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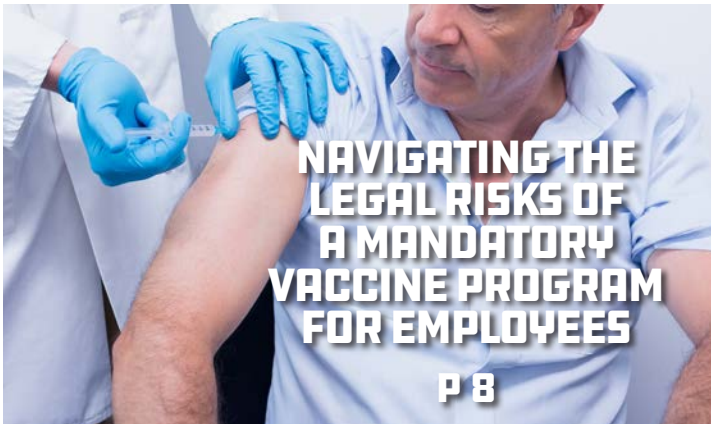

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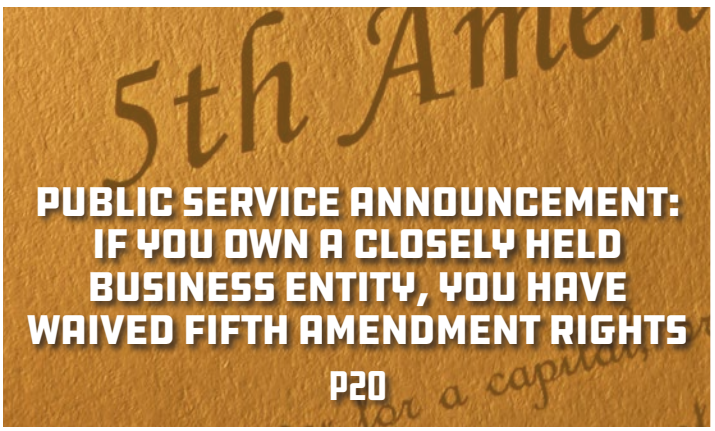

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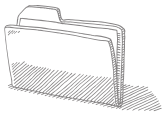

from the CHAIR'S DESK

This has been a busy year with increased conversation about cannabis, data privacy, online retail competition, fitness, mergers and acquisitions, the crossroads of technology and transportation and so much more. These conversations have created the basis for some of the articles you will enjoy as you peruse the pages of the winter issue of USLAW Magazine+. USLAW members and our exclusive corporate partners share their experiences, insights and observations across an array of subject to educate and inform on critical topics.

Our quarterly issue also gives us the opportunity to acknowledge industry honors, leadership changes, trial successes, transactions and pro bono work led by our members from coast-to-coast and across borders. Our members are generous with their time and resources given to those in need in their hometowns, states and legal communities. Check out our Faces of USLAW section to see what our members have been doing outside of the office and courtrooms.

Please enjoy this issue of USLAW Magazine+. Please also connect with us, participate in our programs and take advantage of the many additional complimentary USLAW resources available via uslaw.org. Let us know how we can help you. Thank you for your support of USLAW NETWORK.

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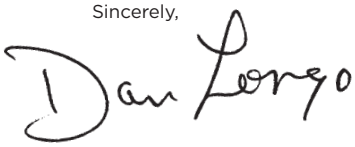

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RUCKUS IN THE MARKETPLACE

Kent Bevan Dysart Taylor Cotter McMonigle & Montemore, PC

DOG LEASH SNAPS

A woman in Pennsylvania walks her dog on a retractable leash with a collar she bought online that was sold by a third-party vendor who advertised there. The dog suddenly pulls ahead, a part of the collar breaks, and the leash snaps back striking the dog owner in in her face ultimately causing her to go blind in one eye.

The seller of the collar could not be found. The woman sues the online marketplace under a theory of strict products liability, negligence and misrepresentation. The district court determined that the online company from whom she had purchased the collar was not liable for her injuries when the third-party seller had listed the collar on the internet-based site and the court granted summary judgment to the online company.

The district court held that under state law, the online company where the dog owner saw the product and purchased it was not a "seller" of the product and further held that the woman's claims were barred

under the Communications Decency Act since she tried to hold the online company accountable as the online publisher of third-party content. The Third Circuit vacated the district court's ruling and remanded the case. Thereafter, the online company asked that the case be reviewed en banc before the full panel of judges for the Third Circuit, and the court granted a petition for rehearing.

HOVERBOARD FIRE

In Georgia, a man sustained grievous bodily injury when he was burned when his house was extensively damaged in a fire allegedly caused by a Chinese-made hoverboard that was not even plugged in when the lithium-ion battery caught fire. Though he and his girlfriend escaped the burning house, the man's injuries required skin grafts.

The man sued an online company along with some foreign co-defendants, including the Chinese manufacturer. The co-defendants never answered the suit and the federal district court threw out the case against the online company. Later, the Eleventh Circuit vacated the district court's order, which dismissed the plaintiffs' claims, remanding the case to the district court for further proceedings. The online company filed a motion to dismiss.

The Eleventh Circuit found that the owner had alleged enough facts from which one may infer reasonably that the online company had at least constructive knowledge of the potential risk of fire associated with the hoverboard. Further, the plaintiff had claimed that when it sold the hoverboard involved in the fire, the online concern had been notified in writing of several "specific fires that had been caused by hoverboards" that it sold. Beyond that, the plaintiff claimed, "thousands of hoverboards had been seized by U.S. customs authorities based on concerns about the hoverboards, and their potentially explosive lithium batteries."

FAUCET WATER DAMAGE

In Wisconsin, a consumer bought a bathtub faucet adapter from an online company that allegedly failed and caused extensive water damage in the buyer's home. While the manufacturer would have liability, the product was purchased online and the Chinese manufacturer could not be sued. There are many other instances of product failure where people purchased items advertised on the internet and they, or more often their insurance carriers, end up having no recourse with the seller that is out of business, has simply disappeared, or cannot be sued.

Large web-based retailers sell many of their own products and also allow others to sell products on their websites. What recourse does the consumer have when something goes awry and causes injury, death, or damage and a manufacturer – especially a foreign company – can't be located or sued? Should the web-based host have liability exposure and if so, should there be any limits or parameters? Certain state laws may shield sellers when they do nothing more than act as a pass-through for the sale of a product.

CONSUMER PROTECTION VERSUS LAISSEZ FAIRE ECONOMICS

As to a theory of recovery in products liability, there is case law that the plaintiff must prove the defect existed when the product left the manufacturer's control and the product entered the stream of commerce. Careless handling of products has been found to be abnormal use and can bar recovery. After all, an online company may merely be the last link in the chain of distribution of the product, that begins with the designer/inventor/manufacturer and moves forward to the ultimate sale of the product to consumers around the world who purchase through websites. Sellers using online companies to advertise their products on the internet may elect to pay a monthly fee in some instances to store the seller's products plus have the online company handle incoming orders and shipment of the product.

Alternatively, the seller may decide to ship the product from its own warehouse or facility. When the seller elects to have the online company handle the orders and shipment, does that transform the online company into something more in the chain of distribution and sale than a mere pass-through? Is there any difference if the seller ships directly? Is an online company in a position to stop the flow of any defective goods of which it becomes aware? Does it have any responsibility to investigate or test products before selling or shipping? Should online companies require indemnity agreements with the suppliers of the products they deal with, and if so, what is covered in such agreements? Should plaintiffs in cases filed against online concerns be required to prove what knowledge the online concern had, if any, that would make it aware of potential or actual problems with the product? Who has legal liability? Is it shared and can it be re-apportioned in the event one party's liability cannot be reduced to a judgment that's collectible? Can the online company limit their liability at the time of sale through a disclaimer or limited liability language restricting recovery to the cost of the sales transaction? Is the online concern somehow transformed into the manufacturer when it has nothing to do with designing, engineering, or producing the product?

What would happen to the selling model if the online company should ultimately be found to be liable and unsuccessfully exhausts all of its appellate options? Would these online companies decide to only sell their own products and no longer sell anything from third parties that want to advertise on their site? A lot is riding on the balance between issues involving consumer protection versus laissez faire economics in the marketplace.

CAVEAT EMPTOR VERSUS CAVEAT VENDOR

Federal courts are bound by the substantive law of the jurisdiction in which they sit, so there are potentially different outcomes for the same set of facts that unfold in different jurisdictions throughout the country. Stated differently, federal courts do not have the power to create their own federal common law when they are hearing state law claims under diversity jurisdiction but rather must apply the substantive law of that state.

For example, there have been incidents where lithium batteries taken on board commercial airplanes in various electronic devices have caught fire or exploded causing damage and injury to the airline company, its employees, and third parties; not just the owners of these devices. Determining what law applies is crucial to a determination of liability. Should online sellers have any liability for defective products that merely wind their way through their warehouses and sit on a shelf until they're sold? What oversight should government exercise in the scheme of marketing and selling? Caveat emptor versus caveat vendor. Are existing governmental agencies up to the task and equipped to handle the role of watchdog for the consumer?

For now, there may be more questions than answers. The fulcrum has not yet finally come to rest. In what direction will it pivot?

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FLEXING YOUR MUSCLES – FITNESS CLUB WAIVERS

Kevin Diamond Thorndal, Armstrong, Delk, Balkenbush & Eisinger

INTRODUCTION

There has been a vast proliferation of fitness clubs across the country. With the rising popularity of fitness trends which focus on bodyweight workouts, i.e., without the need for heavy fitness equipment, we are seeing many more "mom and pop" clubs. Boot camps, Ninja Warrior training, training for obstacle races and similar workout regimens allow for people to utilize relatively small facilities without having to invest much by way of tenant improvements.

While these small fitness clubs may be taking a bite out of large chain club business, the small clubs typically don't have the sophistication of the larger clubs. This is evident in a number of areas, the most obvious of which to legal practitioners is risk management and the ability to limit potential liability exposure. The lack of sophistication in this regard begins with the first and most important document a member will sign – a waiver. If a waiver is not properly drafted, it is not worth the paper it is written on. Fitness clubs must advise patrons of the risk of injury and require them to agree that they understand and voluntarily accept this risk. Patrons further must agree that the club will not be liable for injuries suffered while using the facilities.

A waiver, which is an express assumption of risk, serves as an enforceable bar to liability which arises from a contractual undertaking that relieves a potential defendant from any duty of care to the injured party. The party consents to bear the conse-

quences of a voluntary exposure to a known risk. Most courts generally agree that waiver clauses are not invalid against public policy, especially when freely contracted to by the parties.[1] This is true even if the member waives rights against a party whose negligence may have caused or contributed to the cause of an injury.

TYPICAL WAIVER FACTORS

A waiver begins with ensuring that there is an assumption of risk by the member. This can be tricky when an incident occurs which is arguably unforeseeable [i.e., while one may expect that a treadmill may malfunction while using it, it would be difficult to prove that a member assumed the risk of a ceiling caving in while using a steam room]. The Nevada Supreme Court in *Renaud v. 200 Convention Ctr.*[2] cited two requirements which must be met to prove a plaintiff has assumed a risk:

First, there must have been voluntary exposure to the danger. Second, there must have been actual knowledge of the risk assumed…. A risk can be said to have been voluntarily assumed by a person only if it was known to him and he fully appreciated the danger.[3]

In *Renaud*, the plaintiff sustained injury while using a free-fall simulator. A release had been required. The Court reversed the granting of summary judgment because the trial court failed to evaluate whether or not the plaintiff had actual knowledge of the risks assumed – an essential element of the defense. The Court stated that it was necessary to evaluate all circumstances that existed at the time the release was obtained. "Considerations should include (but are not limited to) the following: the nature and extent of the injuries, the haste or lack thereof with which the release was obtained, and the understandings and expectations of the parties at the time of signing."[4] The law in *Renaud* is similar to various other states.

Nevada, like the majority of states, follows the construct that the question of whether a "duty" exists is a question of law solely to be determined by the court, as opposed to being left in the hands of the jury as a factual question. As a result, assumption of the risk is typically incorporated into the district/lower court's initial duty analysis, and not treated as an affirmative defense to be decided by a jury.

Additionally, *Kerns v. Hoppe*[5] is edifying as the Court found mere acknowledgment of a risk is not enough for an express assumption of risk, but the individual signing the waiver "must have agreed to assume the risk of injury caused by [releasee's] negligence, if any." *Kern* also held that the releasor must appreciate and fully understand the risks at issue in executing a waiver.

As with any type of waiver, a fitness club waiver will be strictly construed, as they are taking away a right from the signing member. To do this the waiver must spell out the intention of the parties and release issues with great specificity.

A fitness club membership agreement and waiver was examined in light of these precedents by the Federal Court sitting in Nevada when a gym member slipped and fell in the steam room.[6] The court explained that to be enforceable, a contractual exculpatory provision must set forth the parties' intentions with "the greatest particularity," and expressly state the intent to release liability.[7] Although the plaintiff tried to avoid summary judgment by contending issues of fact remained regarding the parties' intentions, the court noted that, unless there is ambiguity in the contract language, contract interpretation is a question of law. Ultimately, the Federal Court upheld the membership agreement because it contained an express, unambiguous waiver which identified the potential risk of injury and stated that by entering into the agreement, the plaintiff consented to assume the risk of injury caused by the gym's negligence.[8]

AGREEMENT ACROSS STATES

The majority of courts hold that a release is sufficient as long as it contains a clear and unequivocal waiver with specific reference to a defendant's negligence. Also, courts throughout the country have overwhelmingly held waivers releasing fitness clubs for liability are not void as to public policy.[9] Courts have held fitness club releases to be conspicuous where the waiver is immediately under a signature block, labeled in bold, capitalized type, ended with a sentence referring to waiving any right to assert a claim for negligence, and which discussed a member's agreement to release a health club from liability for its own negligence.[10]

WAIVER DRAFTING TIPS

When formulating a fitness club waiver, the following tips should assist in strengthening the argument to insulate the fitness club from liability:

1. Prospective patrons should be given **time** and the opportunity to read the membership agreement prior to its execution;
2. The waiver should be **explained** by sales employees to the prospective members;
3. The waiver must include **clear language** that expressly states the intent to release the club (and employees) from liability, including for the club's own negligence;
4. The language should be **over inclusive**, utilizing terms such as *any and all*;
5. The waiver language should be **right above or below the signature block, in all capitals and bold**; and,
6. Give the patron a copy of the membership agreement, even if they signed up online.

CONCLUSION

People have options in selecting a fitness club. A person can choose many fitness alternatives, including not joining a club and instead buying home equipment, using podcasts or hiring a personal trainer. Because gym membership is not a "compelling need" like utilities or housing, waivers as a condition for membership are not violative of public policy. Moreover, there are public benefits to enforcing waivers, such as reducing the cost of club memberships and making additional options affordably available. The fitness club also benefits, by limiting its exposure to liability. A properly drafted waiver is an exceptional tool to assist in limiting a fitness club's potential liability exposure.

