agreements?

In its original wording, the Law provided that leniency agreements could only be executed by the first company to plead guilty. To its advocates, this scheme would give incentives for companies involved in corruption scandals to "rush" for the first position. That would lead to a more thorough leniency program, as the uncertainty in whether the other involved agents are far ahead in seeking the leniency would push a certain company to do it itself.

This reasoning was challenged by the Federal Government. In the mentioned MP, the Government amended the Anti-Corruption Law so as all companies eventually involved in the same corruption case could plead guilty and execute leniency agreements.

Generally speaking, advocates of this alternative scenario tend to outweigh settlements and alternative solutions over the strict application of fines in a traditional way. In this manner, the enforcement of the Law would supposedly be carried out in a more efficient way, with a reduced litigation cost and a more appropriate enforcement of compliance rules.

What Should be the Effects of Executing a Leniency Agreement?

The effects of executing a leniency agreement are also a controversial subject. In its original wording, the execution of a leniency agreement could absolve the company from paying up to 2/3 of the fines provided for by the Law, also exempting the company from the other associated penalties set forth by Law.

That aspect was also changed by the MP. First, the MP provided that the first company to report the violation and execute the leniency agreement could be granted up to the full exemption of the fine provided for by the Law (as opposed to only up to 2/3 of it, as originally provided). Second, the MP indicated that the leniency should also have the following effects (i) exemption from the penalties barring the companies from public bids (a penalty provided for by the Public Procurement Law and also other laws related to public bids) and (ii) in addition to the reduction of up to 2/3 of the penalty provided for by the Law, it should be granted that "no other pecuniary penalty should be applicable to the company for the violations described in the agreement."

Again, the proposed were not unanimous. To its advocates, the MP was welcomed as it "ties" the leniency agreement provided for by the Anti-Corruption Law with other existing laws for the sake of legal certainty.

Those who oppose the MP have a far different view of it, however. In a very complex scenario of political scandals, the proposal of the MP was perceived by some commentators as "too indulgent" with the companies recently caught in corruption acts involving Petrobrás, the Brazilian state oil company. Therefore, the fact that the amendments were proposed by the Worker's Party (PT) – for some a party directly related to the corruption scandals – may somehow have also influenced the tone given to the MP.

CONCLUSION

Critical controversies on how a leniency program should be structured appeared in a scenario in which corruption is a highly sensitive matter. In that scenario, the MP failed to be converted into Law by the Congress and lost its effects. No leniency agreement is publicly reported to have being executed during the period the MP was effective. And after more than two years since the Law came into force, only one leniency agreement has been executed to this date.

The debate, however, does not seem to be over yet. Although the MP itself is no longer under discussion, there are several bills of laws in Congress today aimed at governing the subject. In this regard, the success of the program depends on the incentives for companies to adhere to it, and legal certainty does have a special role in it. Putting political implications aside, the leniency program does seem to pose as an important tool to reconcile the Anti-Corruption Law to other existing laws.

Vinicius Ribeiro is an associate attorney at Mundie e Advogados in São Paulo, Brazil. His main areas of work are Compliance and Antitrust.

Firms on the Move

Bingham Greenebaum Doll LLP partner Brian W. Welch, of Indianapolis, Indiana, has been elected to serve as president of the 7th Circuit Bar Association. After a number of years as a member of the Board, Welch accepted the position at the close of the joint annual meeting with the 7th Circuit Judicial Conference in Chicago. He will serve through May 2017. More than 1,000 lawyers who practice in the federal courts belong to the Association. The Association also has honorary members, including the judges serving on the federal bench in the circuit. Welch has been practicing law for 38 years. He handles cases that involve contract disputes, business torts, stock and asset transactions and municipal utilities.

Philip F. McGovern Jr., John D. Cromie and Karen Painter Randall of **Connell Foley LLP** in New Jersey have been named Fellows of the American Bar Foundation. According to the American Bar Foundation, the Fellows is an honorary organization of attorneys, judges, law faculty, and legal scholars whose public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession.

Connell Foley LLP partner Karen Painter Randall received a second appointment to the Standing Committee on Lawyers' Professional Liability by the President of the American Bar Association (ABA). Randall was originally appointed to the Standing Committee in 2014 and will now serve a three-year term running from 2016-2019.

The American Subcontractors Association's National Attorneys' Council elected Lee Brumitt, of **Dysart Taylor Cotter McMonigle & Montemore PC** in Kansas City, Missouri, to serve as its chairman for 2016-2017. The Council is comprised of construction lawyers from across the United States whose practices include representation of subcontractors and specialty contractors.

John F. Wilcox, Jr. of **Dysart Taylor Cotter McMonigle & Montemore, PC** in Kansas City, Missouri, was elected secretary/treasurer of the Transportation Lawyers Association (TLA). The TLA is an international association of attorneys serving the transportation industry representing both providers and commercial users of transportation and logistics services covering all modes, including air, rail, truck and maritime. Every year, the officers ascend to the next position up the line, meaning that Wilcox will become TLA's president in 2020. He will be Dysart Taylor's seventh TLA president. Dysart Taylor currently has had more of its attorneys serve as TLA president than any other law firm.

Flaherty Sensabaugh Bonasso PLLC attorney Tom Flaherty was re-elected chair of the West Virginia University Board of Governors. His term will run through June 2017. Tom has served on the Board of Governors since 2009. Among the duties of the Board of Governors are the control, supervision and management of the financial business and education policies and affairs of West Virginia University.

Neil A. Goldberg, a nationally recognized trial lawyer and a founding partner of **Goldberg Segalla** in New York, has been named to the National Advisory Board of the University at Buffalo (UB) Law School's Advocacy Institute. UB Law established the institute to help train its students to become the best advocates they can within the profession – with the Advisory Board in place to ensure quality programming that is reflective of the leading ideas in the field. Neil, a UB Law graduate, joins 14 other acclaimed practitioners on the National Advisory Board and will help guide the institute in becoming one of the country's top advocacy programs.

André Campbell of **Hanson Bridgett LLP** in San Francisco has been selected by the California Diversity Council to receive a Multicultural Leadership Award. This award is designed to recognize individuals of color who have made a difference through their achievements and exemplify the ability to excel in their field.

Hanson Bridgett LLP, along with six other San Francisco law firms, was invited to participate in a blue ribbon panel specially convened by San Francisco District Attorney George Gascon, on a pro bono basis. The Panel was tasked with conducting an investigation into allegations of racism, homophobia and misconduct in the San Francisco Police Department in the wake of the texting scandal and shootings. Hanson Bridgett's working group consisted of Partner Neil Bardack and associates Matt Peck and Candice Shih. The Hanson Bridgett group's issue was whether racial bias in crime clearance rates could be established through police arrest and crime closure data. Hanson Bridgett's team presented to a Panel consisting of California Supreme Court Chief Justice Cruz Reynoso (ret.), United States District Court judge Dickran Tevrizian (ret.) and California

Superior Court judge LaDoris H. Cordell (ret.), at three different public hearings. The findings and conclusions of the Panel's work is now published in the Report of the Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement.

