WHAT TO DO IF YOU’RE SLAPP’ED

Copyright Infringement and the DMCA

LEAD LITIGATION

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THE POTENTIAL COST OF “FREE” PUBLIC WIFI

Social Media Evidence and Its Impact on the Standard of Care

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Touchdown, USLAW Client!

I look forward to the upcoming year serving as your Chair and welcome any suggestions you may have on how USLAW NETWORK can continue to come up with the big plays on behalf of our firm’s clients.

Sincerely,

Edward G. Hochuli
Chair, USLAW NETWORK, Inc.
We have probably all used free public WiFi to access the Internet at a coffee shop, lunch or when visiting a bank, hospital, hotel, or other business. While free public WiFi access to the Internet is convenient for customers, it is not without substantial risk to the business offering such access. Some individuals may use the free access to carry out infringing activities – such as downloading movies from an illegal file-sharing site, “swapping” songs through a music sharing service, or pirating software. These infringing activities on the part of customers can potentially leave businesses vulnerable to claims of copyright infringement and subject to both civil and criminal liability.

However, businesses can protect themselves from potential copyright liability by taking proper proactive measures which will be addressed later in this article.

AVENUES OF LIABILITY

Under copyright law, there are four avenues of liability for copyright infringement, which may apply to public WiFi providers:

1. Direct infringement occurs when an individual actually carries out the infringing act. For example, a user infringes a copyright when he downloads a movie or song without permission from the copyright owner. WiFi providers are not liable under direct infringement unless they or their employees/agents are the ones carrying out the infringing act.

2. Contributory infringement occurs “by intentionally inducing or encouraging direct infringement.” This definition comes from *MGM v. Grokster*, where the Supreme Court held a peer-to-peer file sharing software company liable for contributory infringement because its services were known to encourage copyright infringement activities.

3. Vicarious infringement occurs when an individual or entity profits from direct infringement, while the entity maintains the ability to stop or control the infringement. The factors of vicarious liability also come from *Grokster*, where the Supreme Court determined that Grokster profited from its infringing software and had the ability to stop the infringement by cutting off access to its software. How the theories of contributory and vicarious infringement apply to providers of free public WiFi will remain for the courts to decide.

4. The final avenue of liability for WiFi providers for copyright infringement arises under a theory of negligence. Under this theory, it is negligent for WiFi providers to leave their network open and unsecured, knowing that other individuals may connect and engage in infringing activities. The concept of negligence has not traditionally been applied to copyright infringement law, and the courts will ultimately decide whether this approach will be adopted. However, in light of this possibility, it is prudent for WiFi providers to consider proactive measures to shield themselves from liability.

INDUSTRY ENFORCEMENT TACTICS

With the advent of peer-to-peer file sharing, infringement of music and movies has increased exponentially, and copyright owners have implemented new enforcement tactics. For example, over the last 13
years, the Recording Industry Association of America (“RIAA”), has pursued lawsuits against various parties with the objective of targeting the “key” parties in the infringement chain to reduce the overall level of infringement. In 1999, the RIAA began suing the peer-to-peer file sharing networks, including Napster, Grokster and their equivalents, in an attempt to target the source of the infringement. But the case of creating a peer-to-peer network has prevailed, and new file sharing sites appear continuously. So these suits did not make a considerable impact on infringement activities. In 2003, the RIAA began pursuing individual infringers. As of early 2006, the number of total suits against individual infringers totaled 17,587.1 Intensifying the attack on individual infringers, the RIAA began pursuing college students by contacting universities to have them forward pre-litigation infringement notices to the students whose IP addresses were identified as infringing activity. In 2008, at the height of this campaign, the RIAA had sent over 5,400 of these letters. However, none of these tactics appears to have considerably reduced infringing activities.

More recently, copyright owners have targeted the next link in the infringement chain, namely, Internet Service Providers (“ISPs”). The copyright owners have negotiated with ISPs so that the ISPs will forward copyright infringement notices to individual subscribers. The goal of this program is to prevent future infringement, first through education, and if necessary, mitigation measures.

The process works as follows: 1) a copyright owner monitors the Internet for infringing content and identifies the IP addresses where infringing material is found and the IP addresses that access it; 2) the owner notifies the corresponding ISP, who will then forward an online alert, such as an e-mail, to the particular subscriber (without giving the copyright owner any information identifying the subscriber); 3) the subscriber receives the alert, which ranges in severity from an educational warning to a notice that mitigation measures will be imposed on the subscriber’s services.

Mitigation measures include temporary reductions of Internet speed, redirection to a landing page until the subscriber contacts the ISP to discuss the infringing activities, or other measures that the ISP deems appropriate. Although the stated purpose of mitigation measures is to educate subscribers about how to avoid infringing activities, the severity of the response by the ISP will increase for each infringing activity.

**IMPACT ON PUBLIC WIFI PROVIDERS**

While this system appears to provide ample warning and education to subscribers before they face mitigation measures, a business that provides free public WiFi could feasibly receive multiple alert notices for infringing activity in a single day. This puts the public WiFi provider at risk of the ISP slowing down their Internet connectivity, which could have a serious, detrimental impact. At this point, it is unclear how ISPs will penalize public WiFi providers.

Further, we have had several clients offering free public WiFi receive notices directly from copyright owners alleging that infringing material has been transmitted over the client’s network. In each case, the potential of liability for copyright infringement has been raised.

In light of the above, it is our recommendation that providers of public WiFi consider taking the following measures.

**DMCA SAFE HARBOR AND BEST PRACTICE**

The Digital Millennium Copyright Act of 1998 (“DMCA”) provides four safe harbor provisions that provide immunity to service providers (like public WiFi providers) for infringing activities that take place on their networks provided that the service providers meet specific requirements. There are three basic requirements which must be met to be eligible for any of the safe harbor provisions. A service provider must:

1. Adopt and implement a policy for terminating the accounts or subscriptions of repeat infringers (such a policy includes notifying the individual who conducted the infringing activity and ultimately blocking the individual from accessing the network if the infringing activity persists; additionally, documentation of all steps taken by the provider to stop infringing activities is necessary);

2. Inform users of this policy; and

3. Accommodate and not interfere with the “standard technical measures” that copyright owners use to identify copyright infringement and protect their copyrighted works.

Two of the four safe harbors in the DMCA are most applicable to public WiFi providers. The first safe harbor applies to service providers that only offer an Internet connection. The service provider in this case merely acts as a data conduit. For a provider to be eligible for this safe harbor, it must not interact with the content of the data transmission in any way, aside from performing the function of transmitting the data. This may apply to some public WiFi providers.

The second safe harbor provision, sometimes referred to as 512(c), applies to any provider of network access. This definition includes most public WiFi providers. For a service provider to be eligible for this safe harbor and not liable for any infringing material that resides on the provider’s network by the direction of a user, the provider must have a designated agent registered with the United States Copyright Office. The designated agent shall receive and process all DMCA takedown notices of infringement. An outline of the registration process and copy of the required form can be found at: http://www.copyright.gov/onlinesp/

Additionally, under 512(c), the provider must not have knowledge of the infringing activity, be aware of circumstances where infringement is apparent, or receive a financial benefit from any infringing activity. While 512(c) places additional prerequisites on the provider with the registration of a designated agent, it is a best practice for any public WiFi provider to comply with this requirement. Compliance with the prerequisites of 512(c) gives the public WiFi provider safe harbor protection, further shielding its business from infringing acts that take place on its network.

With public WiFi providers open to multiple avenues of potential liability, it is recommended that they comply with the requirements of the safe harbor provisions under the DMCA to shield themselves from potential liability for copyright infringement that occurs on their networks.

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1 The RIAA stopped publicly publishing the number of lawsuits it issued against individual infringers after February 2006.
WHAT TO DO IF YOU’RE SLAPPED’ED

How would you characterize a plaintiff who deliberately filed suit against a wide array of persons, knowing that the suit could not succeed but willing to spend vast amounts of time and money to litigate it? An eccentric crackpot? For a corporation whose large real estate or industrial development project encounters vociferous opposition from local citizens, such a lawsuit can be merely a cost of doing business. In the last 30 years such suits have come to be known as SLAPPs – strategic lawsuits against public participation.

A typical SLAPP targets the individuals who have spoken out against the developer’s project in a public forum. The developer sues them for defamation, abuse of process, wrongful interference with business advantage, and other torts. When the SLAPP defendants finally win summary judgment after a year or more of discovery (assuming they have not caved in long before then), they are too exhausted and impoverished even to consider striking back against the developer with a suit for wrongful use of civil proceedings.

Anti-SLAPP statutes are now on the books in 26 states. Their purpose, as expressed in the preamble of the California statute, is to respond to the “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” The wording of these statutes, and their interpretation by the courts, vary from state to state. This article will focus on the anti-SLAPP experience of two states with nearly identical statutes – probably the most far-reaching in the country – and a substantial volume of anti-SLAPP litigation.

ANTI-SLAPP STATUTE OF MAINE AND MASSACHUSETTS

The key elements of the Massachusetts and Maine anti-SLAPP statutes are:

- When a party asserts that the civil claims (including counterclaims and cross-claims) against him are based on his exercise of his right of petition under the U.S. or State Constitution, he may bring a “special motion to dismiss” within 60 days after service of the complaint or, in the court’s discretion, at any later time.
- The court shall advance the special motion so that it may be heard and determined with as little delay as possible.
- All discovery proceedings (except, with the court’s permission, specified discovery pertaining to the special motion itself) are stayed until the court has ruled on the special motion.

- The court must grant the special motion unless the opposing party shows that “the moving party’s exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law,” and that the moving party’s acts caused actual injury to the responding party.
- In making its determination, the court shall consider the pleading and supporting and opposing affidavits.
- If the court grants a special motion to dismiss, it may award costs and reasonable attorney fees to the moving party.

The two statutes then define “a party’s exercise of its right of petition” to mean any statement:

- Made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding;
- Made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding;
- Reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding;
- Reasonably likely to enlist public participation in an effort to effect such consideration;
- Falling within constitutional protection of the right to petition government.

The Massachusetts/Maine experience has served as a laboratory for both the strengths and the unintended consequences of this legislative attempt to curb an abuse in the civil justice system.