1 *See Agricultural Aviation v. Board of Clark County Commissioners, 106 Nev. 396, 794 P.2d 710 (1990); Miller v. A&R Joint Venture,* 97 Nev. 580, 636 P.2d 277 (1981).
2 *102 Nev. 500, 728 P.2d 445 (1986).*
3 *Sierra Pacific v. Anderson,* 77 Nev. 68, 358 P.2d 892 (1961).
4 *Renaud,* 102 Nev. at 502.
5 128 Nev. 910, 381 P.3d 630 (2012).
6 *Moffitt v. 24 Hour Fitness USA, Inc.,* 2013 WL 1080441 (D. Nev. 2013).
7 *Id. at 2 (citing Agric. Aviation Eng'g Co. v. Bd. of Clark Cnty. Comm'rs,* 794 P.2d 710, 712–13 [Nev.1990]).
8 *Id. at 3.*
9 *See, e.g., Lund,* 78 Cal. App. 4th at 739.
10 *See Stokes v. Bally's Pacwest, Inc.,* 113 Wn. App. 442, 448–450, 54 P.3d 161 (2002).

Kevin Diamond grew up in Las Vegas, Nevada, and received his J.D. at California Western School of Law in San Diego. He is a shareholder at Thorndal, Armstrong, Delk, Balkenbush & Eisinger. He is an AV-rated civil litigation attorney, and also is an Arbitrator, Mediator and Judge Pro Tem.

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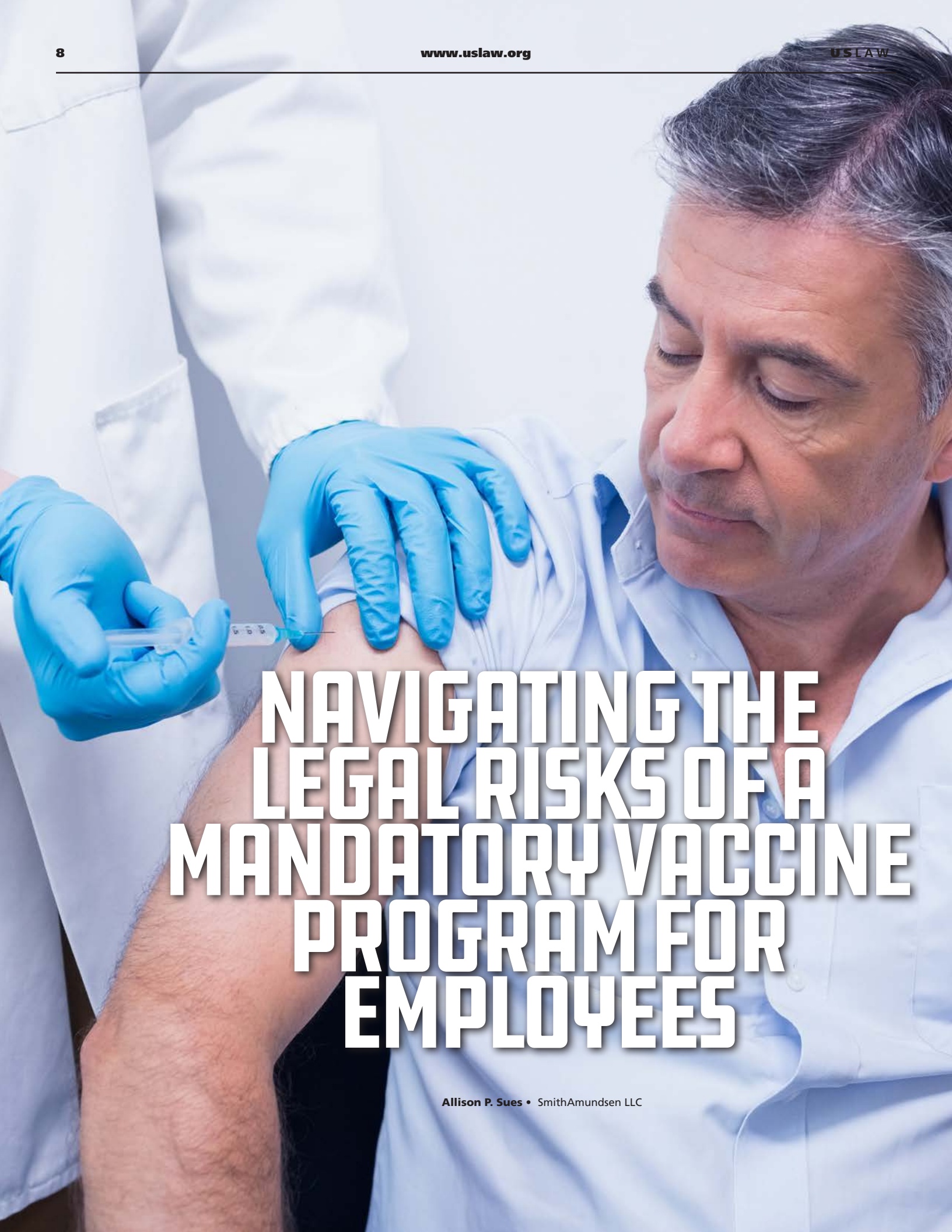


NAVIGATING THE LEGAL RISKS OF A MANDATORY VACCINE PROGRAM FOR EMPLOYEES

Allison P. Sues • SmithAmundsen LLC

Flu season is here and that likely means employers can hear sneezing and sniffling up and down the hallways at work. Sick employees are less productive and their absences can disrupt an employer's operations. Worse still, sick employees may come into work and spread an illness to coworkers, exacerbating the problem. According to the U.S. Center for Disease Control (CDC), recent studies show that flu vaccinations reduce the risk of flu by between 40 and 60 percent. Given this, employers may wish they could mandate that all employees receive a flu vaccination. But can they?

For those employers outside the healthcare field, the answer is probably not. The Americans with Disabilities Act (ADA) allows employers to submit their employees to certain health screenings and inquiries depending on what point in the stage of employment the screening or inquiry takes place. Per the federal regulations supplementing the ADA, employers are generally prohibited from asking any disability-related questions or requesting any medical exams before a conditional offer of employment is extended to the applicant. Once an offer of employment is made, an employer may require a medical examination if the same examination is used for all entering employees in that job category. If an employer uses certain criteria from these examinations to screen out employees, those criteria must be job-related and consistent with business necessity.

As for current employees, the ADA generally prohibits employers from mandating that employees receive any medical testing or vaccinations unless they are job-related, consistent with business necessity, and no more intrusive than necessary. This is a very difficult standard to meet unless the employer is part of the healthcare field or otherwise requires employees to regularly interact with immune-compromised clients, patients, or customers.

But there are several practices that employers can take to encourage employees to receive vaccines short of job-contingent mandates. Employees are more likely to get vaccinated if it is easy and affordable to do so. Employers may want to subsidize the cost of vaccines, allow paid time off to go get vaccines, or offer vaccines at the workplace to reduce any inconvenience.

As for employers in the healthcare field, courts have repeatedly upheld an employer's right to require that employees receive vaccinations if they work directly with patients – such as a nurse, doctor, or patient care assistant – or if they handle materials that could spread infection – such as a lab technician. The CDC recommends that these healthcare workers receive vaccinations for hepatitis B, flu, measles, mumps, rubella, chickenpox, tetanus, diphtheria, pertussis, and meningococcal diseases.

Mandating vaccines, even in the healthcare field, is not without legal risks of which employers should be aware. The U.S. Equal Employment Opportunity Commission takes the position that healthcare employers must consider exemptions for those employees who cannot receive vaccines for reasons related to disability, pregnancy, or religion. Employers should analyze each request for exemption on a case-by-case basis, including review of the employee's job position, as well as the employee's particular religious belief or medical documentation corroborating the disability at issue.

For employees who object to vaccines based on religious grounds, employers should first determine if the employee sincerely holds the religious belief. Courts do not overly scrutinize this question. While the belief cannot be social, political, or personal to qualify as a sincerely held religious belief, courts cast a fairly wide net as to what religious-based beliefs will provide protection under Title VII. The religious belief may be newly adopted, inconsistently observed, not part of a formal church or sect's religious practice, or different from the commonly followed tenants of the individual's religion. As an example of the broad interpretation of sincerely held religious beliefs, courts have determined that veganism may constitute a religion where an employee protests receiving a vaccine containing animal products, such as eggs.

For employees who seek an exemption from mandatory vaccines based on their disabilities, the employer may ask for medical documentation corroborating the disability. Some examples of disabilities that may preclude employees from receiving certain vaccinations include life-threatening allergies, diseases that compromise the employee's immune system, or – in the case of a recent Third Circuit Court of Appeals case – a severe and well-documented anxiety associated with the side effects of receiving vaccines.

Once an employer determines that an employee is objecting to a mandatory vaccine based on a sincerely held religious belief or documented disability, the employer must determine whether allowing the employee an exemption from the vaccine creates an undue burden on the organization. For exemptions based on disabilities, the employer may also similarly consider if the exemption would create a direct threat to the employee, his or her coworkers, or the organization's patients. This inquiry is often directly related to the employee's position. While it may be feasible to exempt a hospital billing clerk from mandatory vaccines, the same is likely not true for a pediatric nurse working with young patients who are particularly vulnerable in the NICU.

The employer should also consider if there are alternatives that could sufficiently protect the employee and patients short of requiring the vaccine, whether it be requiring the employee to wear a mask or transferring the employee to a position with less patient contact. If the employer determines that exempting the employee will create an undue burden, it can require the vaccine as a condition of further employment, but this decision should be documented with a clear explanation as to why the vaccine is job-related, no more intrusive than necessary and consistent with business necessity. The employer must also monitor and ensure that it conducts the exemption consideration and decision process consistently for all employees.

Sometimes learning more about the employee's specific concerns will lead to a solution. For example, an employee objecting to a vaccine on religious grounds because the vaccine contains animal cells may be willing to accept an alternative version of the vaccination that does not contain the offending material. The key to handling requests for exemptions is to ensure that the consideration focuses on the specific concerns of the particular employee and encompasses an open and back-and-forth dialogue with the employee.

Allison Sues is a partner in SmithAmundsen's Labor & Employment Practice Group. She represents employers in workplace disputes, including discrimination, harassment, retaliation, lost wages and failure to accommodate a disability. Allison can be reached at 312.455.3951 or asues@salawus.com.

GRACE PERIOD CLOSES FOR ENGLISH-ONLY TRADEMARKS IN QUEBEC

Annie Gauthier Therrien Couture JoliCoeur L.L.P.

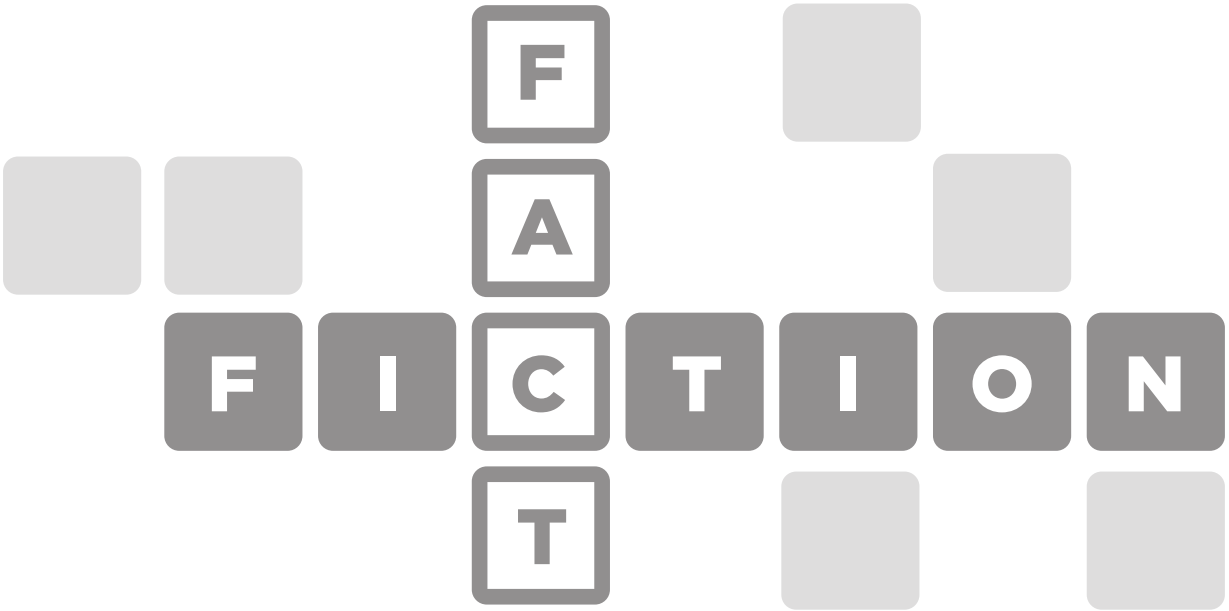
The *Charter of the French Language* (the "**Charter**") which applies in the Canadian province of Quebec, requires French to be "clearly predominant" in public signage and commercial advertising in the province. This requirement can cause issues with the use of English language trademarks in Quebec. While the public display of a trademark in a language other than French is not prohibited, it is strictly regulated.

In particular, since November 24, 2016, the *Regulation respecting the language of commerce and business* (the "**Regulation**") includes the requirement for any trademark that is displayed in a language other than French to be accompanied by sufficient French language elements. The presence of sufficient French can be ensured by the addition of a French generic term, a description of the products or services concerned or a slogan, or by using other terms or indications relating to the products or services offered by the business.

Businesses were given a three (3)-year grace period for existing trademark displays, so that all public displays existing on November 24, 2016, must be modified and comply with the provisions of the Regulation by November 24, 2019. The *Office québécois de la langue française* recently sent notices to that effect to several businesses to remind them of their obligations and the need to make their displays compliant before the deadline.

Business that fail to comply with the Regulation are subject to sanctions ranging from the suspension of their francization certificate to fines in amounts ranging between $1,500 and $20,000 per alleged offense.

Annie Gauthier recently joined Therrien Couture JoliCoeur L.L.P. after more than a decade acting as in-house counsel for a multinational manufacturing and retail company. Her strong experience in writing and negotiating local and international commercial agreements combined with her ability to identify and understand clients needs make her a great asset to our commercial and business law teams.