Jones, Skelton & Hochuli, P.L.C. in Arizona published the summer 2016 issue of JSH Reporter, a comprehensive digital magazine designed to provide information about changes in the law and how the changes affect a variety of industries. Articles in the current issue of *JSH Reporter* focus on attorney-client privilege, social media research, large jury verdicts, claw-back agreements, *cumis* counsel requirements, bad faith defense themes, and more. To read the current or archived issues, visit www.jshreporter.com.

Kevin L. Gramling, of **Klinedinst PC** in California, has been formally accepted into membership of the highly respected American Board of Trial Advocates (ABOTA).

LeClairRyan of Virginia launches two new blogs: *Marketplace Shift*, that explores the legal side of financial technology, and *Long Term Care Counsel* that is geared toward owners, operators and management companies in the long term care sector. *Marketplace Shift* covers the gamut of game-changing innovations in financial technology – from crowdfunding and peer-to-peer lending to alternative online financing. Readers can access the blogs via http://marketplaceshift.com/ and http://ltccounsel.com/.

Murchison & Cumming LLP in southern California has launched a new blog – Post 85 – that covers the hot legal topics impacting business. To read the latest posts, visit www.murchisonlawblog.com.

Margo D. Northrup of **Riter, Rogers, Wattier & Northrup, LLP** of Pierre, South Dakota, recently completed her three-year term on the Board of Governors of the State Bar of South Dakota. She has now been elected Chair of the South Dakota Defense Lawyers. She also regularly provides lectures to statewide groups on employee-employer relations and work place safety.

Melissa R. Hoeffel, partner-in-charge of **Roetzel & Andress LPA**'s Columbus (Ohio) office, was inducted into the Association of Ohio Commodores, which is a group of individuals recognized by the Governor of Ohio with the state's most distinguished honor, The Executive Order of the Ohio Commodore. Each year, outstanding Ohioans are recognized for their business accomplishments, acumen, and leadership with this prestigious honor.

Simmons Perrine Moyer Bergman PLC (Cedar Rapids, Iowa) attorneys Matthew Brandes and Larry Gutz were recognized by Chief Judge Grady of Iowa's Sixth Judicial District for helping make access to the civil judicial system available to Iowans of low income. These attorneys have distinguished themselves by contributing more than 50 hours of pro bono service in 2014-15 to clients referred by the Iowa Legal Aid Volunteer Lawyers Project.

A century of service. 2016 marks the 100th Anniversary for USLAW NETWORK member **Simmons Perrine Moyer Bergman PLC** of Iowa.

Meryl R. Lieberman, a founding partner of **Traub Lieberman Straus & Shrewsberry LLP** and a New York Law School graduate (1981), has been selected to serve on the School's Board of Trustees for a one-year term, which began on July 1, 2016.

E. Holland "Holly" Howanitz, a partner of **Wicker Smith O'Hara McCoy & Ford P.A.**'s Jacksonville, Fla., office was selected as one of the *Jacksonville Business Journal*'s 2016 Women of Influence. This award recognizes women who have helped shape Jacksonville's business community and the region overall by their involvement in businesses, nonprofits and the public sector.

FACES of USLAW

Dysart Taylor Managing Director Amanda Pennington Ketchum receives the 2016 Distinguished Counselor Award from the Kansas City Metropolitan Bar Association. This award recognizes individuals who demonstrate professional gallantry, peacemaking, harmony and friendship. From left to right: Associate Meghan A. Litecky, Managing Director Amanda Pennington Ketchum, Director Don Lolli, and Associate Kate Alfaro.

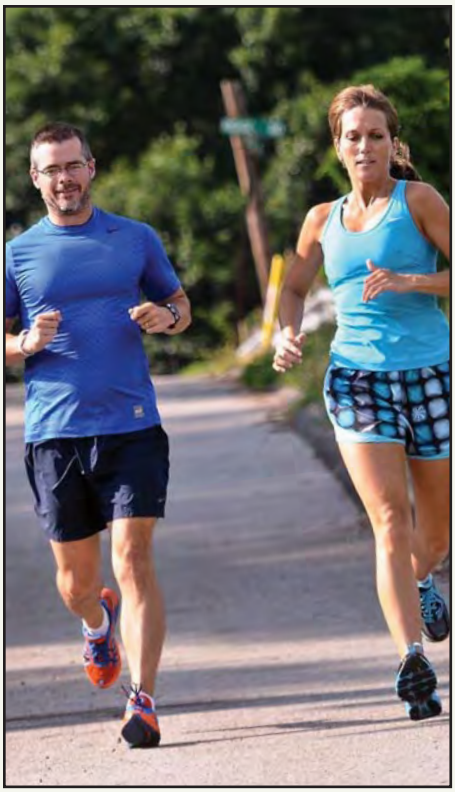
In April, **Traub Lieberman Straus & Shrewsberry LLP** of Hawthorne, N.Y., hosted its 5th Annual Volleyball Tournament, which was held at Chelsea Piers in NYC. In attendance were members of insurance companies, third-party administrators, municipal corporations and private companies, including a group from Hiscox, pictured here with one of the Traub Lieberman teams.

After presenting to the GEICO office in Tucson, Ariz., Ed Hochuli – a partner with **Jones, Skelton & Hochuli** in Arizona, and a referee in the National Football League – stays to sign memorabilia and take pictures with his clients.

Phil Burian of **Simmons Perrine Moyer Bergman PLC** in Iowa, a veteran of the first Persian Gulf War with the U.S. Army National Guard, practices primarily in civil litigation, trial in state and federal courts and alternative dispute resolution. In his spare time – and although he's only been curling for three years – Phil is very active in the leadership of the Cedar Rapids Curling Club. He frequently travels to curl in competitions throughout the U.S. and he even competed in the U.S. Arena National Championship earlier this year in West Chester, Pa.

SmithAmundsen's Diversity Committee hosted their third annual PRIDE event in Chicago, celebrating LGBT equality with attorneys, staff and clients. Also, SmithAmundsen was recognized by Equality Illinois as a top Illinois law firm for LGBT inclusiveness and equality for 2016.

At the mic: Glen Amundsen – founder, chairman and CEO of **SmithAmundsen**



Charleston, West Virginia, residents Tim and Jenny Mayo have run a half-marathon, marathon or ultra-marathon in 46 states. They plan to reach their six-year goal of all 50 states later this year. When the Mayos are not training or raising their three children, Tim practices law at **Flaherty Sensabaugh Bonasso** and Jenny teaches second grade.