JUDICIAL INTERPRETATION OF ANTI-SLAPP STATUTE

The anti-SLAPP statute is a more potent weapon than the traditional motion to dismiss for failure to state a claim, which can be deployed immediately but is rarely successful, or the summary judgment motion, which is more often successful but cannot be used until months or even years of discovery have taken place. The anti-SLAPP statute is a game changer, and courts in Massachusetts and Maine have had to wrestle with a number of difficult questions that arise under it.

What constitutes “petitioning activity”? Reports of illegal activities to the proper governmental authorities are “petitioning activity.” These include reports of crime to the police or District Attorney, reports of
child abuse to the Department of Human Services, and similar reports to environmental, landlord/tenant, professional regulation, and other governmental agencies.

Petitioning activity also includes speaking out at (for example) planning or zoning board meetings, or submitting written comments. Nor is it necessary for the petitioner’s statement to address a topic on a current hearing or legislative agenda; petitioning activity extends to statements that may have the effect of bringing some new issue into consideration or review by any governmental body. Furthermore, the statement is not required to deal with a matter of public concern in order to be protected petitioning activity. It may express the petitioner’s personal, commercially motivated point of view.

A person may engage in petitioning activity indirectly. In a recent federal case in Maine, a chiropractor sued a 77-year-old former patient who had accused him of sexual assault. She reported him to the police and sued him (clearly petitioning activities), and also published the allegation of sexual abuse on a website, concluding with an appeal to others who had been similarly mistreated by the same chiropractor to share their stories. The court found that the website content was arguably a statement “reasonably likely to enlist public participation in an effort to effect consideration” by some governmental body in the future, but denied her anti-SLAPP motion as devoid of factual support.

Any lawsuit is a constitutionally protected petitioning activity, which raises a conundrum: why isn’t a SLAPP suit a petitioning activity? In the paradigm case of a huge developer cynically crushing opposition by suing the local citizens who have spoken out against its environmentally ruinous project, it is easy to identify the white hat and the black hat. Such was not the case, however, in Ralph Nader v. Maine Democratic Party, decided in April 2012. The former presidential candidate sued the Maine Democratic Party and the Democratic National Committee alleging they had deliberately filed numerous baseless complaints challenging his nomination papers, for the admitted purpose of distracting his campaign and draining it of money, time, and resources. The defendants filed an anti-SLAPP motion, which was granted by the Superior Court because their tactics, even if unsuccessful, had constituted petitioning activity. The Maine Supreme Judicial Court reversed, pointing out that the case implicated Nader’s right to petition the court, and also the fundamental right of voters to cast their votes effectively.

Who has standing to be protected for petitioning activity?

The statute refers to “the moving party’s exercise of the moving party’s right of petition,” and ordinarily the defendant seeking the protection of the statute will have engaged in activities seeking to further his own interest. In addition, the Massachusetts courts early recognized that “the statute would provide but hollow protection for citizens who wished to exercise the right of petition if statements made by an attorney on their behalf were not covered by the anti-SLAPP statute to the same extent as statements made by them directly.”

Conversely, speaking out on a subject of public concern does not automatically qualify as petitioning activity. In a 2010 Massachusetts case, a journalist who was a longtime resident of Boston’s North End wrote five newspaper articles critical of a local property owner, who then sued her for defamation and interference with business relations. The court agreed that her articles fell within at least one branch of the definition of “petitioning activities,” but held that the statute was inapplicable because her articles did not seek to redress a grievance of her own.

How should the court determine whether a petitioning activity was devoid of any reasonable factual support or any arguable basis in law?

To prevail on an anti-SLAPP motion, the defendant bears the initial burden of showing that the suit was based on some activity that would qualify as an exercise of his right to petition. The burden then falls on the plaintiff to “show” that the exercise of the right of petition was “devoid of any reasonable factual support or any arguable basis in law.” Except for stating that “the court shall consider the pleading and supporting and opposing affidavits,” the statute is silent on how the court is to evaluate this “evidence.” Unlike a motion to dismiss for failure to state a claim or a summary judgment motion, the anti-SLAPP statute requires the judge to assume a fact-finding role. The only facts available, however, will often be those stated in the parties’ affidavits, which are not subject to cross-examination and are likely to contradict each other.

In an early anti-SLAPP case, the Maine Supreme Judicial Court ruled that the trial judge must view this evidence “most favorably to the moving party,” which is the opposite of how motions to dismiss or for summary judgment are treated. As the federal judge observed in the 2011 chiropractor case described above,

If that were correct, any defendant could succeed on a special motion under anti-SLAPP merely by filing a false affidavit, and there would be no way around it. Of course false affidavits can be filed to defeat summary judgment, but the result is to move the case to trial where the jury can decide the facts. Here, the result would be to prevent trial, and no one would ever decide the facts.

Seven months later the Maine SJC tacitly acknowledged this point and announced, in the Nader case, a change in the law. Reversing its earlier decisions, the court held that henceforth a plaintiff confronted with an anti-SLAPP motion need only make a prima facie showing that any of the petitioning activities was devoid of any reasonable factual basis or arguable basis in law.

EVALUATION OF ANTI-SLAPP STATUTES

The course correction in the Nader case may have saved the Maine statute from going off a constitutional cliff, but anti-SLAPP statutes in general will continue to raise constitutional concerns. Because of the breadth of the right to petition government, most of the litigants who have taken advantage of its protection are startlingly different from the public-spirited environmentalist standing in front of the developer’s bulldozer. Furthermore, because the denial of the anti-SLAPP motion gives rise to an immediate appeal, meritorious lawsuits can be monkey-wrenched by tactical anti-SLAPP motions with little chance of success. In spite of these drawbacks, however, the anti-SLAPP statute does provide a powerful response to a serious abuse of the judicial system by the rich and powerful, and until a more surgical instrument can be developed it will serve an important purpose.

1 AZ, AR, CA, DE, FL, GA, HI, IL, IN, IA, LA, ME, MD, MA, MN, MO, NE, NY, NM, OH, OK, OR, PA, RI, TN, UT, and WA.
From an outsider’s perspective, the healthcare industry appears to be a lucrative field upon which many would like to capitalize. That outsider is correct. In light of the new healthcare reform law, the majority of which the Supreme Court has upheld, the Federal government has been doling out huge sums of money as incentives to help achieve its “triple aim” of (1) better care for individuals, (2) better health for populations, and (3) lower growth in expenditures, and many are jumping at the opportunity to claim their share. However, a lucrative healthcare business comes at a price that is beyond capital contributions and investments.

The price in this industry is the countless landmine statutes and regulations dictating the formation of certain healthcare entities, relationships between members of the healthcare world, as well as a healthcare entity’s workforce, to name a few. Naturally, with increased opportunity for money comes increased regulation and increased enforcement. Nevertheless, what entrepreneurs should remember is, if State and Federal laws are navigated properly, a healthcare business can become successful.

This article, through a review of some of the most common Federal healthcare laws and regulations, provides the top five considerations for prospective healthcare-business owners in working toward a successful healthcare business.

1. **KNOWING HOW YOU CAN FORM YOUR ENTITY**

   First and foremost, before hitting the ground running with a new business venture, when incorporating professional services into the business model, it is important to determine how this entity may be formed. Beyond the limited liability company versus corporation debate, most states have a prohibition against the corporate practice of medicine (“CPOM”). While each state may define the term slightly differently, the general idea is that a general corporation, not owned by a physician, may not employ a licensed professional (e.g., a physician) to perform professional services (e.g., practice medicine). The impetus behind the CPOM doctrine is that physicians, and not corporations, should be practicing medicine. The doctrine aims to maintain the integrity of the delivery of medical services by eliminating competing interests in the outcome of the services being provided.

   Notably, however, many common exceptions exist. For instance, the CPOM doctrine does not usually apply to hospitals. Hospitals may employ licensed professionals to provide their professional services because the hospital is in the business of providing healthcare services. Likewise, many states permit licensed professionals to perform their professional services through professional corporations or professional limited liability companies as, typically, each shareholder or member must be licensed in the professional service being rendered. Therefore, after identifying the service being provided, it is important to determine if the State has a CPOM doctrine and whether it applies.

2. **KNOWING WHO CAN WORK FOR YOU**

   Healthcare entities that submit claims to Federal healthcare programs (e.g., home health agencies, mental health organizations, etc.), like Medicare, have an obligation to perform certain background checks on those who provide services on behalf of those entities. Included in those background checks is ensuring that no person employed or contracted with the healthcare entity is excluded from participation in Medicare, Medicaid and all other Federal health care programs. Federal healthcare programs will not pay for any items or services furnished, ordered or prescribed by an excluded individual or entity. Likewise, entities submitting claims for healthcare items or services provided by an excluded provider or entity can
face enormous civil monetary penalties. As such, it is crucial to perform initial and periodic checks of all employees and contractors to ensure none are excluded.

PROTECTING PATIENT INFORMATION (IT IS NOT ONLY FOR DOCTORS AND HOSPITALS)

Many know the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) as a prohibition against the release of medical records; however, HIPAA is much more than that. In fact, although HIPAA was enacted in 1996, in 2009, the Health Information Technology for Economic and Clinical Health (“HITECH”) Act, significantly amended HIPAA to instill a breach notification process and to increase penalties for violating HIPAA. The Department of Health and Human Services (“HHS”) Office of Civil Rights (“OCR”) enforces the HIPAA rules.

HIPAA, as a law, only applies to covered entities (i.e., health plans, health care clearinghouses, and healthcare providers). However, recognizing that covered entities do not perform all of their own healthcare functions or activities (for instance, billing and collections), the OCR drafted provisions of the Privacy Rule to permit covered entities to disclose patients’ protected health information (“PHI”) to business associates. Business associates are individuals or entities that provide a service to covered entities requiring the sharing PHI. Business associates can take a number of forms including, billing companies, consultants, independent transcriptionists, accreditation organizations, auditing companies, to name a few. HIPAA requires covered entities utilizing the services of business associates to enter into Business Associate Agreements, which set forth the parameters within which PHI may be used by the business associate. Failure to enter into, and abide by, a business associate agreement can result in significant fines.