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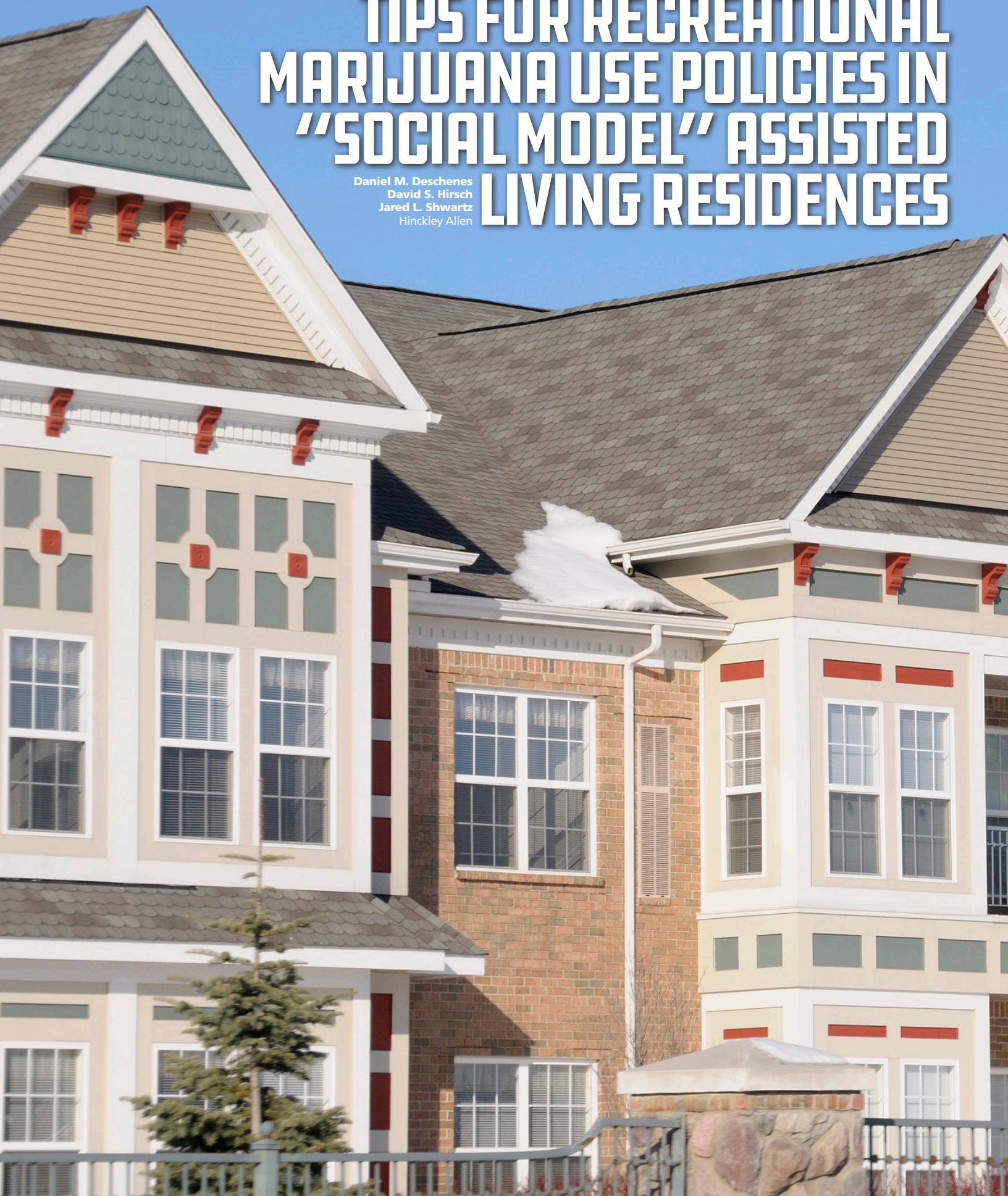
TIPS FOR RECREATIONAL MARIJUANA USE POLICIES IN "SOCIAL MODEL" ASSISTED LIVING RESIDENCES

Daniel M. Deschenes
David S. Hirsch
Jared L. Shwartz
Hinckley Allen



As more states consider legalizing recreational marijuana, assisted living residences (ALRs) face a unique challenge: residents that chose to use this product. Formal guidance regarding how ALRs should address a resident's use of recreational marijuana is scarce. However, facilities should have a written policy in place that (i) establishes a resident's rights to use marijuana, (ii) sets guidelines and parameters to ensure the safety of all residents, and (iii) is consistent with ALR licensure requirements.

By crafting policies that address these key issues, ALRs can reduce their legal and operational risks. This article examines Massachusetts ALR regulations as well as its recreational marijuana laws and regulations with a view toward determining the policies certain ALR operators outside of Massachusetts should adopt if recreational marijuana is legalized in their states.

Massachusetts recognizes the "social model" of ALR resident care. The goal of ALR care in the Commonwealth of Massachusetts is to provide residents with the maximum amount of independence possible within a residential setting, supported by certain personal care services.

Massachusetts laws and regulations governing ALRs enumerate a number of resident rights that must be honored by all facilities. These resident rights include:

- the right to privacy within the resident's unit, while abiding by ALR rules reasonably designed to promote the health, safety, and welfare of other residents;
- the right to retain and use personal property within the resident's living space; and
- the right to exercise the resident's civil liberties.

These particular rights suggest that an ALR must permit resident use of recreational marijuana, underscoring the need to have a written policy that balances the right to use with the welfare of the resident community at-large.

Here are three key items to address in any policy discussing the use of marijuana at an ALR:

1. LIMIT PERMITTED AREAS FOR RECREATIONAL MARIJUANA USE

A marijuana policy should explicitly designate the areas within the ALR in which recreational use is permitted. Provided that an ALR has legitimate health and safety concerns regarding marijuana use in common areas within the facility, residences would be justified in prohibiting recreational marijuana use in these areas, thereby restricting marijuana use to a resident's unit. Further, ALRs are authorized to prohibit the use of recreational marijuana in outdoor common space and public ways abutting the residence, just as Massachusetts law prohibits recreational marijuana use in any public area.

2. SPECIFY THE TYPES AND AMOUNTS OF MARIJUANA THAT RESIDENTS ARE ALLOWED TO POSSESS

An ALR marijuana policy should also address the permitted types and amounts of marijuana that residents are allowed to possess in their units. These policies should be consistent with ALR tobacco and smoking policies. As smoke and vapors may pose a nuisance to the general resident population, ALRs may determine that only edible forms of marijuana may be consumed within the unit. Such a policy would strike a reasonable balance between upholding the rights of residents to use recreational marijuana, while promoting the health and welfare of the entire ALR community.

Similarly, ALR policies should prescribe the amount of marijuana that residents are permitted to store in their unit at any given time. This particular policy should be consistent with limits provided for under state law. In Massachusetts, for example, ALRs should limit the amount of recreational marijuana that a resident may possess and store within their unit to 10 ounces, which mirrors the legal limit that an individual is authorized to store in their home under Massachusetts law.

3. SET REQUIREMENTS FOR STORAGE OF RECREATIONAL MARIJUANA IN A RESIDENT'S UNIT

Finally, since ALR residents may have dementia or similar diagnoses affecting their resident's cognitive abilities, making it critical that a facility's recreational marijuana policy requires secure storage of marijuana to minimize the risk of unauthorized access or use. Massachusetts law requires that recreational users possessing more than one ounce of product store their marijuana in a locked location. To protect the health and welfare of the ALR community, an ALR marijuana policy should require residents to keep all recreational marijuana, regardless of amount, in a lockbox within their unit. Additionally, the amount of marijuana in a resident's possession should be logged on a regular basis for review by the ALR. These measures balance the rights of residents to store recreational marijuana in their unit with the need to protect the welfare and safety of other residents at the ALR.

Operators of Massachusetts ALRs should contact legal counsel to discuss and craft recreational use policies consistent with resident rights and the duties of the ALR under state law and regulations.

Daniel M. Deschenes' practice is focused on civil litigation with an emphasis on construction matters. He advises owners, contractors, and developers in various phases of the construction process, including negotiation and arbitration of contract disputes and contract development.

David S. Hirsch focuses his practice on general corporate law, with dedicated emphases on mergers and acquisitions, corporate finance, commercial lending, and securities law.

Jared L. Shwartz advises businesses on a wide variety of matters, including governance, entity choice and formation, mergers and acquisitions, contract and financing negotiations, and related transactions.

THE ANATOMY OF A CONSTRUCTION CLAIM

Brandi Blair • Jones, Skelton & Hochuli, P.L.C. **Denise M. Montgomery** • Sweeney & Sheehan, P.C.

CONSTRUCTION CLAIM LANDSCAPE

Construction defect litigation is on the rise. Practitioners who are new or unfamiliar to this work need to understand the unique challenges these claims present. A construction defect occurs when construction fails to perform as expected and the failure causes physical injury to an individual, the work itself or other property or work. Matters which do not involve personal injury can have an extraordinarily long period of viability. Some jurisdictions may allow claims for defective construction to proceed years after completion.

It is imperative to identify the named parties to make sure they are the proper entities per the contract and that they were served correctly. It is vital to be aware that the initial complaint rarely includes all of the parties that may be at fault. Construction defect suits involve many parties and may involve other areas of law, such as personal injury or wrongful death.

Common claims include those filed by homeowner associations against owner/developers of planned communities. They are generally constructed in phases and involve multiple designers, developers and prime subcontractors, who perform work over many years. At the end of construction, the association will complete a transition study which identifies incomplete or faulty construction. It may be performed years after work completion and is often the basis for litigation.

If the transition report cites poor design, the owner or developer may then sue a host of other professionals. Architects, engineers and general contractors are the first-tier parties. Prime subcontractors are second-tier defendants. Third-tier defendants are those the prime subcontractors hired to complete portions of the work. When third-tier parties hire other contractors to complete their work, these last-tier defendants may not be joined to the litigation until years after the suit is initiated which presents a variety of challenges to the practitioners assigned to defend them.

It is your responsibility to identify and pursue your insured's subcontractors, product suppliers, product manufactures and third parties hired by others to perform the work.

INITIAL STEPS

First, review the physical file which contains time records and invoices indicating when work started and finished and payments which could identify subcontractors. It is key to understand what kind of work your insured performed, the alleged damages and the chain of events to identify everyone responsible for the alleged loss.

If the insured does not have complete files, obtain the insurance agent's file. They may have copies of executed contracts. Also check sign-in sheets and safety training records to identify who was on the job site, and when.

The carrier must determine if the entity seeking coverage is entitled to a defense. The two questions which must be answered, are whether there is an occurrence and if the entity seeking coverage is an insured under the policy. The duty to defend is separate from the duty to indemnify and it arises if the complaint alleges facts that fall within the coverage.

Typical policy language defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In a personal injury action involving a single instance of harm, there is an occurrence as defined by the policy. In the context of a

claim for damages associated with defective construction an occurrence may vary. Some jurisdictions have held that negligent construction is an occurrence under the definition while others held that improper or faulty construction may constitute an accident if the resulting damage occurs without the insured's expectation or foresight.

POLICIES HIDING IN PLAIN SIGHT

The determination of whether an entity is an additional insured under a CGL policy requires that the insurer have all executed contracts. The American Institute of Architects (AIA) promulgates contracts which are used in the industry. The AIA contracts include provisions for indemnification and additional, primary insured status in favor of the owner and designer. The subcontractor is contractually obligated to indemnify these parties for damages, losses, or expenses, arising from the performance of work. The standard AIA indemnification language does not require the indemnitor to protect the indemnitee for its sole negligence.

The standard forms also require subcontractors to provide insured status for claims caused by the subcontractor's acts or omissions during operations. Completed operations coverage applies when the insured's work results in an occurrence of bodily injury or property damage during the policy period. The insurance must be primary and non-contributory to any GL policy maintained by the additional insured. If it is commercially available to the named insured, it must provide no less coverage than ISO CG 20 10 07 04, CG 20 37 07 04, and CG 20 32 07 04. If the insured executed an AIA subcontract, they promised to provide this to the enumerated parties.

Owner Controlled Insurance Programs (OCIP) and Contractor Controlled Insurance Programs (CCIP), often referred to as "wrap-ups" are policies unique to the field of construction. Both are policies which are held by the owner or general contractor for the length of the project and provide general liability, workers compensation and excess coverage for the project. A wrap-up policy is primary to any other coverage a subcontractor may have as part of its underlying contract. The subcontractors may not be aware of the existence of such a policy, so it is imperative to find out if one exists.

INSURANCE COVERAGE IMPLICATIONS

Homeowners often assert claims involving breach of common law or statutory warranties, consumer protection violations, fraud or unfair trade practices. An insurer must review each policy and explain to the insured the claims asserted and what coverage and exclusions may apply.

Insurers must be vigilant in identifying and raising any claims which fall under a policy exclusion. If there is any question of what claims are covered, coverage counsel should be engaged prior to drafting the appropriate reservation of rights to the insured and defense counsel should be provided a copy of any reservation of rights letter.

REPRESENTING THE INSURED

Construction defect claims often involve damages associated with punch-list work, which is unfinished work that is pending final payment. Punch-list items can be significant hurdles in the overall management of the claim. Some jurisdictions require that any claim arising out of the action must be asserted in the underlying action or it can be barred. Assigned counsel needs to ask the insured if their work has been completed and paid in full or whether there is a pending lien. Unpaid work can impede settlement between the insurer and the plaintiff, since most settlement agreements seek to end all disputes between the parties. Memorialize discussions with the insured which concern ancillary claims they need to pursue.

Another competing interest in these claims is the role of a surety. A construction bond is a type of surety bond used by investors in construction projects to protect against disruptions or financial loss. Bonds are not insurance policies and may impose significant financial obligations upon the insured. Proper representation of the insured may require cooperation between the surety and appointed counsel.

RISK AND ALLOCATION

Many construction defect claims occur over a period with multiple policy years and insurers. Depending upon the applicable Statute of Limitations or Statute of Repose, a claim may not be filed for a decade after construction was complete.

Issues arise when the loss is ongoing, indivisible and implicates multiple policies and policy periods. Each carrier must determine when coverage is triggered. Courts generally apply one of four trigger theories and two methods of allocation. The four theories and when they trigger are:

1. **Exposure** - first injury-causing condition
2. **Manifestation** - personal injury or property damage becomes known or discovered
3. **Continuous** - injury or damage occurs continuously from the time of exposure or installation until the time of discovery
4. **Injury-in-fact** - personal injury or property damage occurs

The allocation methods for losses under multiple policies are:

- **All-Sums or Joint and Several** - allows a policy holder to choose the policies that pays the loss. Once the plaintiff is compensated, insurers allocate the loss among themselves.
- **Pro-Rata** - provides that policies respond in proportion to the amount of the injury or damage that takes place during that policy period.

EXIT STRATEGIES

The statute of repose is the deadline a plaintiff can file a claim. It is longer than the statute of limitations and it is important to identify the date that the statute of repose begins for an early motion to dismiss. Keep in mind that it can differ between entities. The statute of limitations is shorter and requires an analysis of what the plaintiff knew regarding defects.

Additionally, there are various statutes that protect purchasers of new construction. Many jurisdictions have statutes that require warranties and provide exclusive administrative remedies for new construction. If the plaintiff is an association which submitted any administrative claim for relief, these statutes provide an excellent avenue for early dispositive work.

Successful management of these complex claims requires counsel to wear multiple hats and advocate the interests of the insured and insurers at every phase of litigation and to be aware of all aspects of the timeline. Understanding the relationships between the parties, the insured's role in the construction, and the project timeline are essential to the successful management of these complex claims.

Brandi Blair is a partner with Jones, Skelton & Hochuli P.L.C. in Arizona and defends clients against claims involving construction defect, premises liability, wrongful death and personal injury, and professional liability. She represents clients in a variety of industries, including retail and hospitality, medical and healthcare, legal, accounting, and governmental, and quasi-governmental entities.