Goldberg Segalla partners Neil A. Goldberg and Thomas F. Segalla were honored with the Distinguished Alumni Award for Private Practice by the SUNY Buffalo Law Alumni Association at its 54th Annual Alumni Dinner, held May 11, 2016. The awards – established by the UB Law Alumni Association's Board of Directors in 1963 – recognize the contributions its alumni have made in the legal profession and the community in which they serve.

A team of 12 attorneys and staff from **Sweeny Wingate & Barrow, P.A.**, competed in the Palmetto 200, a relay race across South Carolina on March 18-19 to raise funds for the Leukemia & Lymphoma Society. Team Tort-Us completed the 205.4 mile course in 29 hours, 26 minutes, with each runner averaging 17 miles at an 8:35/mile pace.

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8 High-level corporate partners

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Successful Recent USLAW Law Firm Verdicts

Bingham Greenebaum Doll LLP (Indianapolis, IN)

A Bingham Greenebaum Doll LLP (BGD) trial team led by Litigation practice group co-chair James M. Hinshaw and partner John McCauley were victorious on behalf of their client The French Lick Resort (a.k.a. Blue Sky Resorts, LLC and Blue Sky Casinos, LLC) in U. S. District Court for the Southern District of Indiana. Firm attorneys secured the outright dismissal of a proposed nationwide class action against The French Lick Resort, arising out of a data security breach initiated by criminal hackers from Russia in an effort to obtain some of the resort's customer's credit card information. In a 14-page ruling, Judge Pratt from the Southern District of Indiana determined that the plaintiffs had experienced no injury in fact from the data security breach, and thus lacked constitutional standing to file their lawsuit. Judge Pratt further ruled that, in light of the Plaintiffs' failure to show any injury that could support a plausible claim that raises a right to relief above the speculative level, neither Indiana nor Kentucky courts would recognize the Plaintiffs' novel state law claims in the data breach context. BGD attorneys Alex Gude and Jessica Whelan assisted on the research and briefing for the Motion to Dismiss.

Flaherty Sensabaugh Bonasso PLLC (Charleston, WV)

In a memorandum decision, the Supreme Court of Appeals of West Virginia recently affirmed the Circuit Court of Kanawha County, West Virginia's dismissal of Plaintiff's Complaint alleging multiple products liability claims against a Defendant automaker stemming from the failure of an engine component in the Plaintiff's vehicle.

In upholding the circuit court's decision, the Supreme Court found no error in the dismissal of Plaintiff's Complaint for failure to state a claim upon which relief could be granted. Specifically, the Court found Plaintiff did not give the required statutory notice of his intent to sue under the West Virginia Deceptive Trade Practices Act and determined that Plaintiff's breach of implied warranty of merchantability claim was filed beyond the statute of limitations provided by the West Virginia Uniform Commercial Code. The Court further found no error in the circuit court's dismissal of Plaintiff's strict liability cause of action because the alleged damages were to the vehicle's engine only and did not occur as part of a "sudden calamitous event," which under West Virginia law would permit recovery in strict liability.

Defendant was represented by Flaherty Sensabaugh Bonasso attorneys Mike Bonasso, Nate Tawney, and Philip Reale, II.

Goldberg Segalla (Syracuse, NY)

Attorneys from Goldberg Segalla's Syracuse team recently secured the dismissal of hundreds of independent claims of physical and psychological abuse against health care professionals employed by New York State Office for People with Developmental Disabilities. Following a $30-million demand presented by the plaintiffs during mediation, this summary judgment victory protects the livelihoods and reputations of Goldberg Segalla's clients and highlights the capabilities of the firm's Health Care and General Liability Practice Groups.

Kenneth M. Alweis and Heather K. Zimmerman led the Goldberg Segalla team in this victory in the U.S. District Court for the Northern District of New York. They represented six professionals who worked at a state-owned residential home for severely disabled individuals. The plaintiffs, parents of a disabled man who lived at the facility, alleged that the defendants violated their and their son's constitutional rights through a pattern of abuse, neglect, and retaliation.

The Goldberg Segalla team took over the defense of its clients from the New York State Attorney General's office. Document discovery involved the analysis of tens of thousands of pages of treatment and related records. In September 2015, after extensive fact and expert discovery, Goldberg Segalla filed a motion for summary judgment. In June 2016, the court granted the firm's motion and dismissed the case against its clients in its entirety.

Johnson, Trent, West & Taylor (Houston, TX)

Chris Trent of Johnson, Trent, West & Taylor in Houston, successfully defended a multi-million dollar claim on behalf of Polaris Industries, Inc., involving two injured plaintiffs following their ejection from a Polaris Ranger XP900 side-by-side off-road utility vehicle. On June 14, 2016, a unanimous jury in the Western District of Texas, Austin Division, found no design defect in a 2013 Polaris Ranger XP900 following an August 10, 2013, incident whereby Plaintiff Charlie Campbell and Plaintiff Gina Wolff were ejected from a hunting high seat installed in a cargo box. The incident occurred on the afternoon of the day the Ranger was purchased from Opolaris, LLC d/b/a Polaris Fun Center in Bryan, Texas. The dealer sold and installed the high seat in the cargo box of the Ranger. After several hours of use and approximately 14 miles of service, the cargo box came unlatched while Ms. Campbell and Mrs. Wolff were passengers, the ladies were ejected, and both suffered severe injuries. Ms. Campbell, a single 36-year-old mother of two children, was rendered a quadriplegic and Mrs. Wolff suffered a fractured pelvis and torn labrum necessitating surgeries. Plaintiffs sued Polaris Industries, Inc. (designed and manufactured the Ranger XP900), Opolaris, LLC (dealer who sold the Ranger and the high seat), and Trinity Outdoors (designer of the high seat), alleging product liability, negligence, and gross negligence. Plaintiffs settled with Opolaris, LLC for a confidential amount and Plaintiffs dismissed Trinity Outdoors. Plaintiffs asked the jury for more than $16,000,000 in damages. After one day of deliberations, the jury returned a complete defense verdict.