UNDERSTANDING THE LIMITATIONS ON REFERRAL RELATIONSHIPS

Most typical business relationships thrive on rewarding a party for referring business. For instance, in many business ventures, it is common to offer a discount to an existing client or customer for referring a new client or customer. However, a person in the healthcare world engaging in a payment-for-referrals relationship could find him or herself in jail and/or facing colossal monetary penalties, depending on the violation.

Three Federal laws specifically govern referral relationships: the Anti-Kickback Statute (“AKS”), the Physician Self-Referral Law (“Stark”) and the Beneficiary Inducement Statute. The AKS is a criminal statute that prohibits knowingly and willfully soliciting, receiving, offering or paying anything of value to induce referrals of items or services payable by a Federal healthcare program. “Anything of value” includes cash, free rent, hotel stays, meals, concert tickets, excessive compensation, etc. Notably, one does not have to be a healthcare professional to violate the AKS.

Because almost any business relationship, especially a marketing relationship, could run afoul to the AKS, the HHS Office of Inspector General (“OIG”) has issued a number of regulatory safe harbors that protect relationships fitting squarely within the safe harbor. Some of these safe harbors include equipment or space rental agreements, employment agreements, and investments in ambulatory surgery centers.

In the most general terms, Stark relates to physicians referring patients to themselves. Specifically, Stark prohibits physicians from referring patients who receive certain designated health services (“DHS”) payable by Medicare or Medicaid, to entities with which the physician, or an immediate family member, has a financial relationship, unless an exception applies. DHS includes certain clinical laboratory services, physical therapy, occupational therapy, speech therapy, radiology and imaging services, durable medical equipment and supplies, etc. Financial relationships can take a number of forms, including ownership and investment interests as well as compensation arrangements. For example, generally, providing gifts to a referring physician would constitute a compensation relationship. However, Stark, like the AKS, has certain regulatory exceptions, including the Non-Monetary Compensation exception, which permits the relationship so long as it satisfies the requirements of the exception.

The Beneficiary Inducement Statute prohibits a person from offering or transferring to a Medicare or Medicaid beneficiary any remuneration that the person knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner or supplier of Medicare or Medicaid-payable items or services. The OIG has issued a number of exceptions to this statute, including the permissible provision of gifts with a value of not more than $10 per item or $50 in the aggregate to a single beneficiary annually. Therefore, unless it fits within an exception, offering a dis-

count to patients to induce the patient to purchase a service or supply from a particular provider is prohibited and can result in significant penalties.

Many impermissible relationships are not as obvious as the aforementioned examples; however, it is critical for healthcare business owners to have their relationships thoroughly evaluated by counsel to ensure full compliance with these laws.

CONCLUSION

While the regulation of healthcare has been common since the 1990s, with the enactment of healthcare reform, and the availability of incentive payments, healthcare enforcement has increased dramatically. Healthcare professionals and non-healthcare professionals alike find themselves on the front page of the newspaper, faced with multi-million dollar fines and decades of jail time. As such, it is more important than ever for prospective healthcare-business owners to understand the landmines before them and to consult with qualified counsel to assist in navigating the Federal law issues as well as the many State law issues that may arise in forming and owning a healthcare business.

Neda Mirafzali is an attorney with Clark Hill PLC’s healthcare practice group. She regularly counsels healthcare providers, billing companies and management companies on corporate and healthcare compliance matters, reimbursement matters, audit appeals, litigation matters, and regulatory analysis. She may be reached at nmirafzali@clarkhill.com or @nedazali.
On April 20, 2010, the BP Deepwater Horizon oil rig exploded 40 miles off the coast of Louisiana. The explosion killed 11 crewmembers and injured 16 more. By the time the rig was capped nearly three months later, 4.9 million barrels of crude oil (nearly nine times the size of the Exxon Valdez spill in 1989) had escaped into the Gulf of Mexico and surrounding waters. The result was 580 miles of oiled shoreline, and extensive damage to marine and wildlife habitats, and the Gulf’s fishing and tourism industries. The spill marked the worst environmental disaster in U.S. history and the largest spill the world has ever seen.

INITIAL REGULATORY RESPONSE

In the days and months following the explosion, there was a flurry of political, legislative, environmental, and industry activity. On May 21, 2010, the White House created the bipartisan National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (National Commission) to determine the root cause of the spill and to offer options on safety and environmental precautions. A week later, the U.S. Department of the Interior (DOI) issued a moratorium on all deepwater offshore drilling on the outer continental shelf (OCS), which was later rescinded, reinstated, and rescinded again. Dozens of Committee hearings were held in Congress and the Senate, and the White House unsuccessfully pushed a legislative package to increase funding for regulatory oversight, raise liability limits on the parties responsible for environmental disasters, and increase the tax on the oil industry to pay into the federal oil liability trust fund.

One of the most significant changes, however, was the abolition of the Minerals Management Service (MMS). The DOI created the MMS in 1982 to regulate offshore drilling and production in U.S. waters. The MMS had been under fire for perceived conflicts of interest and other improprieties prior to the Gulf spill and the attacks intensified in the wake of the spill. The result was the replacement of the MMS with the transitory Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), which, by October 2011, was replaced by three distinct administrative bodies: Bureau of Ocean Energy Management (responsible for administering the development of mineral resources on the OCS), Bureau of Safety and Environmental Enforcement (responsible for promulgation and enforcement of regulations), and Office of Natural Resources Revenue (revenue collection).

Prior to its dissolution, BOEMRE developed and implemented safety rules designed to prevent another offshore catastrophe. The first rule, the Drilling Safety Rule, created stringent new standards for well design, casing, and cementing, and well control procedures and equipment, including blowout preventers. The rule also required operators, for the first time, to obtain certification of their proposed drilling process by a qualified engineer. A second rule, known as the Workplace Safety Rule, requires operators to develop a comprehensive safety and environmental management program that identifies the potential hazards and risk-reduction strategies for all phases of activity. At its core, the rule seeks to reduce the human and organizational errors that lie at the heart of many accidents and oil spills.

FAILURE TO ACHIEVE A LONG-TERM POLICY “FIX”

Beyond such stopgap measures, long-term policy solutions have been lacking. To be certain, the moratorium on offshore drilling has ended, and development is poised for a comeback. While it is unlikely any political conventions will swell with the chorus “drill baby drill” this election cycle, the vast sums of offshore oil wealth cannot be denied. Offshore wells provide 15 percent of America’s domestic natural gas production and 27 percent of America’s domestic oil production. In fact, the OCS contains an estimated 85 billion barrels of oil in technically recoverable resources – more than all onshore resources and those in the shallower state waters combined.

For this reason, offshore drilling is now back on line. On February 28, 2011, BOEMRE announced that it approved the first deepwater drilling permit since the Deepwater Horizon explosion, noting that it approved the permit because “the operator successfully demonstrated that it [could] drill its deepwater well safely and that it [was] capable of containing a subsea blowout if it were to occur.” Since that time, the agency has continued to approve deepwater drilling applications.

However, even with permits now being issued, the larger policy issues remain unre-
solved. Not surprisingly, in this political climate, legislative progress has been lacking. Despite a flurry of proposals, Congress has not been able to agree on any one legislative ‘fix.’ Initially, in 2010, two proposed bills that promised to bring major change to oil spill liability and safety failed: the House passed the Consolidated Land, Energy and Aquatic Resources Act (CLEAR), which would add restrictions on offshore drilling and increase response safety and liability provisions in current law. However, following a grueling health care vote, the Senate failed to ever address the bill. The Senate also drafted a similar bill, the Clean Energy Jobs and Oil Company Accountability Act of 2010, which similarly died in the halls of Congress. More recently, the House voted to revoke President Obama’s five-year plan for offshore drilling, replacing it with its own plan that calls for more ambitious oil and gas development off the U.S. coast. The House’s plan will likely go nowhere in the Senate and would be vetoed by the current administration.

Opponents of offshore drilling have also tried their hand in court. In the Southern District of Alabama, the Defenders of Wildlife (DOW) filed suit challenging BOEMRE’s approval of a Shell deepwater exploration permit off the coast of Alabama. The claims included violation of National Environmental Policy Act for failing to perform an Environmental Impact Statement before approving the permit and violation of the Endangered Species Act for not suspending the bid approval process before consulting with the expert agencies and performing a supplemental analysis of the environmental effects of the drilling operations. However, in a May 8, 2012 decision, the court granted summary judgment in favor of BOEMRE and dismissed DOW’s claims.

A NEW HORIZON FOR CLEAN OFFSHORE ENERGY?

In the midst of the national debate on offshore drilling, many have questioned why we do not use the Deepwater Horizon catastrophe as an opportunity to shift our energy course altogether. In fact, on October 6, 2010 – only 6 months after the Deepwater Horizon oil rig exploded – Secretary of the Interior Ken Salazar and the Cape Wind Associates, LLC president James Gordon signed the nation’s first lease for commercial wind energy development on the OCS. The Cape Wind project comprises 46 square miles on the Nantucket Sound in Massachusetts, and consists of 130 3.6 megawatt (MW) wind turbine generators. On average, the turbines are expected to generate 170 MW of electricity, about 75% of the average electricity demand for Cape Cod, Martha’s Vineyard, and Nantucket island combined.

As attorney Todd Griset noted in his well-reasoned article, Harnessing the Ocean’s Power: Opportunities in Renewable Ocean Resources, the “Earth’s oceans contain vast stores of energy, much of which can be harnessed to create usable power in the form of electricity.” Consider, for example, that the National Renewable Energy Laboratory has estimated that the gross wind resource of United States waters approaches 4,150 gigawatts of power – approximately four times the nation’s total electric installed capacity in 2010. Similarly, the United States has a wave or tidal power capacity that would meet more than half of the country’s electric power demand. Why not, then, maximize the potential for clean, renewable energy?

One impediment, as Mr. Griset notes, is the fragmentation of our laws and regulations. For instance, renewable energy ocean projects are subject to the regulations of a whole host of federal agencies, including the Environmental Protection Agency, Fish and Wildlife Service, National Park Service, NOAA’s National Marine Fisheries Service, Federal Aviation Administration, Department of Defense, and United States Coast Guard. In addition to this complex web of federal regulation, states also have broad discretion to regulate projects. Thus, in order for clean energy development to take hold, there must be a streamlining and simplification of the “patchwork of regulatory regimes” governing renewable ocean energy projects.