Denise M. Montgomery is a senior associate at Sweeney & Sheehan, P.C. in Pennsylvania and focuses her practice in the area of construction defect, representing prime contractors and subcontractors in complex construction defect claims

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CORWIN DOCTRINE

DISCLOSURE DEFICIENCIES AND STOCKHOLDER APPROVED TRANSACTIONS

Steven Howard Roth and Christopher P. Reuscher Roetzel & Andress LPA

The central goal of any for-profit entity, regardless of its industry, is very simple and is always the same: continuously increase value for all of its stockholders. While companies can increase value in a number of ways, one of the most common, time-tested, and effective ways to grow stockholder value is through mergers and acquisitions. Transactions not only provide organizations the ability to increase market share, but also frequently grant companies with access to new product offerings, market segments, and customer bases. The concept and value proposition of mergers and acquisitions is straight forward, and, in a perfect world, every interested party would end up happy with each and every transaction. The world, however, is anything but perfect, and as a result, it is not uncommon for a subset of stockholders to formally challenge the validity of a corporation's actions and/or the underlying transaction. For a corporation's directors, officers and in-house counsel, the key to successfully navigating these roadblocks is taking the appropriate steps during the transaction process to ensure that the corporation can overcome them if and/or when they occur.

Perhaps the most important and relevant guidance to defending post-closing lawsuits from stockholders comes out of *Corwin v. KKR Financial Holdings, LLC,* which was decided by the Delaware Supreme Court in 2015. The aptly named Corwin Doctrine provides that so long as the decision being challenged was approved by a majority of disinterested, fully informed and uncoerced stockholders with no interested/conflicted controlling stockholder present at the time of said vote, the business judgment rule applies, and the claims are entitled to dismissal. Seems like a clear cut and easy way for directors to ensure their actions and decisions are safe from scrutiny, right? Indeed, for several years following the emergence of the *Corwin Doctrine*, the number of cases in which it applied and benefited directors and their organizations steadily increased. Commencing in 2018, however, that trend abruptly reversed course, with the *Corwin Doctrine* being applied much more conservatively. So, what happened? In a nutshell, plaintiffs attacked one of the principal tenets of the *Corwin Doctrine*: the premise that stockholders have been fully informed.

Two cases heard by the Delaware

Supreme Court in 2018, *Morrison v. Berry* and *Appel v. Berkman*, highlight this tactic. In *Morrison*, a company called The Fresh Market ("Fresh Market") entered into a merger agreement with an entity controlled by private equity firm Apollo Global Management LLC ("Apollo"). As a part of the transaction, Fresh Market's founder agreed to roll over his equity interest in Fresh Market into shares of the acquiring entity. Fresh Market's Board of Directors recommended that the company approve the transaction, and the shareholders approved it. Following closing of the acquisition, however, one of Fresh Market's shareholders filed suit, claiming the directors of Fresh Market breached their fiduciary duties. Although Delaware's Court of Chancery applied the *Corwin Doctrine* and dismissed the case, the plaintiff appealed, arguing that Fresh Market failed to make material disclosures that prevented shareholders from accurately evaluating the transaction, and the Delaware Supreme Court reversed the decision. Specifically, the Supreme Court, noted, among other things, that Fresh Market's failure to disclose to stockholders that the company's founder had agreed with Apollo prior to the board's consideration of the acquisition, to roll over his equity in Fresh Market to the acquiring entity and that he had previously denied the existence of that agreement to Fresh Market's board was a material disclosure defect. In reversing the Court of Chancery's decision, the Supreme Court also stated that the relevant test in determining whether the failure to disclose information is material is not whether it would have made stockholders less likely to accept a tender offer, but if "there is a substantial likelihood that a reasonable stockholder would have considered the omitted information important when deciding whether to tender her shares or seek appraisal." The Supreme Court also held that material information includes any information or facts that a stockholder may "generally want to know in making a decision, regardless of whether it actually sways a stockholder one way or the other" and that "a single piece of information rarely drives a stockholder's vote."

In *Appel*, Diamond Resorts International ("Diamond"), a hospitality and vacation company, completed a two-step merger transaction for cash with Apollo. In the first step of the merger, Diamond's shareholders were provided with the tender offer and a Schedule 14D-9 Solicitation/Recommendation Statement, in which Diamond's board of directors recommended the merger. Following the tender offer, once Apollo had acquired more than 50% of Diamond's stock, the second step of the process was completed through a backend merger under Section 251(h) of the Delaware General Corporation Law ("DGCL"), without a stockholder vote. Shortly after closing of the merger, however, one of Diamond's shareholders filed suit, questioning the transaction's fairness and alleging that Diamond's board of directors failed to disclose all material information to Diamond's shareholders regarding the tender offer. Specifically, the plaintiff argued that the Schedule 14D-9 failed to disclose that Diamond's founder, largest stockholder, and chairman of the board, had told the board of directors that "he was disappointed with the price and the Company's management for not having run the business in a manner that would command a higher price" and that "it was not the right time to sell the Company."

Relying on *Corwin*, the Court of Chancery granted the defendant's motion to dismiss, holding that the "stockholders' acceptance of the first-step tender offer was fully informed" and that (i) Diamond's failure to disclose its chairman's statement and reason for abstaining from the vote on the merger was immaterial, and (ii) including it in the disclosures would not have materially altered the mix of information provided. On appeal, the Delaware Supreme Court reversed the Court of Chancery's ruling. In its opinion, the Supreme Court noted that "directors of a Delaware corporation have a fiduciary duty to disclose fully and fairly all material information within the board's control that would have a significant effect upon a stockholder vote when it seeks or recommends shareholder action." Applying that principle to the facts in *Appel*, the Supreme Court explained that a chairman abstaining from voting on the sale of a business he or she founded and led is not a standard occurrence, especially when the "reasons for doing so contradict the board's recommendations to the stockholders," and the failure to include such facts in the company's disclosures is material and precludes reliance of the business judgment rule in connection with a motion to dismiss at the pleading stage.

CRITICAL TAKEAWAYS

1. The plaintiffs in both *Morrison* and *Appel* relied upon board minutes, e-mails and other documents obtained under Section 220 of the DGCL, which gives shareholders the right to inspect the books and records of the corporation. It is critical to be mindful of what those documents state in relation to what is and is not disclosed to shareholders in Schedule 14D-9 statements and other documents. Consistency and transparency are key.

2. In order to minimize potential landmines, it is vital for boards of directors to consult with legal counsel in order to ensure that the corporation discloses any and all material information to shareholders (i.e. information for which there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote or information for which there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available).

3. In determining whether something is material for disclosure purposes, boards of directors should place themselves in the shoes of an unassuming shareholder, with no special knowledge of the corporation's dealings or internal discussions, and ask themselves whether the information at issue is something that they, as individual shareholders, would find relevant or want to know in making a decision in connection with a merger or acquisition. Within reason and subject to first consulting with legal counsel, leaning towards the side of disclosure is better than withholding or omitting information.

Steven Howard Roth received his JD and MBA from Case Western Reserve University and is an attorney in the corporate and transactional practice group at Roetzel & Andress, LPA. Steven's practice focuses on corporate/business transactions, real estate, intellectual property, and sports, media and entertainment law. He represents and counsels companies of all sizes on mergers and acquisitions, commercial and residential real estate transactions, copyright and trademark matters, franchise development, debt and equity financing, business formation, and construction projects.

Christopher Reuscher is a shareholder and practice group manager in the corporate and transactional practice group at Roetzel & Andress, LPA. Chris has significant transactional experience with complex business mergers, acquisitions, divestitures, debt and equity financings, leveraged buyouts, and recapitalizations. He has worked extensively with private equity, subordinated debt and venture funds as well as the portfolio companies of such funds.

PUBLIC SERVICE ANNOUNCEMENT: IF YOU OWN A CLOSELY HELD BUSINESS ENTITY, YOU HAVE WAIVED FIFTH AMENDMENT RIGHTS

Lori Voepel and Alexander Lindvall • Jones, Skelton & Hochuli, P.L.C.

Most people are familiar with "pleading the Fifth." Most people understand it to mean they have "the right to remain silent," *Miranda v. Arizona*, 384 U.S. 436, 468 (1966), and that the government cannot force them to disclose incriminating information that could lead to their own indictment or conviction. *Williams v. Florida*, 399 U.S. 78, 111 (1970) (Black, J., concurring). What most people don't know, however, is that this right does not apply to most business-related activities. For example, the Supreme Court has held that corporations, partnerships, labor unions, and all "collective group[s]" with an "impersonal" character do not possess any privilege against self-incrimination.[1]

In its harshest opinion on this topic, the Supreme Court held 5-4 in *Braswell v. United States*, 487 U.S. 99, 108–14 (1988), that a corporation's sole shareholder could be forced to produce, compile, organize, and (by way of compelled testimony) authenticate his company's incriminating business records. "[T]he custodian of… entity records holds those documents in a representative rather than a personal capacity," the Court reasoned. *Id.* at 109-10. Thus, "the custodian's act of production is not deemed a personal act, but rather an act of the corporation," which has no Fifth Amendment privilege. *Id.* at 110. In other words, because businesses have no privilege against self-incrimination, and records custodians are mere extensions of their businesses, custodians forfeit that privilege while acting on behalf of the business.

What this means in real-world terms is that businesses and their records custodians can *never* resist government-issued subpoenas on Fifth Amendment self-incrimination grounds, regardless of how small the business may be and even if the individual custodian is the actual target of the investigation. *Braswell*, 487 U.S. at 108-10. Assume, for example, that you and your spouse decide to open a small business. You go to the Corporation Commission's website, fill out the necessary paperwork, and form Mom and Pop, LLC. Congratulations, you have just forfeited a fundamental constitutional right. The moment you filed your articles of organization with the Secretary of State's Office, you and your spouse, as the business's records custodians, surrendered your right to withhold any business-related documents from the government. *See id.* The IRS or criminal prosecuting agencies—without even a reasonable suspicion of wrongdoing—can serve you with a subpoena duces tecum and require you to produce, compile, and authenticate all of your business's records. If you refuse to comply, you will be held in contempt of court, meaning you could face serious fines and even jail time. In effect, under *Braswell*, the government can force small-business owners to create the exhibits that will be used against them at trial.

"In effect,… the government can force small-business owners to create the exhibits that will be used against them at trial."

In February 2019, Jones, Skelton & Hochuli, P.L.C., in collaboration with Jones Day, filed a Petition for a Writ of Certiorari with the United States Supreme Court, asking the Court to hear a case that would have overturned or limited *Braswell* as it applies to small, family-owned, closely held businesses. In October, the Court unfortunately denied this Petition—leaving in place, for now, the rule that businesses and their custodians do not enjoy a constitutional privilege against self-incrimination.

Under current Supreme Court precedent, such businesses have the right to engage in free speech, the right to freely exercise their religion, the right to freely associate with whom they choose, the right to be free from unreasonable government searches and seizures, the right not to be tried for the same crime more than once, the right to a jury trial, the right to equal protection under the law, and the right to due process of law.

In our Petition, we argued that it makes no sense to afford the owners of small businesses so many constitutional rights but to arbitrarily withhold Fifth Amendment rights without even requiring any type of waiver. As the Supreme Court recently explained in *Burwell v. Hobby Lobby Stores*, Inc., 134 S. Ct. 2751, 2768–69 (2014), small, family-owned businesses are often mere extensions of "the human beings who own, run, and are employed by them." And when rights are extended to such small businesses, "the purpose is to protect the rights of these *people.*" *Id.* (emphasis added).[2] Unfortunately, the Court was not ready to address this discrepancy and will continue to withhold Fifth Amendment self-incrimination rights from the owners of small and family-owned businesses for the foreseeable future.

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[1] *Wilson v. United States, 221 U.S. 361, 376, 385 (1911) (corporations); Bellis v. United States,* 417 U.S. 85, 101 (1974) (partnerships); *United States v. White*, 322 U.S. 694, 701 (1944) (labor unions and other "collective groups").

[2] *See also Burwell*, , 134 S.Ct. at 2768 ("[E]xtending Fourth Amendment protections to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies.").

#METOO AND BEYOND

HOW TO EFFECTIVELY STOP AND PREVENT WORKPLACE HARASSMENT IN GERMANY

Dr. Jan Tibor Lelley, LL.M. and Diana Ruth Bruch Buse Heberer Fromm

#MeToo and #MeTooWhatNext: The nightmare does not seem to be ending anytime soon since cases and allegations of harassment are numerous, as are grounds for discrimination. Sexual harassment is only one, but most likely the most prominent ground for workplace harassment. Nonetheless, there are mechanisms in place, in the USA as well as in Germany, to effectively prevent and stop workplace (sexual) harassment.

BACKGROUND: UNITED STATES AND GERMANY

As the main authority in the U.S., the Equal Employment Opportunity Commission (EEOC) was established in order to prevent and remedy unlawful employment discrimination (and to advance equal opportunities for all in the workplace). In doing so, the EEOC not only enforces federal U.S.-laws by investigating charges of discrimination, but also has the authority to file lawsuits in the interest of the individual concerned and in the interest of the public.

Since *Burlington Industries Inc. v. Ellerth and Faragher v. City of Boca Raton* it is clear that an employer is liable for unlawful harassment by a supervisor unless the employer took reasonable measures to prevent such conduct or the employee did not take advantage of such measures.

In Germany, the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz* – AGG) was established in 2006 and is very similar to the anti-discrimination laws in the U.S. Together with the Act, the Federal Anti-Discrimintaion Agency (*Antidiskriminierungsstelle des Bundes* - FADA) was established, which, much like the EEOC, is meant to prevent sexual harassment and discrimination in the workplace. Although the FADA does not have the authority to file lawsuits, the FADA outlines possibilities for taking legal actions to individuals in need, refers them to counseling on whether or not to file a lawsuit, and provides amicable settlements between the parties involved if they so desire. Furthermore, the FADA conducts scientific studies on discrimination and workplace harassment and files extensive reports to the German parliament every four years. Based on that, the FADA also makes recommendations on how to abolish and avoid discrimination and sexual harassment for the future.

HOW TO PREVENT WORKPLACE HARASSMENT IN GERMANY

The first question that arises is, what does the employer have to do in order to prevent sexual harassment and/or discrimination? On a general level, the General Act on Equal Treatment merely requires the employer to take suitable measures to draw attention to the inadmissibility of workplace harassment and discrimination but does not name any certain measures and thereby leaves it to the employer to decide

in which way this is achieved. Nonetheless, if an employer wants to avoid liability, they should conduct mandatory regular in-house trainings for all employees. This in-house training should include clear parameters of what constitutes discrimination and, most importantly, what constitutes sexual harassment. Content-wise this in-house training should make clear the employer's disapproval of discrimination and sexual harassment as well as underline the sanctions and consequences resulting from such behavior. Moreover, a code of conduct, which includes clear rules should be established. Training should be conducted regularly and should be documented. Thereby the employer complies with his obligation under the General Act on Equal Treatment and the employer can avoid liability, should an employee or a supervisor then sexually harass or otherwise discriminate against another employee.

Moreover, the General act on Equal Treatment expressly names the right of employees to lodge a complaint, wherefore the employer is required to establish such an opportunity for an employee to make a complaint.

HOW TO STOP WORKPLACE HARASSMENT IN GERMANY

Notwithstanding the preventive measures, there are instances in which the harassment has already happened. The question then is: What to do now?

The law is clear on this point: Under § 12 (3) of the General Act on Equal Treatment, the employer has the duty to stop discrimination and must take effective measures to avoid such discrimination for the future. On a general level, what the employer must do now can be divided into two steps: the first step is to investigate the allegations of discrimination or sexual harassment and to analyze what exactly happened. Only then can it be decided, as a second step, the necessary and effective measures that must be taken.