Lewis Roca Rothgerber Christie LLP (Denver, CO)

Attorneys at Lewis Roca Rothgerber Christie LLP successfully defended Safeco in a recent case in Colorado. Gallegos vs. Safeco was filed in the U.S. District Court for the District of Colorado. Plaintiffs alleged that Safeco had wrongfully denied their claim for a sag in their roof which they alleged was caused by the weight of ice and snow. Plaintiffs asserted claims for breach of contract, violation of C.R.S. 10-3-1115 and -1116, and bad faith. Safeco's retained engineer opined that the roof's sag was caused, at least in part, by wear and tear, faulty design, construction, and repairs, improper maintenance, and deterioration, which are all excluded causes of loss, even if weather also contributes to the loss. Ultimately, when presented with the undisputed amount of snow and ice present on the roof at the time of the sag, and walking through the snow load calculations, Plaintiffs' expert admitted during his deposition that the weight of ice and snow alone was not enough the cause a normally functioning roof to sag. Plaintiffs' expert issued a revised report stating that excluded causes of loss, including wear and tear, faulty design, construction, and repairs, improper maintenance, and deterioration contributed to the sag in Plaintiffs' roof. Based upon these undisputed facts, and the unambiguous anti-concurrent causation language in the policy, Safeco moved for summary judgment. The federal district court granted Safeco's motion for summary judgment and the 10th Circuit affirmed the ruling, finding: "Although the Gallegoses attempt to make it complicated, the issue on appeal is quite simple. The question is whether any reasonable juror could conclude that a specifically excluded cause (i.e., improper construction and/or maintenance) did not contribute to the collapse of the Gallegoses' roof. Like the district court, this court concludes the answer to that question is an emphatic 'no.'" Attorneys involved in the case included Brian Spano, partner, and Holly Ludwig, associate.

McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, LLC (New Orleans, LA)

Ford Motor Company, represented by Keith W. McDaniel and Quincy T. Crochet of McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, LLC, recently prevailed after a jury trial in New Orleans. The underlying accident occurred when a Toyota Tundra rear-ended the plaintiff's 2005 Ford Focus while stopped at a red light. Ford's reconstruction, performed by Tom Perl, Ph.D., P.E., put the speed of the Tundra at 50-60 mph at impact. The plaintiff filed suit against Ford and argued that the driver's seat back strength was inadequate. He also sued the driver of the Tundra, who plead guilty to DWI after the crash. In defense of its seat, Ford called Jeya Padmanaban, M.S., a statistician who explained that the crash was more severe than 97.7% of all rear-end accidents, and that seatback strength is not a statistical predictor of injury outcome. Ford also called Roger Burnett, a Ford engineer, who explained the design process for the seat and Ford's extensive developmental testing. Finally, Ford called David Viano, Dr. med., Ph.D., a biomechanical engineer with expertise in seat design, who testified that the seat performs very well in rear-end crashes and represents the best design choice for occupant protection in the Focus. Dr. Viano also introduced testing that demonstrated that the use of the more rigid alternative seat design proposed by plaintiff actually increased the risk of injury to occupants in crash scenarios experienced much more often than the subject crash scenario and offered no injury reduction benefit even in the subject accident scenario. During closing arguments, plaintiff's counsel suggested a damages award of $5M to $20M plus past and future medicals of up to $4.4M. After deliberations, the jury rejected the claims against Ford and placed all fault for the accident and plaintiff's injuries on the driver of the Tundra.

Murchison & Cumming, LLP (Los Angeles, CA)

A Los Angeles court granted a summary judgement in favor of Motorcycle Safety Foundation, represented by Murchison & Cumming attorney Nancy N. Potter. The plaintiff took a beginners' motorcycle riding course from Motorcycle Safety Foundation, on the campus of Cerritos College; as part of the enrollment, he signed a waiver and release of liability. During the class, another student was unable to control his motorcycle and hit the plaintiff's knee and the plaintiff sued, alleging simple and gross negligence. The defense filed a motion for summary judgment based on the waiver and release which the plaintiff signed, noting the position that he had not been given time to read the document before signing it. The court held that the plaintiff was bound by the release which he had signed, that there had been no facts showing fraud, and that the waiver was not against public policy because motorcycle training is not an essential activity and the plaintiff had many sources for the training. The court also held that there was no possibility of gross negligence, based on the facts alleged, and therefore granted summary judgment.

Quattlebaum, Grooms & Tull PLLC (Little Rock, AR)

Steven W. Quattlebaum, Chad W. Pekron, and R. Ryan Younger, along with attorneys from PPGMR Law, achieved a defense verdict in favor of BHP Billiton in a case claiming a breach of three oil and gas production contracts. The plaintiffs alleged their leases should have been further developed and the failure of the defendant to drill additional wells on the leased properties violated the implied covenant of reasonable development in their leases. A six-day jury trial in United States District Court in Little Rock, Arkansas, resulted in a defense verdict on all counts.

Roetzel & Andress LPA (Cleveland, OH)

Stephen Jones (Columbus office) and Jeremy Young (Columbus office) of Roetzel & Andress LPA recently obtained the dismissal of an eminent domain action filed against Speedway by the Ohio Department of Transportation (ODOT) with respect to a Speedway store in Sandusky, Ohio. ODOT proposed to close one of the store's drives, which had the potential to shutter the store, and to exercise "quick take" authority to begin construction before the conclusion of the case. Roetzel challenged the exercise of quick take authority, as well as the necessity for the appropriation. A hearing was held, and the judge required the parties to submit proposed findings of fact and conclusions of law. Steve Funk (Akron office) then became involved to help make Speedway's submission as strong as possible for appellate review. The court approved Speedway's proposed findings of fact and conclusions of law, dismissing the case and ordering ODOT to pay Speedway's substantial litigation expenses.

Simmons Perrine Moyer Bergman PLC (Cedar Rapids, IA)

A unanimous United States Supreme Court ruled that the Eighth Circuit Court of Appeals used the wrong standard in setting aside Judge Reade's $4.6 MM fee award to Simmons Perrine Moyer Bergman's (SPMB) client, CRST, for the successful defense of the government's misconceived and prematurely executed sex harassment class action originally brought in 2007. Justice Anthony Kennedy's opinion for the Court makes clear that CRST "prevailed" in its defense and is thus entitled to its fee award for the botched prosecution if Judge Reade's award was within the discretion allowed under the proper standard (unreasonable or frivolous), which is the standard she employed in making her most recent award to the company of its costs in prevailing against the government. The Court of Appeals' opinion has been vacated, and the case remanded to the Cedar Rapids District Court for review and a further award of fees. Kevin Visser and Thomas Wolle have led SPMB's efforts for CRST against EEOC's continuing litigation since the 2006 inception of the suit through the present renewed fee application.

SmithAmundsen (Chicago, IL)

Thomas Lyman and Molly Arranz of SmithAmundsen settled a Telephone Consumer Protection Act (TCPA) class action lawsuit 15 minutes before the start of trial in Federal Court. Plaintiff sued a dental practice in 2009 accusing it of distributing (through an independent company) over 7,000 unsolicited

fax advertisements in violation of the TCPA. The TCPA has provided fertile ground for large recoveries or settlements on behalf of classes throughout the country. In fact, the original, statutory amount at issue in this lawsuit was over $3.5 million. The plaintiff accepted a class settlement of $400,000. The potential payout may be only $200,000.