Another obstacle is political will. It is for this reason that commentators have lamented that the Deepwater Horizon tragedy was a missed opportunity to galvanize support for a clean energy future. In fact, the administration’s offshore drilling plan warns that if no additional offshore lease sales are offered between 2012 and 2017, then to compensate, government may need to “favor alternative vehicle fuels such as ethanol or methanol, vehicles with greater fuel efficiency, or alternative transportation methods such as mass transit,” “might mandate increased reliance on… wind-generated electric power,” and “might give more emphasis to programs encouraging more efficient electricity transmission and more efficient use of gas and electricity in factories, offices and homes.” As some might add, this is “just the point.” These are precisely the policy actions that are needed.
The “no-liability” clause contained in some insurance policies can come as an unexpected and unpleasant surprise as you plan your risk transfer strategy in any given case. Its function is to treat a person or organization as an insured, or as an additional insured, in the first instance. Once that person or organization has a second policy that applies to the loss, that second policy triggers the no-liability clause, and the first policy drops out.

In other words, one moment you’re an insured, the next moment, you’re not. This may sound hard to believe, but as one Pennsylvania court put it, “It seems that insurance companies are indefatigable in devising language which excludes coverage rather than accepts it.”

“OTHER INSURANCE” CLAUSES AND THEIR EFFECT
To better understand no-liability clauses, some background on “other insurance” clauses is helpful. “Other insurance” simply refers to a situation in which two or more liability insurance policies cover the same risk for the same insured. The “other insurance” clause describes how the insurers will share the defense and indemnification when more than one insurance policy is triggered. In a sense, a no-liability clause is an “other insurance” clause, because other available insurance affects payments under the policy.

To interpret “other insurance” clauses, one must look at that clause in each applicable policy. In the simplest sense, primary clauses state that they are the first layer of coverage for the insured and pay equally...
where there is other insurance available. *Excess* clauses (in an otherwise primary policy) state that they are excess over other available insurance. There are also variations of these, some at the insured’s request, such as “super-primary” clauses. By intentionally re-wording its “other insurance” clause, an insurance carrier can manipulate where its policy will stack in the paying order.

Like no-liability clauses, other available insurance triggers “other insurance” clauses. Most people in the world of risk management and risk transfer have a good working understanding of the way that “other insurance” clauses work vis-à-vis each other. Where two policies are triggered, both of which have primary clauses, the result will be concurrent, equal sharing. Where one policy has a primary clause, and another policy has an excess clause, the excess clause will typically be given effect, and that particular policy will not be triggered until after the limits of the primary policy are exhausted. Where two or more policies all have excess “other insurance” clauses that contain substantially similar language and cannot be reconciled, the courts will typically find the policies “mutually repugnant,” and find that all policies will share equally beginning at dollar one.

It has become increasingly common to find situations in which two applicable policies both have excess clauses. For example, a contractor retains a subcontractor, and requires the subcontractor to obtain insurance for the contractor. The contractor may have a primary policy that contains “other insurance” language to the effect that the contractor’s policy becomes excess where the contractor has been listed as an additional insured on another’s policy. In other words, risk of loss is contractually passed to any subcontractor. At the same time, the subcontractor hired by the contractor may have added the contractor as an additional insured, but the subcontractor’s policy has an excess provision within the additional insured endorsement. Typically, the excess clauses would then cancel each other out, and neither policy would be deemed excess over the other. Thus, the two policies would apply concurrently and share equally on a primary basis. This result could leave one or both of the parties, and their insurance carriers, frustrated because this result was not their intent.

**EXAMPLES OF NO-LIABILITY CLAUSES**

Enter the no-liability clause: the next step in the insurance carrier’s efforts to move its policy away from the risk. The effect of the no-liability clause is to only provide coverage for people or entities, but only if they have no other coverage at all. For the contractor, recognizing no-liability clauses in its subcontractors’ policies can prevent problems going forward. For the claims professional, recognizing that one of the potentially paying policies has a no-liability clause will allow the claims adjuster to avoid litigation surprises, re-evaluate the risk transfer target, adjust reserves, and help to reach an objective settlement.

So what do no-liability clauses look like? Unlike “other insurance” clauses, which are often labeled in the policy, no-liability clauses may not be clearly marked. In addition, no-liability clauses could appear in virtually any type of policy.

No-liability clauses could read something like this:

- “The insurance contained in this policy is not applicable to any person with respect to any loss against which he has other valid and collectible insurance.”

- “None of the following is an insured... any person other than the named insured, if such person has available to him any other valid and collectible automobile liability insurance.”

- “Who Is An Insured includes you for any covered loss, and anyone else, except your customers, unless they have no other available insurance.”

- “If there is other valid and collectible insurance, whether primary, excess or contingent, available to the garage customer and the limits of such insurance are sufficient to pay damages up to the amount of the applicable financial responsibility limit, no damages are collectible under this policy.”

- “This insurance does not apply to any injury or damage to the extent that the insured has available any other valid and collectible insurance, whether on a primary, excess or contingent basis.”

- “With respect to your mobile equipment, the term ‘insured’ also includes your employee and any other person legally liable for the conduct of such person, but only if there is no other insurance covering the liability available to them.”

These no-liability clauses (also called “escape clauses”) often can be a confusing read, but always favor the insurance carrier. As noted above, the net effect is that coverage is provided under a policy with a no-liability clause, unless or until you have other available insurance, at which point, you are no longer an insured on the policy containing the no-liability clause.

**JUDICIAL TREATMENT OF NO-LIABILITY CLAUSES**

How do the courts treat no-liability clauses? Despite some personal distain, many courts have given no-liability clauses the meaning that the insurance carrier intended. After all, parties are free to contract as they wish, and if the no-liability clause is at issue, it means that the insured already has other insurance available. In other jurisdictions, courts have rejected no-liability clauses as repugnant — after quoting a no-liability clause, an appeals judge in Florida once wrote: “Did the Queen of Hearts write this for Alice?” Still other jurisdictions have applied some other allocation, oftentimes depending upon the specific wording of the no-liability clauses when compared to the other policies. As with most legal matters, this underscores the importance of knowing the rules in your particular jurisdiction.

Thus, in jurisdictions that will apply no-liability clauses, where a properly-written no-liability clause squares off against a policy with a standard primary “other insurance” clause, the no-liability clause wins. Against an excess clause, the no-liability clause will often be given effect, trumping the excess clause, but not always. Two policies that both contain escape clauses are often reduced to primary, concurrent policies.

As with any potential problem, awareness of the issue is the first step. No-liability clauses can arise in a variety of policies, and there is no telling where these will show up in the future. Watch particularly in matters that involve a mix of policies, such as instances where both automobile and general liability policies are triggered, as these clauses are common in commercial automobile policies, but less common in the general liability context. By recognizing no-liability clauses, you are better prepared to deal with them.

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William J. Mitchell is an attorney with Ahmuty, Demers & McManus in New York, where he is co-chair of the firm’s Insurance Coverage Group. His practice focuses on insurance coverage litigation, for both policy holders and insurers, and he may be reached at william.mitchell@admlaw.com.
A number of fundamental shifts are occurring in the world of lead exposure litigation. On the regulatory side, the Centers for Disease Control are eliminating the use of the term “blood level of concern” and replacing it with the term “reference value” due to increasing evidence that there is no blood lead level without deleterious effects. Rather, the evidence consistently correlates even low blood lead levels with IQ deficits, attention-related behaviors, and poor academic achievement. To identify children with elevated blood lead levels, the CDC has adopted a “reference value” based on the 97.5th percentile of the blood lead level distribution among children one to five years of age, which is currently 5 ug/dL. This reduction from the previous standard of 10 ug/dL will likely encourage the plaintiff’s bar to pursue lead exposure cases at lower levels of exposure.

Fortunately, in recent years the defense bar has been successful in educating the judiciary on lead issues. There is a growing recognition among courts that other factors (e.g., socioeconomic factors, family history, and heredity) play a role in a child’s neuropsychological development and that evidence of these factors is relevant and admissible. As a result, courts are beginning to allow discovery of health, IQ, and education information from non-party family members – material that can prove critical to the successful defense of a lead exposure claim.

QUESTIONING CAUSATION

Courts have begun to recognize that a defendant landlord still has the right to question causation and thereby escape liability or mitigate its damages, even where there is evidence of lead exposure and the landlord had actual or constructive notice of the condition. For example, a landlord who has been negligent in dealing with lead hazards presented by paint is clearly entitled to challenge causation by showing that the infant plaintiff ingested other lead-containing substances during the relevant time periods. Furthermore, while the infant plaintiff is usually non sui generis at the time he consumes the lead paint, he is not absolved from all responsibility simply because he was once very young. The plaintiff can be held accountable for pre-teen and teenage misconduct, such as discontinuing prescribed medication or failing to attend school, where such misconduct constitutes a failure to mitigate damages at a time when the plaintiff could be held legally responsible for his or her actions.¹

BUT IS LEAD THE PROXIMATE CAUSE?

In addition to proof of an elevated lead level and actual or constructive notice of a defective lead condition in the premises, a
pleadings, the social and environmental circumstances of his upbringing and family. This is a particularly fertile ground for the defense attorney.

Plaintiffs frequently allege that the infant plaintiff suffers from a lower IQ or neurological, cognitive, and behavioral disorders due to exposure to lead. However, a multitude of variables in a child’s medical, family, social, and environmental history are known to have a far greater negative effect on cognitive and behavioral development than elevated blood lead levels. Known risk factors include family history of learning disorders, speech and language related difficulties, attention deficit/hyperactivity disorder (ADHD), and many other hereditary psychological disorders including depression, anxiety, conduct disorder, and oppositional defiant disorder. Other variables include maternal drug, alcohol, or tobacco use during pregnancy; chronic medical illness during pregnancy; premature and low birth weight; and maternal age.