FIRST STEP – INVESTIGATING ALLEGED MISCONDUCT

It is important to ask the right questions to get the answer; the employer needs these answers for the execution of the second step in the investigation. Those questions are (i) whether the alleged sexual harassment really occurred, (ii) what were the circumstances and what may have triggered it, and (iii) how serious was the harassment? The first question is most important for the employer's decision whether measures have to be taken at all or whether the accused employee is innocent. The second and third questions have an impact on which measures are going to be effective; whether a warning would suffice, or the employee would have to be relocated. The answer to what preceeded the sexual harassment and what were the circumstances, is also crucial for the prevention of sexual harassment in the future. While doing so, the employer would be best advised to conduct interviews, which should be protocolled as well to precisely document all steps and results. During the procedure it is best to conduct the investigation as fast as possible and to keep the involved group of individals as small as possible in order not to damage the reputation of a possibly innocent employee.

SECOND STEP – TAKING EFFECTIVE MEASURES

After the investigation has been completed, effective measures must be taken. According to the German Federal Labour Court, a measure can be considered effective if the employer can expect the harassment to stop and prevent it for the future. This is evaluated from an ex-ante perspective and based on the results of the second and third questions. Multiple measures can be taken, such as a simple written note or meeting with the employee if the conduct was not that serious. Alternatively, an official warning letter can be issued to the employee stating that a repeat of such conduct will result in terminaton of the employment. These are the cases where a simple warning would not be adequate to deal with the harassment. Additionally, the employer can terminate the employment with notice or, as an *ultima ratio*, the employer can terminate the employment without notice in cases where the conduct has been especially serious and where there are strong indicators that such sexual harassment will be repeated. When deciding on a certain measure, the employer must weigh the conflicting interests in the case at hand, always with the sword of Damocles, of having to pay damages swinging over his head. Should the measure be ineffective the employer could be sued for damages by the victim. Should the measure be unnecessary, the employer can be sued by the employee responsible for the conduct. In any case it is crucial for the employer to find a balance between the conflicting interests. In case of a lawsuit due to a repetition of the harassment, employers will not be liable for damages, if they can prove that they could not reasonably expect this repetition from an ex-post perspective.

UNCLEAR SITUATIONS

Notwithstanding the employer's efforts to thoroughly investigate the alleged conduct, there are situations where it remains unclear what happened and whether the alleged harassment really occurred, and many employers are faced with the dilemma of how to proceed. In this regard, the employer is only obliged to do what is legally and factually in his realm of possibilities, since the employer does not have the same investigative privileges and possibilities as the police or the state. Here in general the same principles for choosing a measure as stated above, apply: The stronger the suspicion, the more serious the measure can be. As an *ultima ratio* the employer can terminate the employment based on the suspicion of sexual harassment, should the alleged sexual harassment be so serious that it would amount to a criminal offense. Generally, in cases where the employer can prove that he has done everything that was reasonable within his ability he has fulfilled his duty and cannot be held liable.

CONCLUSION

As a conclusion we would like to say that the anti-discrimintation system in the US and in Germany are quite similar. Nonetheless, despite these similarities due to the legal specifics of German law it may not be sufficient to copy an US-compliance system and to directly implement it into a German company. Investigating the facts and taking effective steps such as warnings or even terminaton of employment are crucial to prevent and stop workplace harassement in Germany.

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U.S. SUPREME COURT RULES THAT "FUCT®" IS FINE

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Maybe you feel that the title to this article is "immoral" or "scandalous," or maybe you don't. Either way, in light of the U.S. Supreme Court's seminal decision in *Iancu v. Brunetti*, whether a word or term is "immoral" or "scandalous" is no longer relevant to whether that word or term can receive federal trademark protection.

In a much-anticipated decision authored by Justice Kagan on June 24, 2019, the Supreme Court, in a six-to-three decision, held that the provision of the Lanham Act that barred the registration of "immoral" or "scandalous" trademarks ("the scandalous provision") was unconstitutional.

As background, in 1990, Erik Brunetti, an established artist and designer, launched the clothing brand FUCT – pronounced similarly to the third word on George Carlin's list of seven dirty words. According to Mr. Brunetti, FUCT functions as an acronym for the phrase "Friends U Can't Trust." In May 2011, Mr. Brunetti filed a trademark application to register FUCT in connection with clothing apparel. In January 2013, the U.S. Patent and Trademark Office (USPTO) issued a final rejection of the application on the grounds that the mark consisted of immoral or scandalous matter. In response, Mr. Brunetti requested reconsideration of the USPTO's final rejection, and also appealed that rejection to the Trademark Trial and Appeal Board (TTAB). Mr. Brunetti's request for reconsideration was denied, and the TTAB affirmed the USPTO's final rejection.

In September 2014, Mr. Brunetti appealed the TTAB's decision to the Court of Appeals for the Federal Circuit (Federal Circuit). The Federal Circuit affirmed the TTAB's decision, finding that there was substantial evidence supporting the conclusion that the FUCT mark "comprised immoral or scandalous matter." But the Federal Circuit concluded that the scandalous provision "is an unconstitutional restriction of free speech" and "reversed the [TTAB's] holding that Mr. Brunetti's mark is unregistrable." The Federal Circuit determined that the scandalous provision "impermissibly discriminates based on content in violation of the First Amendment."

Since the Federal Circuit invalidated a federal statute, the Supreme Court decided to review the Federal Circuit's decision. In doing so, the Supreme Court looked to its 2017 decision in *Matal v. Tam* and concluded that the scandalous provision – much like the disparagement provision at issue in *Tam* – violated the First

Amendment. In *Tam*, the Supreme Court declared that the provision of the Lanham Act that barred registration of disparaging trademarks was unconstitutional because it discriminated based on viewpoint.

In *Brunetti*, the Supreme Court reasoned that the Lanham Act's scandalous provision also discriminated based on viewpoint because the scandalous provision disfavored certain ideas. In reaching this determination, the Supreme Court observed that:

> the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former and disfavors the latter. Love rules? Always be good? Registration follows. Hate rules Always be cruel? Not according to the Lanham Act's "immoral or scandalous" bar.

In its decision, the Supreme Court highlighted several instances where the USPTO engaged in viewpoint discrimination by approving certain trademarks and denying other trademarks. For example, the USPTO approved federal trademark registrations for D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS – REALITY IS THE BEST TRIP IN LIFE, but it refused federal trademark registrations for KO KANE and YOU CAN'T SPELL HEALTHCARE WITHOUT THC. Likewise, the USPTO approved a federal trademark registration for PRAISE THE LORD, but it refused a federal trademark registration for BONG HITS FOR JESUS.

After underscoring several of these examples, the Supreme Court asked the hypothetical question: "How, then, can the Government claim that the 'immoral or scandalous' bar is viewpoint-neutral?" Answer: They cannot. But the Government tried. Specifically, the Government advanced the argument that the scandalous provision, despite its plain language, was susceptible to a more limited construction that eliminates any perceived viewpoint discrimination. That limited construction, according to the Government, would restrict the USPTO to rejecting federal trademark protection for trademarks that were lewd, sexually explicit, or profane as opposed to trademarks that were, generally, immoral or scandalous.

The Supreme Court rejected the Government's attempt to apply such a limitation on a statute that was otherwise plain on its face. Recognizing that it had the authority to interpret ambiguous language to "avoid serious constitutional doubts," the Supreme Court determined that there was no ambiguity with respect to the scandalous provision and that it would not rewrite the provision to make it constitutional. The Supreme Court held that the scandalous provision stretched "far beyond" the Government's suggestion that it should be limited to just trademarks that were lewd, sexually explicit, or profane. And in determining that the scandalous provision violated the First Amendment, the Supreme Court held that:

> There are a great many immoral and scandalous ideas in the world (even more than there are swear words), and the Lanham Act covers them all.

Going forward, the possibility remains that Congress could, in the future, look to enact more limited legislation that may pass constitutional muster. Consistent with the arguments advanced by the Government in *Brunetti*, Congress could, for example, seek to introduce more targeted legislation that prevents the registration of trademarks that are lewd, sexually explicit, or profane, as opposed to immoral or scandalous. To that end, in his concurring opinion, Justice Alito plainly stated, "[o]ur decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas…but we are not legislators and cannot substitute a new statute for the one now in force." To date, it appears that no such legislation is pending.

One thing is eminently clear: The pathway to securing federal protection for trademarks that may be considered "immoral" or "scandalous" is now significantly less encumbered. The question remains, however, how many businesses will avail themselves of this pathway?

If it is any barometer, a preliminary review of the USPTO database conducted by these authors indicates that, as of the date of this article, approximately 60 trademark applications have been filed in the USPTO since *Brunetti* was decided that contain some iteration of the word commonly known as the "f word." Expectedly, many of these trademark applications were filed on an "intent to use" basis and, as a result, whether these trademark applications will actually mature into federal trademark registrations remains uncertain. This is because the owners of these trademark applications will, at some point, need to demonstrate use of these trademarks in commerce before a federal trademark registration will issue. But whether it makes good business sense to use a "scandalous" or "immoral" trademark in commerce is a question for the businesspeople – not the lawyers.

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[1] Rivkin Radler LLP, as counsel of record, participated in the preparation of an amicus brief filed with the Supreme Court on behalf of the New York Intellectual Property Law Association, which advanced arguments that were consistent with the Supreme Court's ultimate holding.

COUNTERACTING THE ANCHORING EFFECTS OF PLAINTIFFS' DAMAGES REQUEST

Christina Marinakis, J.D., Psy.D. • Litigation Insights

Within the same week last year, we saw juries award non-economic damages of $1.25 million to a woman on an insurance bad faith claim, $1.3 million to a phlebotomist who experienced racial harassment, $1.9 million to a cyclist who broke her hip and wrist, and $3 million to a teen who fell from a ski lift. Without any concrete guidelines from the courts, how do jurors arrive at such figures? King Solomon would be disappointed. Indeed, jurors in the ski lift case appeared to merely "split the baby," issuing an award that fell between the $6 million requested by plaintiff's counsel and $700,000 suggested by the defense. Would the result have been any different had counsel from either side not provided a number at all? Consider the following:

Question: *How did the jury arrive at the decision to award the plaintiff $20 million?*

Juror #1: *We started with what the plaintiff was asking for – $80 million, which seemed like a very high amount, and went down and down from there.*

Juror #2: *None of us had been on a jury before, so we had no idea where to start. What's a life worth? It would have been nice to have some precedent to go by, but we didn't. So, we started with what they gave us, and then took off a percentage.*

Jurors are often at a loss when it comes to determining what constitutes fair and reasonable non-economic damages. Lawyers, who are constantly privy to plaintiff demands, settlement values, and jury verdicts, sometimes forget that most jurors have no references aside from the jaw-dropping figures they hear in the news.

ANCHORING AND ADJUSTMENT

Anchoring and adjustment is a psychological heuristic that influences the way people assess numerical estimates. When asked to come up with an appraisal or estimate, people will start with a suggested reference point (i.e., "anchor") and then make incremental adjustments based on additional information or assumptions. These adjustments are usually insufficient, giving the initial anchor undue influence. In a jury deliberation setting, we see this all the time.

Juror A: *What was it they were asking for – 50 million? That's ridiculous. No way.*

Juror B: *What's fair then? Half of that? 25?*

Juror A: *That still seems a little high. I'd cut that in half – make it an even 13.*

Juror C: *You have to figure the lawyers are going to take at least a third of it, and another third*

will probably go to taxes, so you need to bump that up. I'd say $30 million, that way he'll end up with 10.
Juror A: *$30 million still seems a bit high to me.*
Juror B: *That's still a lot less than what he's asking for.*
Juror A: *Okay, I can go with $30 million.*

Had the plaintiff's attorney only requested $30 million, it is very likely the jury would have made similar adjustments and ultimately settled on a figure far less. Most plaintiff lawyers realize this and "shoot for the moon," knowing that they'll end up among the stars even if they miss the mark. So how can defense counsel prevent jurors from using the plaintiff's request as an anchor? We suggest the following methods:

1) REMOVING THE ANCHOR

Jurors assume that lawyers know everything about the law, and the same applies when it comes to damages. Surely, if that's an amount the plaintiff's attorney is comfortable asking for, it's because some jury in the past has given it. These faulty assumptions lead jurors to defer to the lawyers. In fact, some jurors assume assessing damages is an "all or nothing" determination. Therefore, it's important to inform jurors that they're not bound by the plaintiffs' numbers, that those numbers are completely arbitrary, and to suggest that the jury give no weight to figures that are merely requests. For example:

The plaintiff's attorney has asked you to award a specific amount, but that's just a request; it has no basis in fact – it's not based on anything other than what they want. Should you decide my client is liable, although we firmly believe it is not, then we ask that you come up with your own figure that is fair and reasonable, and give no deference whatsoever to a number that is merely a request without any basis.

2) EXPOSING THE ANCHOR

People are less likely to fall prey to mental processing errors when the tendency to engage in such thought is outwardly exposed. By drawing attention to the fact that the plaintiff's counsel is attempting to influence jurors with an anchor, jurors will be less likely to be persuaded by it. For example:

Most people are familiar with anchors being used to keep a boat from drifting too far. What you probably didn't know is that anchoring is a psychological persuasion tactic as well. Let me give you an example:

I was at a conference in Vegas and wanted to bring back something nice for my wife, so I walked into one of those high-end purse stores. The salesman brings over a bag and I take a look at the price tag – $11,000! I tell him, "Hey, I love my wife, but that's just too high." "Ah! I have just the one for you," he says, and he brings over a different one. This purse was $2,000. "Okay," I'm thinking, "This is much more reasonable. I'll take it." When I got home, my wife was VERY happy, but asked why I would spend so much. Then it hit me. If the salesman had never shown me that $11,000 one, there is no way I would have spent $2,000 on a purse.

That's what anchoring is all about. And guess what? That's what the plaintiff's lawyer just tried to do to you. That $10 million request was an anchor, aimed at keeping you from drifting too much lower. Only you, as jurors, decide where that anchor touches down; it's not for the plaintiffs to set it for you.

3) LOWERING THE ANCHOR

Although exposing and removing the anchor have some effect on minimizing damages, in the absence of competing values, jurors will nevertheless use the plaintiffs' figures as the starting point. Thus, we sometimes recommend that defense counsel identify an alternative amount that is fair and reasonable, without conceding responsibility. Consider the following:
Juror A: *For non-economic damages, what do you all think?*
Juror B: *The plaintiff lawyer said $30 million, which seems like way too much.*
Juror C: *I'm thinking closer to what the defense lawyer said, $2 million. The point is to put him whole, not put him up in a mansion.*
Juror B: *I think he needs a little more than 2 – that doesn't last very long in this day and age.*
Juror C: *Okay, what if we bump it up to 5?*
Juror A: *Can everyone agree to $5 million? [all hands raise] Okay, we'll go with 5.*

By offering a counter-figure, the defense "Lowers the Anchor," giving defense supporters and conservative jurors something to argue from and effectively lowering the ultimate award.

We've also learned over the years that anchors have the most "pull" when they're tied to a factual figure. For example, defense counsel might suggest "twice the amount of the hospital bills" or "$20,000 for each year since the accident." Jurors tend to give more weight to figures that appear to be tied to evidence than to numbers that seem completely arbitrary.