Traub Lieberman Straus & Shrewsberry LLP (Hawthorne, NY)

Traub Lieberman Straus & Shrewsberry LLP attorneys Meryl Lieberman, Brian Margolies and Greg Perrotta obtained a favorable ruling on a motion to dismiss a coverage action brought against their clients, American Safety and Indian Harbor, under several pollution liability policies. The insured sought coverage for attorney's fees it incurred in defending in an underlying criminal proceeding brought pursuant to the criminal sections of the Clean Air Act. It also sought coverage for restitutionary amounts it agreed to pay as part of a plea deal. The insured contended that because the criminal proceedings arose out of its air monitoring work performed in connection with several asbestos abatement programs, the policies' professional liability coverage parts were triggered. The insurers denied coverage on the grounds that a criminal proceeding cannot be characterized as a "claim" under a professional liability coverage policy and that in any event, the policies' duty to defend was limited to civil proceedings. On motion to dismiss, the New York Supreme Court for the Onondaga County agreed that no amounts paid by the insured qualified as covered damages, and that dismissal, therefore, was appropriate.

Wicker Smith O'Hara McCoy & Ford P.A. (Coral Gables, FL)

A Hernando County jury returned a defense verdict in a two-week medical malpractice case involving exertional compartment syndrome and the loss of the lateral compartment of the right leg. Mr. Sikalos alleged that he developed acute exertional compartment syndrome to the lateral compartment of the right leg after completing training as a deputy sheriff and running 1.5 miles. Mr. Sikalos argued that his signs and symptoms in the emergency department were consistent with acute compartment syndrome that required a surgical consult and fasciotomy. The Defendants argued that his signs and symptoms were consistent with a sprain or strain, and Mr. Sikalos did not have diagnosable compartment syndrome in the emergency department. The Plaintiffs called an emergency room expert, general surgeon, and vascular surgeon. None of the Plaintiffs' experts had ever seen compartment syndrome develop from this mechanism of injury. The Plaintiffs asked for more than $2 million. The jury returned a defense verdict. The Defendants were represented by Michael E. Reed and Heather L. Stover with the Tampa office of Wicker Smith O'Hara McCoy & Ford.

Successful Recent USLAW Law Firm Transactions

Bingham Greenebaum Doll LLP (Indianapolis, IN)

Bingham Greenebaum Doll LLP client German American Bancorp, Inc. successfully completed its previously announced merger with River Valley Bancorp of Madison, Indiana. German American Bancorp now has 51 banking offices in Indiana and Kentucky following the merger. The shareholders of River Valley Bancorp received approximately $87 million in German American Bancorp stock and cash as part of the transaction. The combination of the two leading companies is expected to expand German American's footprint into the greater Madison market as well as the Kentucky market according to the publication. BGD partner and Banking and Financial Institutions Team Leader Jeremy Hill, partner Tonya Vachirasomboon and attorney Bradley C. Arnett lead the transaction, with assistance from partners Mary G. Eaves, Andy Bowman, Andrew Gruber and Ross D. Cohen on certain specialized matters. Firm partners William J. Kaiser Jr., Eric J. Schue and attorney David T. McGimpsey also provided strong local support on the transaction from the firm's Jasper office.

Klinedinst PC (San Diego, CA)

Klinedinst PC advised Hunter Industries, a leading irrigation products manufacturer, in its acquisition of Hydrawise. Financial terms of the deal were not disclosed. Hydrawise manufactures Wi-Fi enabled irrigation controllers and web-based software, offering users easy configuration of irrigation sites using a standard web browser or smart device app. Hunter will integrate the cloud-based irrigation control and Hydrawise software to offer smart, connected irrigation controllers and promote resource conservation. This acquisition supports Hunter's strategy to bring simplicity to irrigation control and provide information on water savings impact. The Klinedinst PC team was led by San Diego shareholder Christian P. Fonss.

Quattlebaum, Grooms & Tull PLLC (Little Rock, AR)

Timothy W. Grooms and J. Cliff McKinney II of Quattlebaum, Grooms & Tull PLLC in Little Rock, Ark., served as local counsel for two large corporations in connection with the construction, start-up and operation and maintenance of two new manufacturing facilities in Arkansas. Both projects involved incentives from governmental entities. One matter concerned the purchase of a facility in western Arkansas for the development of a new paper processing facility by a Fortune 500 company. The project is expected to create more than 80 highly skilled manufacturing jobs at the new facility with a total capital investment of approximately $80 million. The second matter involved a Chinese company choosing a location in the southwestern part of the state as the site of its first bio-products mill in North America. The $1 billion investment for the plant is expected to create 250 new jobs and have a tremendous economic impact on the state of Arkansas.

Roetzel & Andress LPA (Cleveland, OH)

Roetzel & Andress LPA recently served as legal advisor to Questco, LLC ("Questco") in its sale to Parallel49 Equity, a middle market private equity firm. DLA Piper served as legal advisor to Parallel49 Equity. Founded in 1989, Questco is a premier professional employer organization (PEO), providing outsourced human resource management and administrative services to small- and medium-sized businesses. Questco represents the fourth investment in Parallel49 Equity Fund V, which began making investments in 2014, and the 82nd acquisition over the last 20 years under the Parallel49 Equity brand and its previous brand, Tricor Pacific Capital.

ABOUT USLAW NETWORK

2001. The Start of Something Better.

Mega-firms...big, impersonal bastions of legal tradition, encumbered by bureaucracy and often slow to react. The need for an alternative was obvious. A vision of a network of smaller, regionally based, independent firms with the capability to respond quickly, efficiently and economically to client needs from Atlantic City to Pacific Grove was born. In its infancy, it was little more than a possibility, discussed around a small table and dreamed about by a handful of visionaries. But the idea proved too good to leave on the drawing board. Instead, with the support of some of the country's brightest legal minds, USLAW NETWORK became a reality.

Fast-forward to today.

The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client's legal success. Now as a network with more than 6,000 attorneys from nearly 100 independent, full practice firms with roots in civil litigation, spanning the United States, Canada, Latin America, Europe, Asia and Africa, USLAW NETWORK remains a responsive, agile legal alternative to the mega-firms.

Home Field Advantage.

USLAW NETWORK offers what it calls The Home Field Advantage which comes from knowing and understanding the venue in a way that allows a competitive advantage – a truism in both sports and business. Jurisdictional awareness is a key ingredient to successfully operating throughout the United States and abroad. Knowing the local rules, the judge, and the local business and legal environment provides our firms' clients this advantage. The strength and power of an international presence combined with the understanding of a respected local firm makes for a winning line-up.