Other important and scientifically recognized neuro-developmental risk factors are socioeconomic status and home environments. Children from poor socioeconomic backgrounds have statistically higher mortality rates and are at risk for several chronic medical, behavioral, and emotional disorders. Furthermore, home environments characterized by poor parenting practices, domestic violence, and minimal cognitive stimulation increase a child’s risk for poor cognitive, behavioral, and academic outcomes.

**EVOLVING SCOPE OF DISCOVERY**

Courts have begun to recognize that lead exposure does not equal injury. When supported by scientific studies and articles to show a link, expert testimony can be utilized to show that the plaintiff’s disorder and disabilities were caused by other factors including the social and environmental circumstances of his upbringing and family history.1 Once a court acknowledges that other factors besides lead exposure are material and relevant, the defendant should be allowed to conduct discovery into these areas.

Because claims are usually brought by a parent, in their representative capacity only, on behalf of an infant plaintiff, plaintiff’s counsel takes the position that defendants are only entitled to discovery from the infant plaintiff. Since the mother is not a party in her own right, and she has not put her own medical condition into issue, her medical history remains privileged. However, because a child’s in utero development is inextricably intertwined with the health of his mother, courts do permit discovery of prenatal health records. Nevertheless, plaintiff’s counsel routinely attempt to foreclose inquiry into the health and academic performance of siblings and parents. Considering that social, behavioral, cognitive, and intelligence deficiencies may be attributed to heredity, prenatal conditions, and psychological factors, courts should permit discovery from non-party family members.

The scope of discovery in lead paint cases is an evolving area of the law, and the issue of non-party discovery has arisen frequently in this context. Some courts, citing the broad discovery provision contained in Rule 26(b)(1), have permitted discovery of non-party information because they found it relevant or reasonably calculated to lead to the discovery of admissible evidence.2 Others, however, have rejected discovery of non-party siblings and parents as beyond the scope of Rule 26.3

In a recent New York opinion, the Supreme Court of Schenectady County permitted defendants to show that the mother’s prenatal medical records demonstrated that she only achieved a tenth grade education, she had used alcohol and crack cocaine while pregnant, the infant plaintiff was born with crack cocaine in his system, the father abused drugs, and the plaintiff’s younger brother (who presumably had not been exposed to lead) had learning disabilities.4 The court found that this medical evidence was sufficient to sustain the defendant’s burden to seek medical record discovery and IQ testing from the non-party family members.

This logic presents a Catch-22 because, while parental and sibling histories are material and relevant to determine whether other factors besides the exposure to lead paint are causing or contributing to injuries claimed by the infant plaintiff, the court has indicated that such discovery is only warranted where the evidence of the conditions is known to exist. Arguably, the inquiry should be permitted in the first instance to determine whether the conditions exist. Many courts, probably the vast majority, hold that the medical records of the plaintiff’s siblings and parents are privileged and cannot be disclosed except by way of waiver.5 In these jurisdictions, defense counsel can still effectively cross-examine plaintiff’s experts with respect to those material and relevant factors they have to recognize but did not consider.

In sum, along with increased awareness of the deleterious effects of lead in the blood, courts are also taking note of other environmental, hereditary, genetic, and socioeconomic factors that tend to cause or contribute to those same deleterious effects. Defense counsel must be aware of these factors and should make every effort to pursue discovery of all material and relevant information bearing on these factors.

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6 See, Ryan v. Simms (Rensselaer County 2011). Notably, the court did hold that parent and sibling school records are discoverable, but are subject to in camera inspection to prevent the disclosure of medical information.
Social media websites such as Facebook, MySpace, and Twitter are the 21st century’s preferred method of interacting and communicating with people around the world. As of February 2012, Facebook had over 500 million users, and of those 500 million, 50% of active Facebook users logon every day. Further, another study found that there are approximately 140 million “Tweets” per day, or 750 “Tweets” per second. This phenomenon has lead to courtrooms across the country facing novel issues on the use of social media websites in litigation. As a result, the scope of an attorney’s duty to not only advise clients of the ramifications of maintaining social media websites, but also the duty to use it to obtain information about an adversary, has created a new challenge in competently representing clients.

A common theme found throughout recent decisions on the use of social media websites is that based upon many jurisdictions liberal discovery rules information posted on social media websites may be discoverable and used in the prosecution or defense of a case. A federal court in Colorado held that the content of social networking sites in the public areas, which contradicted the allegations as to the effect of the injuries on the plaintiffs’ daily lives, was discoverable. A New York trial court found that access to information contained on the plaintiff’s current and historical Facebook and MySpace pages and accounts to be both material and necessary. Further, a Florida federal court ordered a plaintiff to produce all photographs added to any social networking site since the date of the subject accident that depicted plaintiff, regardless of who posted the photographs. A recent study revealed that between January 1, 2010, and November 1, 2011, there were 674 reported state and federal court cases that involved social media evidence in some capacity. Thus, social media websites have replaced the use of surveillance and has become a less expensive and more useful source of information for attorneys seeking to find the “smoking gun” piece of evidence.

As new forms of social media websites continue to evolve and advance, so too must the profession of law to keep pace with the duty owed to clients. In fact, a Maryland court recently commented that “[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.” Thus, the question becomes what duty does a lawyer owe to his own client to warn about the messages or photographs he posts to his social media website? Conversely, what duty does a lawyer owe to a client to obtain all relevant and material information about an adversary’s postings and photographs to a social media websites? While there is a dearth of case law on the subject, the sentiment appears to be that a lawyer who chooses to ignore social media does so at his own peril.

With regard to his own client, at the time of being retained, an attorney has a duty to explain to the client the effect his social media website can have on the case. Such a discussion is akin to warning a client that a former conviction may come to light during the course of discovery. However, this is not to say that an attorney should instruct clients to delete potentially damaging
content from their social media websites. This notion was clearly exemplified in Lester v. Allied Concrete Company, 2011 Va. Cir. LEXIS 132 (Va Cir. Ct. 2011) where a plaintiff’s attorney instructed his client to remove damaging evidence from his Facebook page, which showed the plaintiff as anything but grieving, resulting in a severe court sanction of over $700,000. In addition, in Qualcomm, Inc. v. Broadcom Corp., 2008 U.S. Dist. LEXIS 91 (S.D. Cal. Jan. 7, 2008), a Court ordered Qualcomm to pay $8,568,635 for failure to produce tens of thousands of documents requested in discovery. The Court also sanctioned six attorneys from an outside law firm for blindly accepting Qualcomm’s claim that their discovery searches were adequate, as well as intentionally hiding or recklessly ignoring relevant documents. Nevertheless, an attorney has a duty to warn a client that as the litigation proceeds, even non-public postings, or postings to their social media website by a third party may be discoverable.

The other main duty of an attorney arises out of the investigation of an adverse party through social media websites. For example, a defense attorney would not be acting competently and diligently in a personal injury case, if the attorney ignored pictures of a recent trip to Hawaii posted by a blissfully looking plaintiff who is claiming loss of enjoyment of life. However, an attorney does not have carte blanche to send “friend requests” to every opposing party he has an active file with. First, most jurisdictions have a rule prohibiting a lawyer from contacting a represented party without the party’s counsel’s consent. Second, Courts will not permit a “fishing expedition” into a person’s private social media website without a reasonable basis. There still must be a “factual predicate with respect to the relevancy of the evidence”, as described by one New York appellate court in McCann v. Harleysville Insurance Co. of New York, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (N.Y. App. Div. 4th Dept. 2010). Third, most on-line social media is controlled by a non-party service provider. The Stored Communication Act, 18 U.S.C. § 2701 et seq., prohibits electronic communication services from revealing a user’s private messages even if they receive a subpoena. Further, the extent of the privacy protection afforded by the Stored Communication Act may depend upon the user’s conduct, i.e., their privacy settings. Therefore, an attorney is required to obtain written authorization from an adverse party for a non-party to reclaim data from a private social media website. Despite these hurdles, an attorney has a duty to check all public social media websites for any relevant information. Moreover, attorneys should begin to craft and formulate new interrogatories, requests for documents, and deposition questions that can help form a basis for gaining access to potentially material information and photographs contained in an adversary’s private social media website. Similar to obtaining written authorizations for receipt of a plaintiff’s pertinent medical records, attorneys should also consider requesting written authorizations for a plaintiff’s non-public social media websites when deemed appropriate.

Another area of the law where social media has played a large role is in an attorney’s due diligence in serving legal papers upon an adverse party. Courts have recognized a duty of attorneys to perform basic internet searches to find the whereabouts of a party. One Indiana appellate court was amazed that the plaintiff’s attorney had failed to Google an absent defendant as a matter of due diligence, noting that the Court itself had done so and immediately obtained search results that included a different address for defendant as well as an obituary for the defendant’s mother listing numerous relatives who might have known his whereabouts. A Florida appellate court questioned the effectiveness of an attorney who had only checked directory assistance in order to get an address to serve a defendant, calling such a method in the age of the Internet the equivalent of “the horse and buggy and the eight track stereo.” Moreover, in Louisiana the appellate court upheld a trial judge’s rejection of a party’s due diligence claims where that judge had conducted his own Internet search and concluded that the proper contact information for the defendant was “reasonably ascertainable.” Therefore, an attorney’s duty to diligently obtain the location of a party for service purposes has been heightened by the availability of social media.

In a profession based upon tradition and legal precedent, it is apparent that attorneys cannot ignore the technological changes going on around them. Rule 1.1 of the ABA Model Rules requires lawyers to be competent in the representation of their clients. Further, Comment 6 the aforementioned Rule advises that lawyers “should keep abreast of changes in the law and its practice.” Thus, early on in their representation attorneys should discuss the ramifications of a client’s social media on the matter. In addition, an attorney should perform a search, using a search engine such as Google, for any relevant, public information available not only for his client, but any parties or witnesses to the action. Lastly, an attorney should create a discovery plan that includes interrogatories and document requests that take into consideration potentially relevant information contained in a social media website. While a body of case law continues to develop as to the duty with regard to social media, the biggest takeaway for attorneys is that they must be cognizant of these websites and their potential use for better or worse in litigation.