DOES LOWERING THE ANCHOR ADMIT LIABILITY?

Offering an alternative damages figure is a controversial technique, and we often see clients reluctant to do so in fear that jurors will misconstrue it as a concession of liability. Years of experience talking to thousands of jurors suggest this usually is not the case. This is especially true when there is at least one or two sophisticated jurors on the panel and when counsel is clear that there is no liability, so there should be no damages, but he or she is providing an alternative calculation merely to give the jury some guidance in the event they disagree.

Rather than relying on anecdotal evidence, we can turn to the empirical research as support for this technique. In one study, damages were 823% *higher* when the plaintiff requested $5 million as opposed to $250,000. However, jurors awarded 41% *less* damages when the defendant offered a counter anchor than when the defense merely ignored the request or attacked it as unreasonable. Most importantly, jurors were actually *more* likely to render a complete defense verdict when the defendant offered a counter anchor, suggesting that not only do most jurors not view the counteroffer as a concession of liability, but it may even enhance the defense's credibility.

In another study, researchers found that counter anchors significantly reduced overall awards and had no effect on findings of liability when the defendant's case was weak or moderately strong. However, when the defense case was very strong, more jurors found the defendant liable when the defense offered a counter anchor than when it did not. Thus, in *most* cases, providing a counter anchor will not impede your chances of obtaining a defense verdict. However, a counter anchor may be ill-advised when the defense case is particularly strong.

CASE-BY-CASE

If there's one thing we can all agree upon, it's that there is no one-size-fits-all approach to litigating a case. The only way to be sure that an approach is the right one for your case is to test it – either at trial, or with jury research incorporating a variation of alternative defense approaches. We think the latter will cause fewer ulcers.

– With *Exposing the Anchor* contributions from Kurt M. Spengler of Wicker Smith O'Hara McCoy & Ford P.A. in Orlando, Florida.

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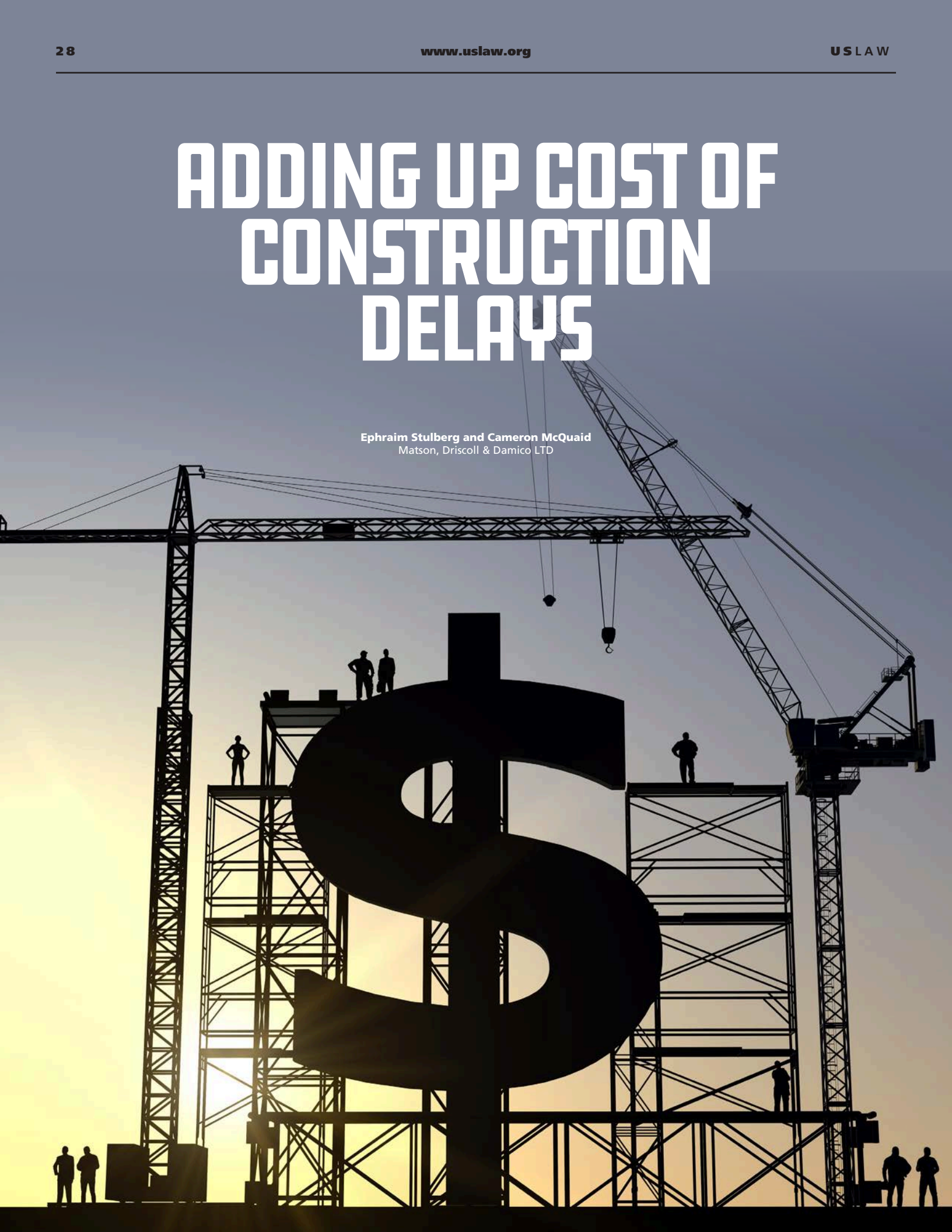
ADDING UP COST OF CONSTRUCTION DELAYS

Ephraim Stulberg and Cameron McQuaid
Matson, Driscoll & Damico LTD



No one likes delays. Whether it's a rain delay at a sporting event or a subway delay stuck somewhere beneath the city of Toronto, delays cost us time that we would rather have spent doing something else. Sometimes, however, delays can cost not only time, but money as well. In this article, we discuss some of the key issues in calculating economic losses in construction delay claims.

Construction delays can occur for a wide variety of reasons. Sometimes they are caused by negligent work performed by a trade or technical expert that needs to be rectified; sometimes they are caused by unforeseen physical damage to the project. Whatever the reason for the delay, it means that things did not happen when they were supposed to happen.

THE CONCEPT

The end goal in these types of claims, as in any economic loss calculation, is to measure the difference between a) the level of profit the plaintiff would have earned based on revenues and expenses that would have occurred but for the delay, and b) the actual profit the plaintiff achieved following the delay.

THE CHRONOLOGY

A key component in this measurement is establishing the timelines of the project and the impact of the alleged wrongdoing or event on that timeline.

While sometimes this issue is relatively clear cut, in other cases it can be very complex, as it may be possible for a delay in one area of a project to be offset by an acceleration of work in other areas. Moreover, the overall project may have also been affected by other, unrelated delays that will have impacted the projected completion date and the corresponding impact on the project's profitability. This is an area where we, as forensic accountants, are often assisted by other experts.

Delays in completion of a construction project can create a variety of types of economic loss. Below are some common types of economic losses that result from construction delays.

SOFT COSTS

The longer a project carries on, the longer the developer will incur time-related costs. These costs can include rental costs for temporary facilities and equipment, insurance and bonding costs, property taxes as well as financing costs including both renewal fees for loan facilities and the interest on those facilities. Some of these costs are only applicable if the developer plans to sell the building upon completion; others apply in all cases.

It is important to understand the direct impact of a delay on these costs. For example, a delay in the construction schedule will mean that disbursements of construction loan facilities (which are often set up as a "revolving loan" where interest is only charged on the amount used by the developer, similar to a line of credit) are delayed as well. The delay should generally be measured based on the loan balance at the time the delay occurs, rather than at the end.

ACCELERATION COSTS

In some cases, a construction delay can cause the cost of certain work to increase. If exterior work that was planned to be performed in the summer is delayed to the winter, this can create higher costs. Similarly, if schedules are expedited following the resolution of the delay, then there may be a higher than planned level of overtime expenses incurred.

LOSS OF RENTS

If the project is a property that will eventually be leased to tenants, a delay in completion can result in lost rents, as well as costs to find temporary accommodation for tenants who were planning to occupy the new space and cannot continue to lease month-to-month.

Again, in analyzing such potential losses, it is important to isolate those rental losses that are causally related to the delay. For example, if following the completion of the building it is only 60 per cent occupied for a long period of time, then it is unlikely that the failure to lease the remaining 40 per cent is related to the delay.

Losses of rents can also occur in condo building projects. Typically, it is possible for a condo project to achieve interim occupancy several months before substantial completion of the project and the final closing dates of the sale of units. During this interim occupancy period, the future condo owner lives in their condo, although they do not officially own it yet, and the monthly payments made to the developer during this period do not pay down the condo owner's mortgage on the property. An assessment of whether a construction delay impacted the interim occupancy payments collected by the developer is necessary when determining the economic loss.

LOSS ON SELLING PRICE

This is an area that can sometimes arise in volatile real estate markets. A delay in completion of a project may result in a reduction in the ultimate selling price the developer is able to achieve on the project.

PENALTIES

In some situations, there can be severe penalties for failure to meet construction deadlines. These are not difficult to quantify; the challenge is in determining whether the plaintiff would have managed to avoid these costs even absent the particular delay in question.

CONCLUSION

In the short space of this article, we have only been able to present a broad outline of some of the major areas we encounter in quantifying construction delay claims. Every case will have its own nuances, but the principles underlying the quantification approach will remain the same.

Ephraim Stulberg is a partner/senior vice president in MDD Forensic Accountants' Toronto office where he is one of the leaders of the firm's litigation services practice. He has provided expert witness testimony in court and at arbitration. He has prepared business valuation reports in the context of shareholder disputes, franchise disputes, matrimonial disputes, income tax reporting, and commercial disputes involving physical damage, breach of contract and fraudulent conveyance.

Cameron McQuaid is a senior manager/vice president in MDD Forensic Accountants' Toronto, Ontario, Canada, office. Cameron's practice concentrates primarily on first party commercial property claims, accident benefits, personal injury, construction delay, commercial litigation and general liability.

Barclay Damon LLP in Buffalo, New York recently redesigned its **website** and received a gold award from the Academy of Interactive and Visual Arts (AIVA) as part of the 14th annual W3 Awards.

Flaherty Sensabaugh Bonasso PLLC attorney **Alonzo Washington** was appointed by The Federation of Defense & Corporate Counsel (FDCC) to serve as vice chair of both the Products Liability Section and Trial Tactics, Practice and Procedures Section for the 2019-2020 year commencing October 1, 2019.

David Cohen, a partner at **Jones, Skelton & Hochuli** in Arizona has been re-elected to the Arizona Health Care Association's Public Policy Committee for 2019/2020. David has been a member of the Committee for 11 years, and frequently presents workshops and writes articles for their educational programming.

Nicolas Martino and **Kimberly Page** of **Jones, Skelton & Hochuli** in Arizona have been named to the Arizona Association of Defense Counsel Young Lawyer's Division (AADC YLD) 2019-2020 Board of Directors. Nic will serve as Community Outreach Chair, and Kimberly will serve as CLE Chair and Board Secretary, where she will oversee CLE programming and professional development for YLD members.

Nadia P. Bermudez, a shareholder at **Klinedinst** in San Diego, California, received the Distinguished Leadership and Service Award as lawyer representative of the U.S. District Court, Southern District of California. The award was presented by Chief Judge Larry Burns.

Klinedinst Founder and CEO **John D. Klinedinst** has been elected to serve on the George Washington School of Business (GWSB) Board of Advisors. John is the only lawyer serving on the Board of Advisors and received his MBA from the institution in 1975.

Klinedinst Shareholder **Ian Rambarran** has been admitted as the newest member of the Federation of Defense & Corporate Counsel (FDCC).

Heather L. Rosing of **Klinedinst** was honored by the San Diego Law Library Justice Foundation with the 2019 Witkin Award for Excellence in Public Service.

MehaffyWeber Managing Shareholder **Bob Black** recently joined the American College of Civil Trial Mediators (ACCTM) as a Fellow. He is one of only a handful of mediators from Texas selected for membership in the prestigious ACCTM Fellows. Established in 1995, the ACCTM is a non-profit organization of professional mediators across the country.

Michele Y. Smith of **MehaffyWeber**as the recipient of the 2019 Founders Award from the Texas Association of Defense Counsel ("TADC").

J. Cliff McKinney II, managing member of **Quattlebaum, Grooms & Tull PLLC** in Arkansas has been elected a Fellow of the American College of Real Estate Lawyers (ACREL) , the premier organization of U.S. real estate lawyers.

Chad W. Pekron, who concentrates his practice on complex business, tort, and class action litigation at **Quattlebaum, Grooms & Tull PLLC** in Arkansas, has become a Fellow of the Litigation Counsel of America.

Quattlebaum, Grooms & Tull PLLC's Joseph W. Price II has been appointed by North Little Rock Mayor Joe Smith to the Board of Directors of Metropolitan Emergency Medical Services (MEMS) for a five-year term. Serving Pulaski, Grant & Faulkner Counties and the cities of Maumelle, Cabot & Conway, MEMS covers approximately 2,400 square miles and more than 500,000 people. Joe also has been reappointed as the Arkansas State Membership Chair for DRI – The Voice of the Defense Bar. The appointment will conclude at the end of the DRI Annual Meeting in October 2020.

Michael J. Kaufmann of **Simmons Perrine Moyer Bergman PLC** in Iowa recently joined the board of directors for Big Brothers Big Sisters of Cedar Rapids & East Central Iowa.

Stuart R. Day, a partner at **Williams, Porter, Day & Neville** in Wyoming, has been appointed to the Wyoming Supreme Court Committee to design and implement the new Chancery Court. Stuart is one of only four Wyoming lawyers who were selected by the Wyoming Supreme Court to participate in this new committee.

Scott E. Ortiz of **Williams, Porter, Day & Neville** in Wyoming has been appointed as the Chair of the Wyoming State Committee for the American College of Trial Lawyers (ACTL) for the 2019-2020 term.

Kyle A. Ridgeway of **Williams, Porter, Day & Neville** in Wyoming has been appointed president of the Business Law Section for the Wyoming State Bar for 2019-2020.

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Pittsburgh, PA

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EXPERTISE BRINGS VALUE

FACES of USLAW

USLAW ADDS THREE TO CLIENT LEADERSHIP COUNCIL

The Client Leadership Council (CLC) is a hand-selected group of prestigious USLAW firm clients who provide expertise and advice to ensure the organization and its law firms meet the expectations of the client community. We are excited to share that we've added the following to the CLC:

Jack Henschel
Vice President and General Counsel
Atlas Copco North America LLC

Mike Morgan
Senior Manager, Global Risk Management
Fluidmaster, Inc.

Brooke Williams
Senior Claims Examiner
Aspen Insurance

Rivkin Radler LLP hosted a development, diversity and inclusion program at its office in Uniondale, New York. The speakers included Rhonda Powell, general counsel and corporate secretary of **Buzzfeed** and Floyd Holloway, Jr., counsel at **State Farm**. The event was moderated by Rivkin Radler's **Nancy Del Pizzo** (at right in picture).