A Legal Network for Purchasers of Legal Services.

USLAW NETWORK firms go way beyond providing quality legal services to their clients. Unlike other legal networks, USLAW is organized around client expectations, not around the member law firms. Clients receive ongoing educational opportunities, online resources including webinars, jurisdictional updates, and resource libraries. We also provide a semi-annual *USLAW Magazine*, USLAW DigiKnow, which features insights into today's trending legal topics, compendiums of law, as well as annual membership and practice group directories. To ensure our goals are the same as the clients our member firms serve, our nearly 50-member Client Leadership Council is directly involved in the development of our programs and services. This communication pipeline is vital to our success and allows us to better monitor and meet client needs and expectations.

USLAW Abroad.

Just as legal issues seldom follow state borders, they often extend beyond U.S. boundaries as well. In 2007, USLAW established a relationship with the Trans-European Law Firms Alliance (TELFA), a network of more than 25 independent law firms representing more than 700 lawyers through Europe. Subsequently, in 2010 we entered a similar affiliation with the ALN (formerly the Africa Legal Network) to further our service and reach. Additionally, USLAW member firms are located throughout Canada, Latin America, and Asia.

How USLAW NETWORK Membership is Determined.

Firms are admitted to the NETWORK by invitation only and only after they are fully vetted through a rigorous review process. Many firms have been reviewed over the years, but only a small percentage were eventually invited to join. The search for quality member firms is a continuous and ongoing effort. Firms admitted must possess broad commercial legal capabilities and have substantial litigation and trial experience. In addition, USLAW NETWORK members must subscribe to a high level of service standards and are continuously evaluated to ensure these standards of quality and expertise are met.

USLAW in Review.

- All vetted firms with demonstrated, robust practices and specialties
- Efficient use of legal budgets, providing maximum return on legal services investments
- Seamless, cross-jurisdictional service
- Responsive and flexible
- Multitude of educational opportunities and online resources
- Team approach to legal services

The USLAW Success Story.

The reality of our success is simple: we succeed because our member firms' clients succeed. Our member firms provide high-quality legal results through the efficient use of legal budgets. We provide cross-jurisdictional services eliminating the time and expense of securing adequate representation in different regions. We provide trusted and experienced specialists quickly.

When a difficult legal matter emerges – whether it's in a single jurisdiction, nationwide or internationally – USLAW is there. Success.

For more information, please contact Roger M. Yaffe, USLAW CEO, at (800) 231-9110 or roger@uslaw.org

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EDUCATION

It's no secret – USLAW can host a great event. We are very proud of the industry-leading educational sessions at our semi-annual client conferences, seminars, and regional meetings. Reaching from national to more localized offerings, USLAW member attorneys and the clients they serve meet throughout the year not only at USLAW hosted events but also at many legal industry conferences. CLE accreditation is provided for most USLAW educational offerings. For a complete listing of programs, please check our Events and Activities Calendar on the home page of USLAW Connect.

A TEAM OF EXPERTS

USLAW NETWORK undoubtedly has some of the most knowledgeable attorneys in the world, but did you know that we also have the most valuable corporate partners in the legal profession? Don't miss out on an opportunity to better your legal game plan by taking advantage of our corporate partners' expertise. Areas of expertise include forensic engineering, court reporting, jury consultation, forensic accounting, structured settlements, complex and catastrophic medical management services, discovery, cyber security and data forensics, investigation and legal animation services.

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SOURCEBOOK

USLAW NETWORK offers legal decision makers a variety of complimentary products and services to assist them with their day-to-day operation and management of legal issues. The USLAW SourceBook provides information regarding each resource that is available. We encourage you to review these and take advantage of those that could benefit you and your company. For additional information, simply contact Roger M. Yaffe, USLAW CEO, at roger@uslaw.org or (800) 231-9110, ext. 1.

USLAW is continually seeking to ensure that your legal outcomes are successful and seamless. We hope that these resources can assist you. Please don't hesitate to send us input on your experience with any of the products or services listed in the SourceBook as well as ideas for the future that would benefit you and your fellow colleagues.

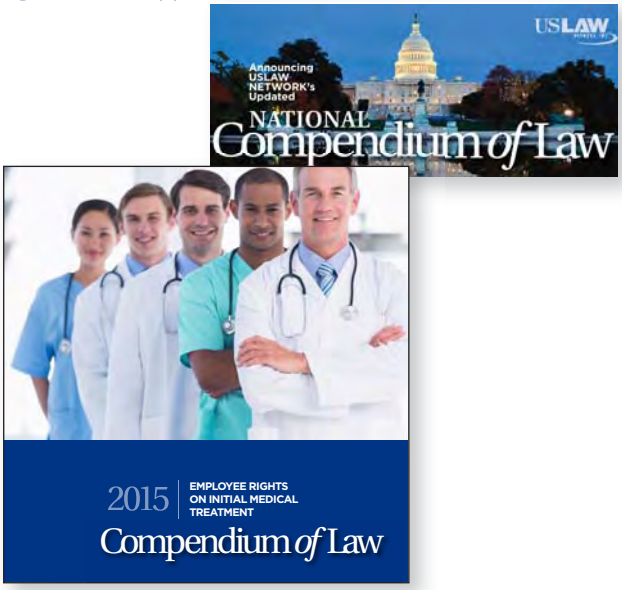
USLAW ON CALL

What is the value in having individual access to 4-8 highly experienced USLAW member attorneys from around the country and around the world (if necessary) roundtable specific issues you may be facing including actual cases or hypotheticals? USLAW is pleased to provide this free consultation which will give you a sense of comfort that you are managing a specific issue/case in an appropriate manner and make you aware of unforeseen roadblocks and variables that may pop up. It never hurts to phone a friend!

LAWMOBILE

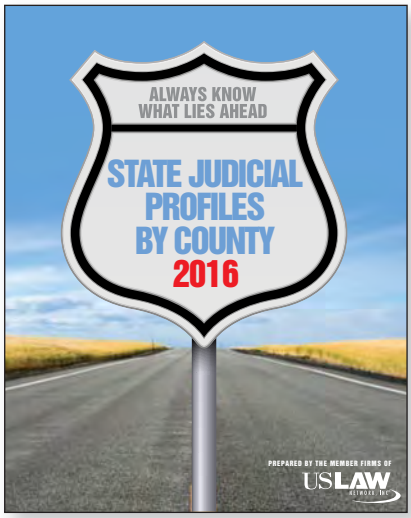
We are pleased to offer a completely customizable one-stop educational program that will deliver information on today's trending topics that are applicable and focused solely on your business. In order to accommodate the needs of multiple staff, we go one step further and provide LawMobile right in your office or pre-selected local venue of your choice. We focus on specific markets where you do business and utilize a team of attorneys to share relevant jurisdictional knowledge important to your business' success. Whether it is a one-hour lunch and learn, half-day intensive program or simply an informal meeting discussing a specific legal matter, USLAW will structure the opportunity to your requirements – all at no cost to your company.