Karen Painter Randall is a Partner at Connell Foley LLP. A Certified Civil Trial Attorney, Randall provides representation and advocacy services to a wide range of professionals and businesses in complex litigation. Randall is the former Chair of the USLAW Professional Liability Practice Group and a member of its Leadership Committee. Randall also manages the Professional Liability and Director and Officer Litigation Practice Groups at Connell Foley, USLAW NETWORK’s New Jersey firm. Randall has lectured and written extensively on defense, coverage and risk management issues while also serving in key leadership positions with the American Bar Association, Defense Research Institute and Council on Litigation Management.

Steven A. Kroll is an associate at Connell Foley LLP in the Professional Liability practice group. In addition to representing professionals in various areas, Kroll represents commercial landlords and tenants in matters related to premises liability. Kroll is a 2009 graduate of Rutgers-Newark School of Law, where he graduated cum laude, and received the distinguished award of Order of the Coif. For more information on Connell Foley, please visit www.connelfoley.com or call 973.535.0500.
Companies that make or sell consumer products may have had occasion to ask themselves, “What would we do if the government notified us that one of our products was defective and that the product would have to be recalled?” The answer to that question would be a resounding, “Wrong question!” Instead of waiting for the government to knock at the door, consumer product companies must self-report safety issues that could potentially lead to product recalls, and may face claims for significant civil penalties if they fail to act in a timely manner.

In the United States, and in several foreign jurisdictions, companies that manufacture, import, distribute or sell consumer products each have an independent affirmative obligation to notify the government when they receive information that may suggest a safety issue has arisen with respect to their products. Although safety investigations and recalls can be initiated by the government, a company that waits to hear from the government before reporting safety information risks the imposition of steep penalties, potentially up to $15 million. This article will focus on the reporting obligations imposed by the Consumer Product Safety Commission (CPSC) and regulatory bodies of two other countries when safety issues arise involving consumer products, and recent trends in the increased monetary penalties sought for violations of these obligations.

WHAT CONSUMER PRODUCT SAFETY ISSUES ARE COMPANIES REQUIRED TO REPORT IN THE U.S.?

In the United States, the Consumer Product Safety Commission (CPSC) is an independent federal agency created by Congress in 1972. It has jurisdiction over more than 15,000 types of consumer products used in and around the home, in sports, recreation and schools. These include virtually all household consumer products except automobiles and other on-road vehicles, tires, boats, alcohol, tobacco, firearms, food, drugs, cosmetics, pesticides, medical devices and watercraft, which are regulated by other entities such as the National Highway Transportation Safety Administration (NHTSA); the Bureau of Alcohol, Tobacco and Firearms (ATF); the Food and Drug Administration (FDA); and the U.S. Coast Guard (USCG).

Companies that import, manufacture, distribute or sell consumer products within the United States must be aware of their affirmative obligations relative to information they are required to collect, maintain, evaluate and report regarding...
sider in determining the amount of civil penalties to seek are the nature, circumstances, extent and gravity of the violation; the nature of the product defect; the severity of the risk of injury; the number of defective products distributed; and the appropriateness of the penalty to the size of the business involved and such other factors as appropriate. The CPSC is also required to consider how to mitigate undue adverse economic effects on small businesses.

In the past few years, the dollar amount of civil penalties paid by firms to resolve CPSC allegations of untimely safety issue reporting has increased. In fiscal year 2011, for example, the CPSC reported that ten firms had paid civil penalties for failing to timely report hazards. Seven of these penalties were $450,000 or less and the other three were under $1 million. By contrast, in the first half of fiscal year 2012, there have been eight reports of firms paying civil penalties for failing to timely report safety issues. Seven of the eight firms paid $400,000 or more. Three of the eight firms paid $1.1 million, $1.3 million and $1.5 million, respectively. Raising the “cap” on possible civil penalties, thus, may have emboldened the CPSC to seek increasing levels of monetary payments to resolve allegations of untimely reporting.

WHAT CONSUMER PRODUCT SAFETY ISSUES ARE COMPANIES REQUIRED TO REPORT IN CANADA?

Canada has recently implemented the Canada Consumer Product Safety Act. This law in part requires companies to report individual safety-related events involving consumer products. Under this Act, companies that manufacture, import or sell consumer products in Canada must report to Health Canada within two days after becoming aware of certain types of safety-related incidents or occurrences. An occurrence may be considered a potentially reportable incident if it involves product mislabeling, missing instructions, a defect, a product characteristic or an occurrence, involving a product in Canada or elsewhere, that may have been expected to result in serious adverse health effects. Recalls that occur in other jurisdictions also must be reported to Health Canada. The CPSC has the discretion and obligation to determine if a product presents a risk that could occur in the future, while the CPSC, in deciding whether to seek penalties for failing to timely report safety issues, will analyze the timeliness of a company’s reports and other actions retrospectively, based on what actually did occur. At times, the CPSC may have the benefit of hindsight that was entirely unavailable to the company when the company was determining whether or not it had a reporting obligation.

WHAT CONSUMER PRODUCT SAFETY ISSUES ARE COMPANIES REQUIRED TO REPORT IN AUSTRALIA?

Australia has a similar statute, the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (ACL) that requires companies to report serious injuries, illness or death associated with consumer goods. This law applies to a broader class of suppliers of consumer goods and services related to the consumer goods and requires all participants in the supply chain including importers, manufacturers and retailers as well as repairers and installers to report within two days of becoming aware of an incident that occurs, in Australia or elsewhere, in which any person “considers that a death or serious injury was caused or may have been caused by the use or foreseeable misuse of the consumer goods.” Under the Australia law, a “serious injury” is an “acute physical injury or illness requiring medical treatment or surgical treatment by, or under the supervision of, a qualified doctor or nurse.” Injuries that do not require treatment by a medical professional are not reportable. Civil penalties for failing to comply with certain notice requirements can be up to $16,500.

WHAT SHOULD A COMPANY DO?

To minimize the risk of penalties, companies should implement programs and procedures to regularly and routinely monitor incident data and other quality and safety data to identify safety issues reportable to the CPSC under Section 15(b). Companies that import or sell products in Canada and Australia should also ensure that procedures are in place to help to identify product related incidents and circumstances that may require that reports be sent to Health Canada or the Australian Competition & Consumer Commission. While consumer product companies may not welcome the thought of notifying government officials of potentially negative information about their products, the alternative approach of waiting for the government officials to make first contact when a safety issue arises presents substantially more unwelcome potential risks and costs.
A. INTRODUCTION

Many people involved in the Canadian insurance industry are alternately amazed and appalled at the bad faith punitive damage awards that occasionally emerge from the US Courts. They are amazed some states allow liability limits on auto policies less than 10% of the Canadian mandatory minimums ($200,000), and they are astounded that a person who purchases only $25,000 of such liability coverage can later receive a jury verdict of $145 million in punitive damages against the auto insurer for “bad faith” handling of an excess liability claim under the policy (the *Campbell v. State Farm* saga). Some Canadian observers were similarly perplexed how a simple water leak claim on a homeowner’s policy spiralled into a “toxic mold” catastrophe and ultimately resulted in a Texas jury tagging the homeowner insurer with some $26 million for mental anguish and punitive damages, and attorneys fees (the *Ballard v. Fire Insurance Exchange* saga).

For their part, US observers would probably be surprised to learn that the highest court north of the border (the Supreme Court of Canada) has effectively limited available punitive damage awards against first party insurers in that country to $1 million and then only in cases of most egregious misconduct. With respect to liability insurance, you can literally count on one hand the number of “bad faith refusal to settle” cases in Canada and the largest such award has been a mere $300,000.

B. THE ORIGIN OF THE GOOD FAITH OBLIGATION

“Bad faith” litigation and run away jury awards of multi-million dollar punitive damages against insurers is strictly a North American phenomenon. There is no such cause of action in the United Kingdom, the very place where today’s modern insurance industry originated.

In the USA, the Restatement of Contracts expressly imposes upon contracting parties “a duty of good faith and fair dealing in [the contracts] performance and enforcement.” No such provision exists in Canada nor, indeed, have the Canadian courts adopted any such general rule as a matter of common law. In addition, most US states have enacted statutes or regulations expressly governing insurance claims and proscribing certain unfair or deceptive claims handling practices. These, along with general tort law principles, form the basis for much “bad faith” litigation south of the border.

Canada, the world’s second largest country in size, comprises ten provinces and three territories, each of which has its own legislative and regulatory regime for insurance. Some, but by no means all, of these provinces/territories have legislative provisions prohibiting “unfair or deceptive practices” in the business of insurance, but none of the legislation provides any statutory cause of action for insurer “bad faith.”

However, the Canadian courts have repeatedly endorsed the concept of a duty of good faith as an implied term in every contract of insurance. The courts have also held that, generally speaking, insurance policies

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**BAD FAITH LITIGATION IN CANADA**

**MUCH ADO ABOUT NOTHING?**

Nigel P. Kent and Samantha Ip Clark Wilson LLP
are “peace of mind” contracts. These principles can form the basis in appropriate cases for both punitive and mental distress damages arising from wrongful denials of coverage.

Thus far in Canada, only one appeal court in one province (New Brunswick) has actually endorsed the concept that insurer bad faith is a tort (as opposed to merely a breach of contract claim). In that case, the court declared “it is settled law, at least in this Province, that insurers owe a duty of good faith and fair dealing to their insured, a breach of which may give rise to their liability in both contract and tort.” Opening the door to tort allows damages claims to be made not only against the insurance corporation, but also directly against its adjusters, claims managers, investigators and other individuals involved in the claims process. However, such tort suits have not in fact gained traction in Canada, and bad faith claims are still generally treated as breach of contract claims against the insurer alone.

Today, as in the USA, coverage enforcement lawsuits in Canada invariably include what have become almost standard form allegations of bad faith claims handling on the part of insurers and very often claim substantial punitive and mental distress damages on that account. Such awards are actually very rare and, in most instances, the claim is merely a litigation tactic designed to ransom settlements through a combination of:

1. the mere possibility of an award being made by a sympathetic, unsophisticated jury; and
2. the increased cost, inconvenience and, occasionally, embarrassments arising from extensive discovery into corporate finances, administration and claims handling.

C. THIRD PARTY LIABILITY CLAIMS: WHAT ARE THE “GOOD FAITH” OBLIGATIONS?

As indicated, there have been relatively few successful bad faith lawsuits against liability insurers in Canada. Of course, like most litigation, the vast majority of such cases settle before trial. Nevertheless, the absence of reported Canadian case law in this area provides an astonishing comparison with the US experience.