USLAW NETWORK partnered with Howard University School of Law in Washington, D.C.to host a recruiting forum in September. The event, which preceded USLAW's fall client conference, featured 16 USLAW member firms and nearly 60 students from Howard who participated in a full afternoon of interviews for Howard's second and third-year law students for both clerkships next summer or for attorney positions after graduation. This was USLAW's first-ever recruitment forum. In addition to the interviews, several students attended USLAW's client conference educational sessions later in the week.

"We had an incredible response from both member firms and Howard University School of Law students for our inaugural recruiting forum," said **Noble F. Allen** of **Hinckley Allen** in Hartford, Connecticut, and chair of **USLAW's Diversity Council**. "The law students at Howard University were disciplined, motivated, talented and extremely well prepared for the interviews. We are excited about this inaugural forum and are very appreciative to Howard for providing USLAW with the opportunity to interview these very talented students."

USLAW facilitated the recruiting forum with the Howard University Office of Career Services

Marion, Iowa, voters re-elected Mayor **Nick AbouAssaly** for another second-year term. Mayor AbouAssaly also serves as a real estate attorney with **Simmons Perrine Moyer Bergman.**

BARCLAY DAMON LLP

Barclay Damon LLP is USLAW's newest member firm and represents the Buffalo, New York, market. Barclay Damon is an established leader in practices that include intellectual property, labor and employment, corporate and transactional, finance, real estate and project development, public finance, and commercial and civil litigation, among numerous others. Visit **barclaydamon.com** for more information.

The Litigation Counsel of America named **Jeffrey L. O'Hara** (pictured right) of **Connell Foley** in Newark, New Jersey, a recipient of the Peter Perlman Service Award at the 2019 LCA Fall Conference & Celebration of Fellows. The Award recognizes Fellows who contribute in meaningful ways to society by giving back their time and resources in an effort to improve the lives of others. Jeff has been accredited by the Department of Veteran Affairs to prepare, present and prosecute claims for veterans' benefits. Arising directly from his pro bono representation of Command Chief Master Sergeant William "Calvin" Markham, USAF (retired), Jeff and Chief Markham co-founded One Vet @ A Time, Inc., d/b/a Project OVAT, a non-profit entity focused exclusively on providing legal and medical support at no cost to select veterans pursuing VA disability claims.

On September 28, 2019, **Rivkin Radler** attorneys **Nancy Del Pizzo**, **Shari Claire Lewis**, **Steven Shapiro** and **Marc Ullman** presented a certificate commemorating Rivkin's donation to the Bahamas Disaster Relief Fund in support of Hurricane Dorian recovery efforts. The presentation was made to Her Excellency Ms. Sheila Carey, Ambassador and Permanent Representative of the Commonwealth of Bahamas to the United Nations, at the 5th Annual SIDS DOCK Conference held at the United Nations.

(Photo L-to-R): Dr. Albert Binger, Secretary-General, SIDS DOCK; Nancy Del Pizzo, Partner at Rivkin Radler; Marc Ullman, Of Counsel at Rivkin Radler; Her Excellency Ms. Sheila Carey, Ambassador and Permanent Representative of the Commonwealth of the Bahamas to the United Nations; Shari Claire Lewis, Partner at Rivkin Radler; Steven Shapiro, Of Counsel at Rivkin Radler; Her Excellency Ms. Keisha McGuire, Ambassador and Permanent Representative of Grenada to the United Nations representing the President of the SIDS DOCK Assembly; and Chair of the SIDS DOCK Island Women Open Network (IWON).

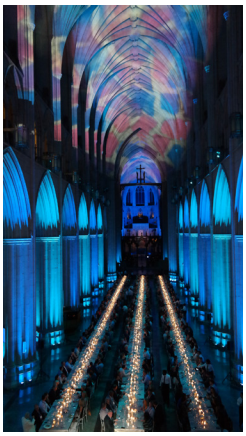
SECOND ANNUAL GLOBAL DAY OF SERVICE

USLAW member attorneys from **Flaherty Sensabaugh Bonasso** in West Virginia and **McCranie Sistrunk Anzelmo Hardy McDaniel & Welch LLC** in Louisiana joined volunteers from more than 70 law firms around the world in the Second Annual Global Day of Service on September 26. This is a worldwide initiative spearheaded by Ford Motor Company's Legal Alliance for Women (LAW), the company's professional organization focused on women in the legal practice.

Flaherty attorneys prepped and served at Manna Meal, a vital part of the Charleston community serving as many as 400 people each day.

McCranie Sistrunk Anzelmo Hardy McDaniel & Welch partnered with the Geaux Teal Organization, a non-profit based in Louisiana whose mission is to raise awareness for women of all ages about the signs and symptoms of ovarian cancer. They volunteered at a local hospital in Covington, Louisiana where they disseminated educational materials and spoke with hundreds of hospital employees, patients, and visitors about the signs and symptoms of ovarian cancer.

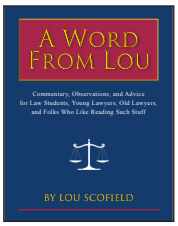
Attendees at the Fall 2019 USLAW NETWORK Client Conference dine under the arches at the Washington National Cathedral in Washington, D.C.



All **Lewis Roca Rothgerber Christie** offices participated in a volunteer day to promote charitable work in their communities. The Denver office collected food and clothing donations to give to the Denver Rescue Mission and socks, gloves and coats to the Coalition for the Homeless. The Colorado Springs office collected food for Partners in Housing, a local Colorado Springs organization that guides families in housing crisis from insecurity to stability, self-reliance, and prosperity.

At the 2019 State Bar of Arizona Convention, Jones, Skelton & Hochuli partner **A. Melvin McDonald** (pictured right) received a Special Award of Honor in recognition of his significant contributions to the law throughout his 50 years of practice. Mel was presented with his 50-Year certificate by Jeffrey Willis, president of the State Bar of Arizona.

USLAW NETWORK hosted its inaugural Courtroom Academy in Denver in early September. The Courtroom Academy is USLAW's answer to ensuring our next generation of future leaders develop trial skills. This program for members focused on jury selection/voir dire and opening statements. The program was coordinated by Future Leaders chair and vice chair, respectively, **Jeff Choi** (Snyder Burnett Egerer, LLP) and **Ryan Holt** (Sweeny Wingate & Barrow, P.A.), and **Jessica Fuller** and the team at Lewis Roca Rothgerber Christie served as local member firm hosts. We also had a strong lineup of instructors, including **Rod Umberger** (Williams Kastner), **Sheryl Willert** (Williams Kastner), **Dick Ford** (Wicker Smith O'Hara McCoy & Ford P.A.), **Tom Oliver** (Carr Allison), **Scott Ortiz** (Williams, Porter, Day and Neville PC), **Barry Snyder** (Snyder Burnett Egerer, LLP), and **Christina Marinakis** of Litigation Insights. Plans are already underway for the 2nd annual event in September 2020.



Lou Scofield of **MehaffyWeber** published a poignant and humorous book A Word From Lou (Story Arts Media publisher) which is a collection of columns originally published in The Association Press (publication of the Association of Defense Trial Attorneys). As the cover says, it is "commentary, observations, and advice for law students, young lawyers, old lawyers, and folks who like reading such stuff." It is available under its title on Amazon Books and Barnes and Noble.com.

As part of its ongoing commitment to promote inclusion and diversity within the legal profession, Adler Pollock and Sheehan P.C. (AP&S) awarded **Crystal Peralta the 2019 Honorable Walter R. Stone Diversity Fellowship**. The Fellowship awards a second-year law school student a scholarship of $10,000 and a Summer Associate position at AP&S. Crystal completed her internship this past summer and has accepted a position as an associate at the firm next fall. The Fellowship is named in Honor of the late Judge Walter R. Stone, the first African-American attorney in the Rhode Island Attorney General's Office, the first African-American Shareholder at AP&S, a member of the AP&S Diversity Committee and a champion of promoting inclusion for all.

Attendees at USLAW's Taste of Union Market event during the Fall 2019 USLAW NETWORK Client Conference in Washington, D.C. enjoyed delicious and diverse taste treats from more than 20 chefs. At the end of the evening attendees voted for their favorite cuisine and Puddin', which specializes in divine comfort food, was the runaway winner. USLAW made a $500 donation to the American Red Cross on behalf of Puddin' to be used for Hurricane Dorian victims in the Bahamas.

successful
RECENT USLAW LAW FIRM VERDICTS

MehaffyWeber (Beaumont, TX)

On August 22, 2019, the First Court of Appeals, in an en-banc decision, affirmed orders issued by the Texas Silica MDL Pretrial Court dismissing the claims of 106 plaintiffs alleging personal injury through exposure to silica. In so doing, the Court of Appeals also held that the Texas impairment criteria applicable to silicosis lawsuits and the dismissal of those lawsuits for failing to comply with the impairment criterial was not unconstitutionally vague and was not unconstitutionally retroactive. The underlying motions for dismiss which lead to the appeal was filed by Barbara Barron, court appointed liaison defense counsel and Frank Domino of MehaffyWeber. Both lawyers then wrote and filed all briefs through various appeals up to the Texas Supreme Court, back down and back up to the Court of Appeals and finally through the en banc motion for rehearing. The 41-page decision finalized the dismissal of 106 plaintiffs and more importantly upheld a statute which was used to dismiss not only silica plaintiffs, but an additional 40,000 plus asbestos plaintiffs.

Poyner Spruill LLP (Raleigh, NC)

21 states filed an amicus brief on Friday urging the U.S. Supreme Court to grant a certiorari petition that Poyner Spruill filed last month on behalf of Trout Unlimited and California Trout, two well-known conservation groups. The certiorari petition asks the Supreme Court to review a D.C. Circuit decision about when and how states lose their Clean Water Act authority to ensure that federally licensed projects comply with water-quality requirements—a decision that deepened a conflict among the federal appellate courts, and one that has significant implications for states and the environment.

Poyner Spruill lawyers Drew Erteschik, Saad Gul, John Michael (J.M.) Durnovich, Colin R. McGrath, and Cosmo Zinkow represent Trout Unlimited and California Trout before the Supreme Court.

"We're pleased to see such a strong showing of support from the states at the petition stage," said Durnovich. "Petition-stage amicus support from even one state is notable, and here, 21 states are urging the Court to grant cert."

Erteschik, lead appellate counsel for the petitioners, noted the geographic and political diversity of the supporting states. "The states supporting our petition have a wide array of environmental policies and concerns, which are as diverse as one might imagine—for example, those of Hawaii versus those of Mississippi," said Erteschik. "This unified and significant level of state amicus participation only confirms that the case has enormous implications for the states' role in ensuring the quality of our nation's waters."

The case arises in the context of a federal hydropower project along the Klamath River, which runs through California and Oregon. The project would remove four hydroelectric dams, reconnecting more than 400 miles of salmon and steelhead habitat that the dams currently block. The federal government licenses projects like these, which affect the nation's waters, but the role of ensuring that these projects comply with water-quality requirements is reserved for the states.

Under the Clean Water Act, applicants for these projects must request and obtain a certification from the affected states that any discharges into the water will comply with federal and state water-quality requirements. States must act within one year of a request, or under section 401 of the Clean Water Act, they waive their authority to certify the applicant's compliance with water-quality requirements.

In complex cases, however, applicants and states require more than a year to develop the record that states need to make a decision. Thus, applicants often withdraw and resubmit their request before the one-year period expires to avoid forcing the state to decide the request prematurely. In the decision below, however, the D.C. Circuit held that when applicants take this approach, it results in a waiver of the states' Clean Water Act authority.

If a state is deemed to have waived its section 401 authority, the federal licensing continues without any certification whatsoever from the state that a project will satisfy federal or state water-quality requirements. Because many federal projects are licensed for fifty years at a time, and some projects receive permanent licenses, a waiver of state authority means that a project could operate in a manner that harms water quality for generations.

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

Steven W. Quattlebaum and Brittany S. Ford of Quattlebaum, Grooms & Tull PLLC, along with attorneys from another firm, achieved a defense verdict in favor of Johnson & Johnson in a talcum powder asbestos exposure case, *George Crudge, et al. v. Armcord Inc., et al.,* in the Superior Court of the State of California for the County of Los Angeles. Johnson & Johnson was the only defendant at trial. After deliberating roughly one day following a three-week trial, the jury found that the plaintiff was not exposed to asbestos by his use of Johnson's Baby Powder. The plaintiff was claiming that his pleural mesothelioma, a cancer of the lining of the lungs often associated with asbestos exposure, was caused by his use of Johnson's Baby Powder. The trial was conducted September 20, 2019 – October 11, 2019.

Rivkin Radler LLP (Uniondale, NY)

In a case of first impression under New York Law, Evan Schieber of Rivkin Radler LLP secured a major victory for Kings Premium Service Corp. In Adebowale v Kings Premium Service Corp. at al., the Court dismissed in its entirety an action brought against the Kings Premium Service Corp., a financing company, for damage allegedly incurred by an insured after his policy was canceled. The Court held that the finance company properly invoked a power of attorney after plaintiff's non-payment and was entitled to cancel the insured's policy. The Court made new law by recognizing, for the first time, that the power of attorney provision contained in the finance agreement was valid despite the fact that it did not meet the technical requirements of the General Obligations Law. Instead, the Court adopted Schieber's argument that the financing agreement was governed by and complied with the Banking Law. The decision is a big win for financing companies, all of whom have an interest in the continued validity of the standard finance agreement.

SmithAmundsen LLC (Chicago, IL)

Michael Wong and Michael Resis obtained a motion to dismiss for a municipality facing claims of breach of contract and violating the insurance code, federal equal protection clause and Illinois Constitution pension protection clause relating to its health insurance for employees and retirees. They successfully defended the municipality on appeal leading to plaintiffs voluntarily dismissing the remaining federal equal protection clause claim.

Williams Kastner (Seattle, WA)

On October 8, 2019, attorneys at Equal Citizens petitioned the Supreme Court of the United States to hear the case about controlling the votes of presidential electors' cases in order to resolve a conflict between courts in Washington and Colorado. If the Supreme Court accepts the case, it would issue a decision by the summer of 2020, well before the presidential election. Attorney Jason Harrow of Equal Citizens added, "With this petition, we are asking the Supreme Court to resolve a critical question that has gone strangely unanswered for two centuries: who are presidential electors, and can state officials force them to vote for certain presidential candidates? With courts around the country split on the answer, the Supreme Court should step in and resolve this question so that everyone knows the rules of the road for 2020 and beyond."

The presidential electors are represented by Harvard Law Professor and Equal Citizens Founder Lawrence Lessig, his colleague at Equal Citizens Jason Harrow, and his colleagues, Sumeer Singla, Daniel Brown and Hunter Abell at Williams Kastner, and Jonah Harrison of Arête Law in Seattle. In May, the Washington Supreme Court upheld unprecedented fines on three presidential electors who did not vote for Clinton or Trump. In August, the U.S. Court of Appeals in Denver issued a landmark opinion disagreeing and confirming that presidential electors have the constitutional right to vote for whomever they please, and they cannot be bound to vote for the state's popular vote winner. That court closely analyzed the Constitution's text and canvassed centuries of history and concluded that "the Constitution provides presidential electors with discretion in casting their votes for President and Vice President."