COMPENDIUMS OF LAW



USLAW regularly produces new and updates existing Compendiums providing a multi-state resource that permits users to easily access state common and statutory law. Compendiums are easily sourced on a state-by-state basis and are developed by the member firms of USLAW. Current Compendiums include: Retail, Spoliation of Evidence, Transportation, Construction Law, Nullum Tempus, Workers' Compensation, Surveillance, Offer of Judgment, Employee Rights on Initial Medical Treatment, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal.

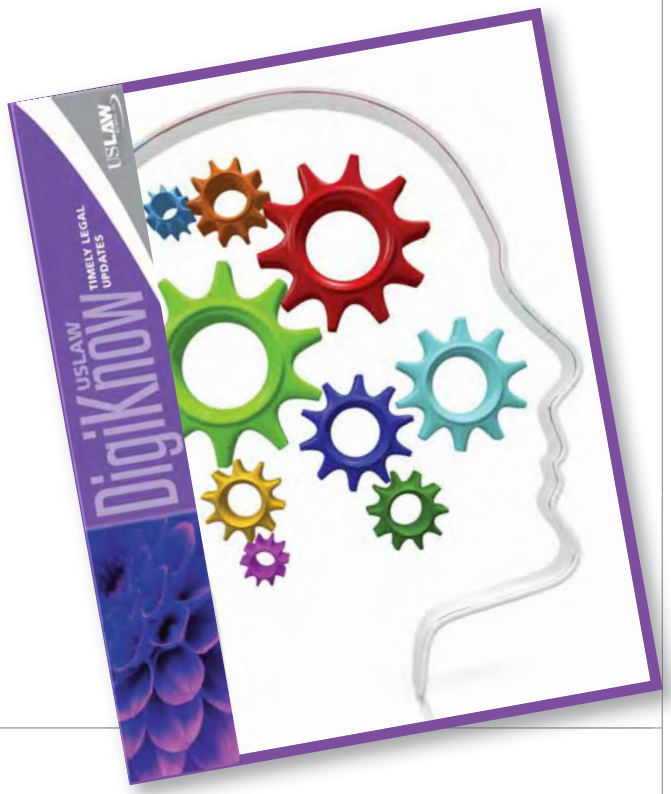
STATE JUDICIAL PROFILES BY COUNTY



Jurisdictional awareness of the court and juries on a county-by-county basis is a key ingredient to successfully navigating legal challenges throughout the United States. Knowing the local rules, the judge, and the local business and legal environment provides a unique competitive advantage. In order to best serve clients, USLAW NETWORK offers a judicial profile that identifies counties as Conservative, Moderate or Liberal and thus provides you an important Home Field Advantage.

USLAW DIGIKNOW

USLAW DigiKnow is USLAW's bi-weekly digital e-newsletter featuring insights and perspectives on today's trending legal issues. Articles and posts and are written by USLAW member attorneys who are subject matter leaders from our 19 USLAW Practice Areas and the USLAW membership in general. Through USLAW DigiKnow, we share legal, legislative and jurisdictional news as well as promote upcoming USLAW events and webinars that might be of interest to you and your colleagues. It is an excellent resource to keep abreast of new case law, important verdicts and other pending legislation.



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We pack light. Take USLAW with you wherever you go with two important USLAW mobile applications: USLAW 24/7 & USLAW Events. Get USLAW information fast by downloading USLAW 24/7. You will have immediate access to our entire membership directory as well as a full line-up of rapid response attorneys for transportation, construction and product liability emergencies. USLAW Events is our Client Conference mobile app that archives all of the presentation materials, among several other items, from past USLAW Conferences. USLAW apps are available on iPhone/iPad, Android (by typing in keyword USLAW) and most Blackberry devices.

USLAW CONNECTIVITY

In today's digital world there are many ways to connect, share, communicate, engage, interact and collaborate. Through any one of our various communication channels, sign on, ask a question, offer insight, share comments, seek advice and collaborate with others connected to USLAW. Please check out USLAW on Twitter @uslawnetwork and our LinkedIn group page.

USLAW MAGAZINE

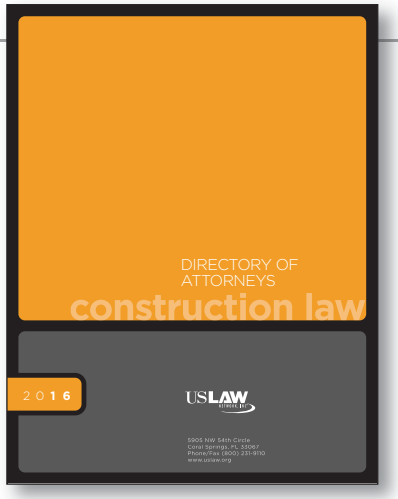
USLAW Magazine is an in-depth publication produced twice annually and designed to address legal and business issues facing commercial and corporate clients. Released in Spring and Fall, recent topics have covered cyber security & data privacy, management liability issues in the face of a cyberattack, defending motor carriers performing oversized load & heavy haul operations, employee wellness programs, social media & the law, effects of electronic healthcare records, patent troll taxes, allocating risk by contract and much more.

USLAW EDUNET

A wealth of knowledge offered on demand, USLAW EduNet is a regular series of interactive webinars produced by USLAW practice groups. The one-hour programs are available live on your desktop and are also archived at USLAW.org for viewing at a later date. Topics range from Medicare to Employment & Labor Law to Product Liability Law and beyond.

USLAW MEMBER AND PRACTICE GROUP ATTORNEY DIRECTORIES

Several USLAW NETWORK practice groups have compiled detailed directories of the active attorneys within their group. These directories showcase the attorneys' specific areas of experience, education, industry memberships, published articles, and in some cases representative clients. These directories are available as downloadable PDFs.



RAPID RESPONSE

The USLAW NETWORK Rapid Response App locates USLAW attorneys quickly when timeliness is critical for you and your company. Offered for Transportation, Construction Law and Product Liability, this resource provides clients with attorneys' cell and home telephone numbers along with assurance that USLAW will be available 24/7 with the right person and the right expertise. Available at uslaw.org and the USLAW 24/7 App.

CLIENT LEADERSHIP COUNCIL

Take advantage of the knowledge of your peers. USLAW NETWORK's Client Leadership Council is a hand-selected, diverse group of prestigious USLAW firm clients that provides expertise and advice to ensure the organization and its law firms meet the expectations of the client community. In addition to the valuable insights they provide, CLC members also serve as USLAW Ambassadors, utilizing their stature within their various industries to promote the many benefits of USLAW NETWORK.