Canadian courts have held that while the opportunity to settle a defensible case for the policy limits necessarily produces a conflict of interest between insurer and insured, it is not a situation where the insurer owes fiduciary duties to the insured, and the insurer is not required to abandon their separate interest simply because of the possibility of a judgment in excess of policy limits. Rather, liability on that account will only flow where the defense is mishandled, where the insurer fails to consider the insured’s interests as well as its own, and where there has been poor or untimely communication to the insured of all material information touching upon their position in the litigation.

Cases involving failure to settle within limits do not usually result in punitive damage awards. Rather, the insurer becomes liable for the amount of the excess judgment. Indeed, the highest punitive damage award in Canada for wrongful denial of liability coverage was made in 2012 and was only for $75,000.

D. FIRST PARTY COVERAGE: WHAT ARE THE GOOD FAITH OBLIGATIONS?

By far the most common form of bad faith allegation against insurers is made in the context of first party property or disability insurance coverages. Even so, the Supreme Court of Canada has declared; “an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate…the question instead is whether the denial is as a result of the overwhelmingly inadequate handling of the claim or the introduction of improper considerations into the claims process.”

Conduct which some Canadian courts have held to constitute a breach of the duty of good faith in first party cases includes:

- Failing to provide an accurate and fair explanation of the policy terms and claims procedures;
- Failing to act with reasonable promptness during each step of the claims process, including timely payment of undisputed portions of the claim;
- Failing to undertake a competent investigation of the claim using objective unbiased experts; and
- Denials of coverage or delayed payments to take advantage of the insured’s economic vulnerability or to gain bargaining leverage.

The highest punitive damage award in a first party coverage case in Canada is $1 million. It involved a denial of coverage under a homeowners policy on grounds of alleged arson even though the insurer was told by their own investigators, they “didn’t have a leg to stand on.” The award was made by a jury and while the Supreme Court of Canada ultimately allowed it to stand, they expressed the view that the amount was extremely high.

E. PUNITIVE DAMAGES: WHAT IS THE THRESHOLD?

While the case law establishes that the insurer’s breach of the implied duty of good faith claims handling is a necessary pre-condition for any award of punitive damages, it does not follow that such awards are automatic in all cases where there has been a breach. Rather, the Supreme Court of Canada has made it very clear there is a two-step analysis which must be undertaken namely:

1. Beyond establishing that the denial of coverage was an incorrect judgment call, was the denial also the result of both overwhelmingly inadequate claim handling or the introduction of improper considerations? and
2. If so, was the insurer’s conduct so exceptionally egregious that an award of punitive damages is warranted.

It is only in exceptional cases where both conditions are met, that punitive damages are supposed to be awarded in Canada. Some observers believe the trial courts often overlook the exceptional nature of the award and that some dilution of the threshold criteria has occurred. Still, awards of punitive damage for insurer bad faith in Canada remain relatively rare even where the denial of coverage or the handling of the claim has been judicially found wanting. Given the size of awards regularly made in US courts, observers south of the border may be inclined to think bad faith litigation in Canada is indeed much ado about nothing.
OUTBOUND INVESTMENT OVERVIEW

As Chinese companies currently have both the capacity and desire to invest overseas, outbound investment has been increasing at a very fast pace in recent years (See Chart). Chinese companies have exhibited strong interest in entering the American market in an effort to “Go Global.” The Chinese government has issued over the past few years regulations encouraging and facilitating outbound investment in accordance with the Chinese’ 12th five-year plan. For example, since June 2011, the Measures for the Administration of Pilot RMB Settlement for Overseas Direct Investment and the Circular on Issues Relevant to Cross-border Direct Investment with Renminbi (RMB, the official currency of the PRC) now entitles certain investments made by Chinese investors (except financial domestic enterprises) outside the Peoples Republic of China (PRC) to be settled in RMB, and the income made through those investments may be repatriated to the PRC in RMB. A bank will also be able to grant a loan in RMB to a foreign enterprise or investment project if a domestic enterprise is one of the investors. Although great strides have been made, Chinese investments still remain strongly monitored by Chinese authorities. The Chinese system can still be described as “a government approval system.” In other words, before Chinese companies are entitled to invest in the American economy, they will have to go through a lengthy process, generally involving many approvals from numerous governmental entities. Although obtaining such approval is generally not the main obstacle to the closing of a transaction (unless there is specific restrictions attached to the investment industry), obtaining all necessary approvals usually slow down the process considerably and therefore may affect the competitiveness of Chinese companies in transactions for which time is of essence.

CONCERNS OF CHINESE CLIENTS WHEN DOING BUSINESS IN THE UNITED STATES

One of the main concerns being raised by the Chinese is in regard to the corporate tax structure in the United States as well as withholding tax. Chinese need guidance regarding the best way to structure a contemplated transaction. They also seek advisement on business structure, which State to register a company, visa issues, necessary governmental licenses and permits, procedures to purchase and sell real estate, how to identify, approach and negotiate with an American target, applicable listing rules in the US, as well as the restricted investment industries according to US regulations. Questions often posed might be, “What is the best way in which to invest in the energy and mining sector?” or “What role does the Committee on Foreign Investment in the United States (CFIUS) play and can it be problematic in the case of transactions involving Chinese investors. Also, as US environmental law is at a more mature stage, Chinese clients will need to be advised on the best way to structure a transaction in order to comply with such regulations. Chinese clients are usually unfamiliar with such regulations, so it is important to offer an added-value service by verifying that the transaction complies with such norms. Labor law is also more developed in the US and Chinese clients will need guidance on the many labor regulations they may face.
INTRODUCE TO CHINESE OUTBOUND INVESTMENT RULES

Overseas investments by Chinese domestic enterprises are subject to the approvals and registration with three different governmental bodies in accordance to Chinese law.

A. State Administration of Foreign Exchange (SAFE) in charge of the administration of foreign exchange;
B. National Development and Reform Commission (NDRC) responsible for China’s economic development and industrial policy; and
C. Ministry of Commerce (MOFCOM).

Obtaining the approval of the NDRC is the cornerstone of the process. Once NDRC approval has been obtained, other authorities, including the MOFCOM and SAFE are generally not going to object to the transaction.

First, every overseas investment must be registered with SAFE. Second, it is necessary to obtain NDRC’s approval for investment in Overseas Investment Projects (OIP). Last, an application must be made to transfer the foreign currency abroad.

For example, and according to the Interim Measures for the Administration of Verification and Approval of Overseas Investment Projects (Measures), for an OIP in the field of exploration and exploitation of crude oil and mines (considered as Resources OIP) for which the amount of investment made by the Chinese party reaches $300 million or more (in U.S. Dollars), the verification and approval of NDRC will be required. If a domestic enterprise invests in a Resources OIP, and if the amount of the investment made by the Chinese party is more than $30 million but less than $300 million, the approval documents from the Department of Development and Reform at the provincial level shall be obtained as well as the Registration Approval Form for Local Major Overseas Investment Projects issued and stamped by the Department of Utilization of Foreign Capital and Outbound Investment under NDRC.

In addition, the relevant approvals must also be obtained from MOFCOM. MOFCOM regulations clearly state as a precondition that the project has a broad interest in the country.

Therefore, this requirement shall be examined carefully.

In addition to these three governmental entities, the State-owned Assets Supervision and Administration Commission (SASAC) may also impose restrictions on state-owned enterprises as it is in charge of supervising and managing their overseas investments. SASAC requires that state-owned enterprises do not invest in non-principal industries overseas unless necessary for any specific reason. In that specific scenario, SASAC’s approval must be obtained prior to making such investment. The China Securities Regulatory Commission (CSRC) will also have to approve transactions involving companies which are listed on one of the two Chinese stock exchanges.

Finally, it shall be noted that the above summary does not apply to financial institutions, which are subject to specific rules. It shall also be noted that the Special Administrative Region of Macao and Hong Kong and the autonomous region of Taiwan are also subject to different rules.

OUTBOUND INVESTMENT: A FOUNTAIN OF OPPORTUNITIES FOR AMERICAN LAWYERS

As it can be understood from all the different legal requirements established by the Chinese and American authorities, there are currently plenty of opportunities, if not a necessity, for further collaboration between Chinese and American lawyers in order to better serve client’s interest in cross-border transactions and more specifically to help Chinese clients to successfully invest in the “American Dream.”
INTRODUCTION

The EU market is composed of more than 500 million citizens. Do American SMEs (small to medium-sized enterprises) fully exploit it? The answer is no, they do not, and one of the main reasons is that despite the existence and success of the EU’s single market, in reality only large multinational companies with armies of legal staff can exploit it to its full potential.

Barriers to cross-border trade remain in regards to America (and even among the EU Member States). And not only because of custom duties, tax regulations, administrative requirements, difficulties in delivery, language and culture, but also because of the existence of 27 different contract laws regimes.

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The EU legislation contains a number of common rules (Directive 2011/83/EU on consumer rights, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market, Directive 2011/7/EU on combating late payment in commercial transactions, Directive 93/13/EEC on unfair terms in consumer contracts, etc.), but they do not cover all areas of contract law.

The current legal framework in the EU is characterized by differences within the national legal systems and contract laws of the 27 Member States.

As a consequence, companies operating in the EU are obliged to use a wide variety of contracts governed by different national contract laws when operating in Europe’s Single Market. Many of these result from divergent sales laws between the 27-Member States. This makes selling abroad complicated and costly, especially for SMEs which cannot afford to trade across the EU borders, because selling abroad means adapting sales contracts to up to 27 different legal systems. This cost supposes an average of $12,000 (U.S. Dollars) for each additional country (apart from the extra expenses for translation to the local language, adapting websites when firms want to sell online, etc.).

There is no doubt that contracts are essential for running businesses and selling to consumers and, therefore, the current 27 different sets of national rules lead to additional transaction costs, a lack of legal certainty for businesses and a lack of confidence for the consumers. This acts as an obstacle for both consumers and businesses to shopping and trading across EU borders. SMEs are particularly affected by higher transaction costs and most of the times they renounce to do it.