The Washington electors are asking the Supreme Court, the highest court in the federal judiciary of the United States to review this conflict. The split makes review of this unresolved question by the U.S. Supreme Court very likely.

pro bono SPOTLIGHT

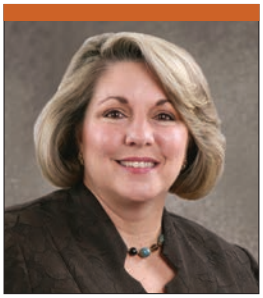
Barclay Damon (Buffalo, NY)

In honor of National Pro Bono Celebration week from October 20 to October 26, Barclay Damon's Buffalo, Rochester, Syracuse, Albany, and Boston offices highlighted their respective pro bono work with the Erie County Bar Association Volunteer Lawyers Project, the Volunteer Legal Services Project of Monroe County, the Volunteer Lawyers Project of Onondaga County, the Albany Law School Community Development Clinic, and Mass Legal Answers Online on the firm's Facebook, LinkedIn, and Twitter accounts. An employee giveaway and contests were also held in the firm's offices.

"National Pro Bono Celebration Week gives us the opportunity to acknowledge the work we've done with amazing community partners and to reaffirm our deeply held commitment to advocating for those struggling with economic and social barriers who typically lack access to systems that can help them meet their legal needs," Heather Sunser, the firm's pro bono partner (pictured), said. "I am proud to be part of a law firm where each attorney is willing to donate their time and talent to help those who need it most."

Through its multi-award-winning pro bono program, Barclay Damon dedicated more than 3,500 hours of time valued at nearly $1 million to pro bono efforts in 2018, with each of the law firm's full-time attorneys participating for the second year in a row. In 2018, attorneys actively participated in firm- sponsored family court clinics, litigated civil rights violations, drafted wills for veterans, assisted with clemency applications, and provided online legal aid through initiatives such as the American Bar Association's Free Legal Answers program. They also helped clients handle legal matters involving many of today's critical issues, including immigration, housing, women's rights, prisoners' rights, and community building and economic development.

The firm's dedication to pro bono work has been recognized with numerous honors, including being named a Free Legal Answers™ Firm Honoree by the New York State Bar Association. In January, Barclay Damon was additionally honored as an Empire State Counsel Honoree by the NYSBA at its annual Justice for All Luncheon for the third year straight. Among other accolades, Barclay Damon has also been ranked the number one firm for pro bono service in Western New York by Buffalo Law Journal.



MehaffyWeber (Beaumont, TX)

Barbara Barron of MehaffyWeber has been president of a number of nonprofits, but recently she has been assisting various nonprofits with their human resource issues. After successfully defending several nonprofits on EEOC claims, Barbara recognized that the vast majority of nonprofits need employment law assistance. However, most nonprofits do not have the resources to hire a dedicated human resource professional. Just this past summer, Barbara has written several employee handbooks for local nonprofits and has defended several on their EEOC charges. Additionally, she is speaking at a joint meeting of United Ways on defending discrimination claims. Barbara is in the process of locating human resource professionals to sit on advisory boards for several nonprofits to provide employment guidance to the nonprofits. Nonprofits benefit the community and Barbara is working hard to ensure their precious resources are reserved for their causes, not for defending employment lawsuits.

Rivkin Radler LLP (Uniondale, NY)

Katherine A. Heptig of Rivkin Radler LLP in Uniondale, New York, worked with The Honor Network to get them incorporated and prepare their application for recognition of their tax-exempt 501(c)(3) status. The organization came to life in the wake of the Route 91 shooting in Las Vegas. Amidst the chaos, the Honor Network decided to do random acts of kindness in honor of the 58 victims who lost their life. Although this project fell outside of the Firm's standing pro bono activities, the partnership recognized the organization's impact throughout the country, and Kate was given the go-ahead to provide her services free of charge.

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 diverse network with more than 6,000 attorneys from more than 60 independent, full practice firms with roots in civil litigation across the U.S., Canada, Latin America and Asia, and with affiliations with TELFA in Europe, 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 quarterly *USLAW Magazine*, USLAW DigiKnow, which features insights into today's trending legal topics, compendiums of law, as well as annual membership directory. To ensure our goals are the same as the clients our member firms serve, our Client Leadership Council and Practice Group Client Advisors are 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 1000 lawyers through Europe to further our service and reach.

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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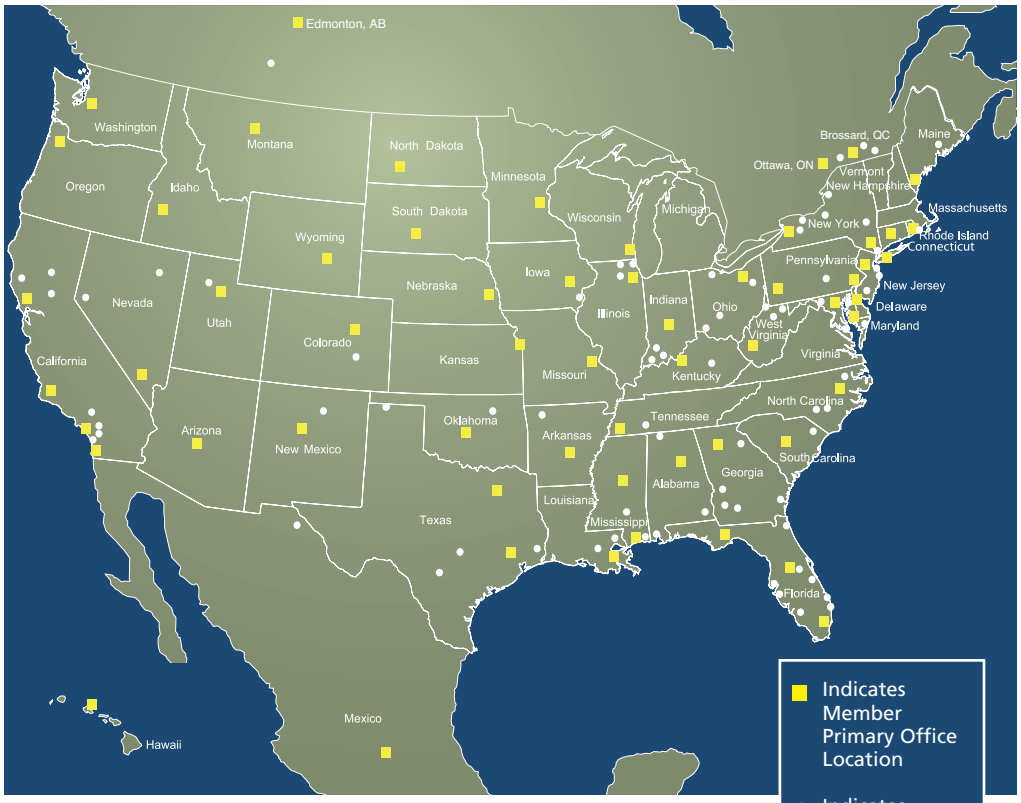

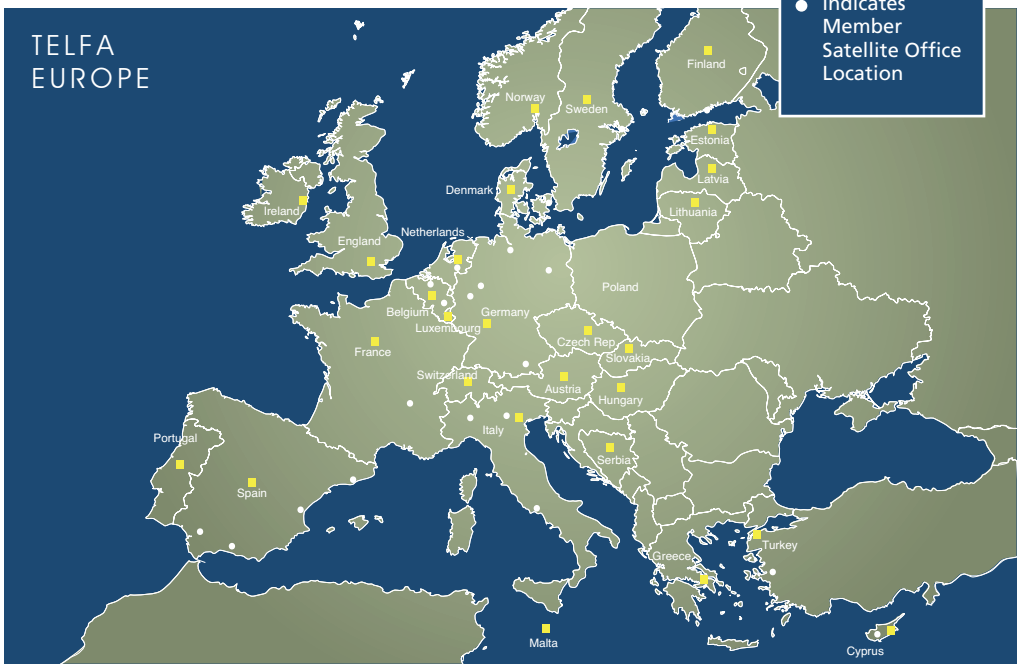

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the complete USLAW SOURCEBOOK

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, 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 colleagues.

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 client exchanges. 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.

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, legal visualization services, court reporting, jury consultation, courtroom technology, forensic accounting, structured settlements, eDiscovery, cyber security and data forensics, and investigation.

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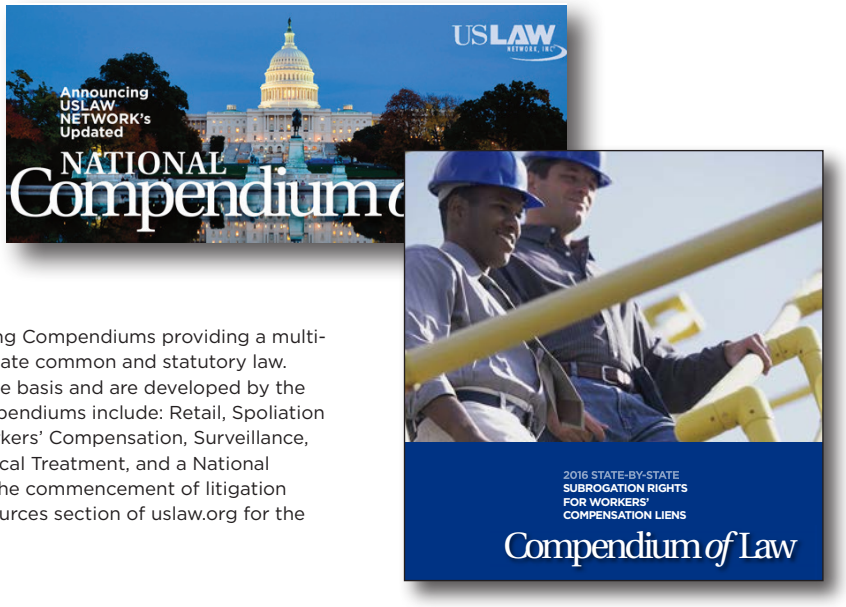
USLAW ON CALL

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 that 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!

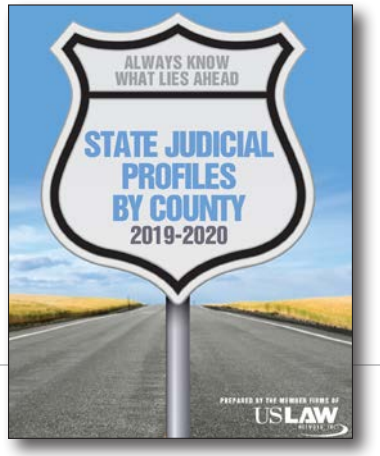
LAWMOBILE

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 a 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. Some of the current compendiums include: Retail, Spoliation of Evidence, Transportation, Construction Law, 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. Visit the Client Resources section of uslaw.org for the complete USLAW compendium library.



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 MOBILE APPS

Take USLAW with you wherever you go. Visit uslaw.org and pin it to your home screen on any mobile device. Also, USLAW Events is our Client Conference mobile app that archives all of the presentation materials, among several other items, from past USLAW Conferences. USLAW Events app is 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 quarterly and designed to address legal and business issues facing commercial and corporate clients. Recent topics have covered cyber security & data privacy, medical marijuana & employer drug policies, 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 MEMBERSHIP DIRECTORY

Each year both print and online versions of our membership directory are produced. Here you can quickly and easily identify the attorney best-suited to handle your legal issue. Arranged by state, listings include primary and alternate contacts, practice group contact information as well as firm profiles.

RAPID RESPONSE

USLAW NETWORK Rapid Response search tool 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 experience. Visit uslaw.org and pin it to your home screen on any mobile device for easy access to USLAW's Rapid Response resource.

CLIENT LEADERSHIP COUNCIL AND PRACTICE GROUP CLIENT ADVISORS

Take advantage of the knowledge of your peers. USLAW NETWORK's Client Leadership Council (CLC) and Practice Group Client Advisors are a hand-selected, group of prestigious USLAW firm clients who provide 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 and Practice Group Client Advisors 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 nearly 20 substantive active practice groups and communities including Banking and Financial Services, Commercial Law, Complex Tort and Product Liability, Construction Law, Data Privacy and Security, E-Discovery, Employment and Labor Law, Energy/Environmental, Healthcare Law, Insurance Law, International Business and Trade, IP and Technology, Professional Liability, Retail and Hospitality Law, Transportation and Logistics, 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.

IT'S NEVER BEEN EASIER TO STAY ON TOP OF TODAY'S MOST IMPORTANT LEGAL ISSUES

A completely customizable, one-stop educational program that delivers information on today's trending topics directly to your office or a pre-selected local venue.

We focus on the specific markets where you do business and utilize a team of experienced attorneys who can share relevant jurisdictional knowledge important to your business' needs.

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.

To learn more, contact Roger Yaffe at roger@uslaw.org or call 800-231-9110 (ext. 1) today.

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S-E-A is proud to be the exclusive partner/sponsor of technical forensic engineering and legal visualization services for USLAW NETWORK.

A powerful resource in litigation for 50 years, S-E-A is a multi-disciplined forensic engineering, fire investigation and visualization services company specializing in failure analysis. S-E-A's full-time staff consists of licensed/registered professionals who are experts in their respective fields. S-E-A offers complete investigative services, including: mechanical, biomechanical, electrical, civil and materials engineering, as well as fire investigation, industrial hygiene, visualization services, and health sciences—along with a fully equipped chemical laboratory. These disciplines interact to provide thorough and independent analysis that will support any subsequent litigation.

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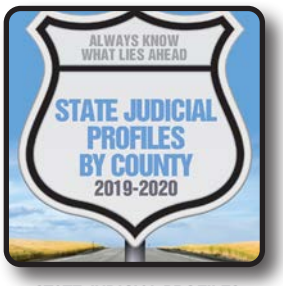

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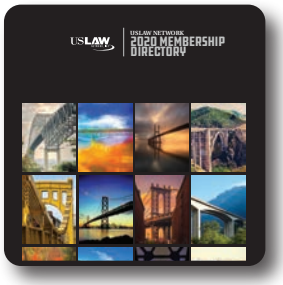

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