PRACTICE GROUPS

USLAW prides itself on variety. Its 6,000+ attorneys excel in all areas of legal practice and participate in USLAW's 19 active groups and communities including Banking & Financial Services, Business & Advisory Services, Business Litigation, Construction Law, Data Privacy & Security, E-Discovery, Employment & Labor Law, Energy/Environmental, Healthcare Law, Insurance and Risk Management Services, International Business & Trade, IP and Technology, Product Liability, Professional Liability, Retail, Transportation, White Collar Defense, Women's Connection, and Workers' Compensation.

Don't see a specific practice area listed? No worries as USLAW firms cover the gamut of the legal profession and we are sure to find a firm that has significant experience in the area of need.

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A powerful resource in litigation for more than 45 years, S-E-A is a multi-disciplined forensic engineering and fire investigation company specializing in failure analysis. S-E-A offers a complete investigative service including: mechanical, biomechanical, electrical, civil, and materials engineering, as well as fire investigation, industrial hygiene services, and a fully equipped chemical laboratory. These disciplines interact to provide thorough and independent analysis that will support any subsequent litigation.

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S-E-A is proud to be the exclusive sponsor of visualization services for USLAW NETWORK.

Established in 1970, S-E-A was a pioneer in forensic analysis and investigation. They continued as an early adopter of visualization services in 1980. We continue to use the most current technology to prepare accurate and court-qualified demonstrative pieces for litigation support. Our on-staff engineers and graphics professionals coordinate their expertise to prepare exhibits that will assist a judge, mediator, or juror in understanding complex principles and nuances of your case. S-E-A can provide technical drawings, camera-matching technology, motion capture for biomechanical analysis and accident simulation, 3D laser scanning and fly-through technology for scene documentation, presentation, and computer simulations. In addition, S-E-A can prepare scale models of products, buildings or scenes made by professional model builders or using 3D printing technology, depending on the application. Please visit www.SEAlimited.com for examples of these capabilities. For more information, please contact Chris Torrens at 800-635-9507 or Ken Corwin at 800-782-6851.

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U.S. Legal Support, Inc. founded in 1996 is a privately held company with over 60 offices located across the United States. As one of the leading providers of litigation services, they are the only litigation support company that provides court reporting, record retrieval, eDiscovery and trial services to major corporations and law firms nationwide.

Their management team is truly unique with division presidents who are experts in the litigation services industry. All are involved in the day-to-day processes and have the autonomy to make immediate decisions regarding client questions and concerns. This, along with their proven ability to organize resources, results in long-term client relationships.

U.S. Legal Support is the proud official Court Reporter Partner of USLAW NETWORK, providing access to over 2000 superior court reporters equipped with state-of-the-art technology. Client services include a complete online office with 24/7 access, offering the ability to easily schedule or reschedule court reporting jobs online, view and download transcripts and exhibits and review invoices.

With their specialists and offices positioned across the country, U.S. Legal Support has the ability to provide you with national resources and local expertise. They look forward to showing you their Power of Commitment.

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Working with our strategic partner, SuperiorReview, Altep assists corporations and law firms with complex discovery management initiatives, including collection, early data assessment, ESI processing, analytics, hosting, managed review, and production. Additionally, we offer full-service consulting to assist with compliance risk assessment and cyber security, and Certified Examiners to provide forensic collection of data related to litigation and investigations.

SuperiorReview is a national certified Minority Business Enterprise with more than 10 years of success in data-intensive, high-profile matters. Altep, Inc. is SuperiorReview's core partner and a minority shareholder. Together, our firms have provided comprehensive service and support in thousands of engagements, for corporations and law firms throughout the U.S. and in Europe.

At Altep and SuperiorReview, our primary goal is always to identify the strategies, techniques and technologies that can save our clients time and money, allowing them to meet their legal obligations thoroughly and efficiently. Our consultative approach to the development of business solutions is the keystone in this effort – we work closely with clients to understand their driving factors and explore creative solutions which avoid unnecessary costs and provide the best value for their money.

Our teams are comprised of broadly-skilled experts who have decades of experience in data forensics, discovery management, compliance, and cyber security. We continually refine our approach to data and matter management, adopting emerging technologies and developing innovative processes to help law firms and corporations respond to the challenges posed by a complicated, global business landscape.

With a long track record of success in complex discovery and compliance management, Altep has the foresight to help plan for the unexpected, control costs and keep projects and initiatives on track.

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Since 1994 Litigation Insights has been a nationally recognized leader in the trial consulting field.

Litigation Insights is proud to be in our second year as sponsor of jury research services for USLAW NETWORK. We have worked with several member law firms over the years and are excited about the opportunity of working with more of the USLAW membership. In a business often characterized by transitory relationships, we have made it a point to build long-lasting partnerships both with clients and our own team members.

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For more information on how can help with jury research, trial graphics or trial presentation, please contact any of our executive staff above.

Marshall Investigative Group

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Marshall Investigative Group is a national investigative firm providing an array of services that help our clients mediate the validity of questionable cargo, disability, liability and workman's compensation claims. Our specialists in investigations and surveillance have a variety of backgrounds in law enforcement, criminal justice, military, business and the insurance industry. Our investigators are committed to innovative thinking, formative solutions and detailed diligence.

One of our recent achievements is leading the industry in Internet Presence Investigations. With the increasing popularity of communicating and publishing personal information on the Internet, Internet Presence evidence opens doors in determining the merit of a claim. Without approved methods for collection and authentication this information may be inadmissible and useless as evidence. Our team can preserve conversations, photographs, video recordings, and blogs that include authenticating metadata, geotagged and/or EXIF information.

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We have been honored to provide our expertise on cases of every size and scope, and we would be pleased to discuss our involvement on these files while still maintaining our commitment to client confidentiality. Briefly, some of these engagements have involved: lost profit calculations; business disputes or valuations; commercial lending; fraud; product liability and construction damages. However, we have also worked across many other practice areas and, as a result, in virtually every industry.

Founded in Chicago in 1933, MDD is now a global entity with over 40 offices worldwide.

In the United States, MDD's partners and senior staff are Certified Public Accountants; many are also Certified Valuation Analysts and Certified Fraud Examiners. Our international partners and professionals possess the appropriate designations and are similarly qualified for their respective countries. In addition to these designations, our forensic accountants speak more than 30 languages.

Regardless of where our work may take us around the world, our exceptional dedication, singularly qualified experts and demonstrated results will always be the hallmark of our firm. To learn more about MDD and the services we provide, we invite you to visit us at www.mdd.com. You are also welcome to contact John A. Damico, one of MDD's founding partners, at jdamico@mdd.com or 404.252.0085.

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