As a result, 55% of the EU companies refuse cross-border transactions due to the legal-contractual obstacles. At the same time, only 7% of EU consumers buy online in another EU Member State, whereas 33% do it in their own country. This situation contrasts with the United States’ internal market, where a company in Detroit can easily sell its products to a consumer in L.A.

The potential of the internal EU market and cross-border electronic trade is still under-exploited and, on most occasions, it is being exploited by large companies of third countries (mostly from USA). Traders who are dissuaded from cross-border transactions due to contract-law obstacles forgo at least € 26 billion in intra-EU trade every year. Meanwhile, 500 million consumers in Europe lose out on greater choice and lower prices because fewer companies make cross-border offers, particularly in smaller national markets.

FUTURE NEW REGIME: OPTIONAL COMMON EUROPEAN SALES LAW

The European Commission has committed to resolve this problem. On October 11th 2011, an optional Common European Sales Law (CESL) was proposed, offering a single set of rules for cross-border contracts in all 27 EU countries. The Commission’s proposal now needs approval from the EU Member States and the European Parliament, that will pass the CESL at the end of 2012 or the beginning of 2013.
The CESL should help to break down the current barriers, and give consumers more choice and a higher level of protection. Why? Because companies will have a unique legal framework to rule their relations all around the EU, providing them with an easier and cheaper instrument to sell their products. Consumers will also have the option of choosing a user-friendly European contract with a high level of protection, as long as the traders offer their products on the basis of the CESL.

The CESL will be applicable:

- only if both parties voluntarily and expressly agree to it;
- to cross-border contracts, where most of the problems of additional transaction costs and legal complexity arise; Member States will have the choice to make the Common European Sales Law applicable to domestic contracts as well.
- to goods-selling contracts, digital-content contracts (such as music, movies, software or smart-phone applications) and services contracts related to the latter.
- for both business-to-consumer and business-to-business transactions if at least one party is established in a EU Member State. Traders could use the same set of contract terms when dealing with other traders both from inside and outside of the EU, giving the CESL an international dimension.

MAIN LEGAL ASPECTS OF THE COMMON EUROPEAN SALES LAW

The Consumer European Sales Law (CESL) is an optional framework, chosen by the parties. The consumer must explicitly declare whether he/she agrees to apply the CESL; this declaration is different from the one in which the consumer expresses his/her agreement to conclude the contract.

It is desirable that the Commission approves some accompanying measures to make the exercise of the free right to choose this regime easier for SMEs and consumers, when they contact with big companies – or companies in a dominant market position – in accordance with the voluntary nature of the CESL.

In addition, the Common European Sales Law is an alternative set of contract law rules, identical in every Member State and applicable throughout the EU, which will co-exist with the national legislation in force in the field of contract law.

As a regulation, the Common European Sales Law will be generally and directly applicable. The CESL includes a comprehensive (183 articles) but non-exhaustive set of contract law rules, covering:

- the general principles of contract law;
- the pre-contractual obligation (information) and its content, rules on how agreements are concluded, consumers’ right to withdraw and the avoidance of contracts;
- rules to interpret the contract terms, rules on the content and effects of contracts as well as contract terms presumed to be unfair; risk and delivery; payment conditions, etc.
- obligations and remedies of the parties to a sales contract or a related services contract;
- supplementary common rules on damages for loss and on interest for late payment;
- restitution; and
- prescription.

Certain aspects continue to be governed by applicable national legislation, on the basis of the Rome I Regulation.

ADVANTAGES FOR COMPANIES

Providing one common (yet optional) regime of contract law that is identical for all 27-Member States so that traders no longer need to wrestle with the uncertainties that arise from having to deal with multiple national contract systems has proven to be of benefit. According to a recent survey (Eurobarometer), 73% of European companies stated that if able to choose, they would use one single European contract law for all cross-border sales to consumers from other EU countries.

Ultimately, the primary benefit to small and medium-sized companies is an easier route to expansion into new markets and a great reduction in transaction costs for those companies that wish to trade cross-border.

ADVANTAGES FOR CONSUMERS

A chief benefit to the consumer is a wider choice of products at lower prices due to the increased competition; all the while providing the same high level of consumer protection in all Member States, transparency and a good knowledge of consumer rights in cross-border transactions.

Once it comes into force, a few European model contracts will be drawn up, designed for specific trade areas or fields of activity, containing comprehensive standard terms and conditions, and available in all the official languages of the EU. These will be very useful tools for both business-to-business and business-to-consumer relationships.

OPPORTUNITY FOR BUSINESSES... AND LAWYERS

Some EU solicitors and in-house lawyers are afraid of the possible decrease of legal advice requests once the CESL comes into force. But, on the contrary, legal work will increase.

On the one hand, in many places, references are made to domestic law (for example, legal personality, invalidity of a contract arising from lack of capacity, illegality, determination of the language of the contract, matters of non-discrimination, representations, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts) which will force companies to seek legal advice regarding the legislative framework and also increase the legal uncertainty. In the beginning, the regulation wouldn’t be applied uniformly throughout the EU. National courts, which are competent for the interpretation and application of the regulation, will offer various possible interpretations, and the legal uncertainty will increase.

On the other hand, the CESL will entail a significant increase of cross-border business-to-business and business-to-consumer transactions, resulting in an increase in the advice needed in other areas of law such as commercial, litigation, etc.

Summarizing, we welcome the Commission’s initiative that will (1) promote the cross-border trade for businesses (especially SMEs), (2) encourage cross-border purchases by consumers, and (3) consolidate the advantages of the internal EU market.

The CESL will be a win-win solution after the current legal diversity for cross-border trade in the EU single market. It will allow SMEs to expand their business to new markets in Europe and help consumers get better deals. We encourage U.S. companies to benefit from it.
With quick and easy electronic access to personal information at an employer’s fingertips, employers must learn how to properly utilize such information in the hiring process. The failure to perform adequate background checks can open an employer up to liability for claims based on negligent hiring. These claims can have a negative impact in the marketplace, adversely affect employee morale and be costly to defend. On the other hand, improper use of background checks during employee screening can expose employers to civil rights violations. These opposing pitfalls require employers to perform a precarious balancing act and to understand the liability to which they are exposed. Employers need to develop a hiring process that effectively insulates them from both negligent hiring and civil rights claims.

Employers understand that they bear a certain amount of liability for the actions of their employees during working hours. What some fail to realize is that hiring someone who is incompetent or unfit for the job can expose the employer to a negligent hiring claim based on harm that employee causes even if the employee’s conduct is outside the employer’s control. For instance, one court found the owner of an apartment complex liable for a handyman’s assault on a tenant outside of working hours. Liability existed because the owner failed to investigate the handyman’s background, which included a laundry list of violent crimes.

The first step in avoiding liability for negligent hiring is to understand the elements of the claim. To prevail on a negli-
gent hiring claim, a plaintiff must show that (1) an employment relationship existed, (2) the employee was unfit for the position, (3) the employer knew or should have known the employee was unfit, (4) the employee negligently or intentionally caused the injury, and (5) the employee’s conduct proximately caused the injury.5 Regarding the first element — employment relationship — employers cannot assume they can escape liability through artful contract language or independent contractor relationships.6 Courts will look at the totality of the facts when determining employment status rather than simply reviewing the language of an employment contract. Second, when determining if an employee is unfit, courts will examine both the nature of the position and the risk the employee posed to those with whom he came in contact.4 A job applicant cannot be deemed unfit solely because of a criminal conviction.5 The third element — requiring an employer to have knowledge that the employee was unfit — can be satisfied by showing that the employer should have discovered information showing the employee was unfit.6 For instance, in the example of the apartment owner above, the owner should have discovered the handyman’s history of violent crimes by simply checking his references and performing a public information search. Under the fourth element — the employee’s tortious conduct — an employer is liable only for the employee’s torts. Therefore, if the employee’s actions were not negligent or intentional, a claim for negligent hiring would fail.7

Finally, on the issue of proximate cause, a plaintiff must show that the injuries were caused by a characteristic of the employee which the employer knew might cause harm.8

While applicants with criminal records are legally barred from holding certain positions, there are many others for which they still may be hired. To comply with federal law, a policy cannot blindly reject candidates based on their criminal record. For instance, as arrest and incarceration rates for African Americans and Hispanics exceed those of the general population,9 a hiring policy that rejects any applicant with a criminal history might have a disparate impact on those two protected classes and might violate Title VII of the Civil Rights Act of 1964. Liability can be minimized by fully researching an employee’s criminal background and applying that information to the standards set forth under a properly developed hiring policy. An employer should develop a hiring policy that relies on factors that is job related. In order to show that an employer’s potential liability under the doctrine of negligent hiring requires employers to weigh the potential disparate impact of their hiring policies. This should not discourage employers from investigating the backgrounds of their employees and implementing an appropriate application process. To the contrary, by implementing a strong background investigation policy and using that policy in conjunction with a carefully tailored applicant screening process, employers can protect themselves from negligent hiring claims while still meeting the standards set forth under Title VII.

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Exclusion based on criminal history is a business necessity, the employer must take into account (1) the nature and gravity of the offense, (2) the time that has passed since the conviction or completion of the sentence and (3) the nature of the job sought.10 Even if a hiring policy does have a disparate impact on a protected group, it might still be validly legal if the requirement is job related and consistent with business necessity.11

For instance, Company A, which processes credit card information, screens for applicants with convictions for credit card fraud. However, Company B, which provides landscaping services, would have a difficult time arguing that credit fraud convictions are related to a business necessity. Thus, while both the processes for screening applicants can result in a disparate impact on a protected group, only Company A’s policy meets the business necessity requirement.

An employer’s potential liability under the doctrine of negligent hiring requires employers to weigh the potential disparate impact of their hiring policies. This should not discourage employers from investigating the backgrounds of their employees and implementing an appropriate application process. To the contrary, by implementing a strong background investigation policy and using that policy in conjunction with a carefully tailored applicant screening process, employers can protect themselves from negligent hiring claims while still meeting the standards set forth under Title VII.

BEST PRACTICES TIPS:

- Conduct a thorough background check by accessing public record sites that would reveal an applicant’s criminal background.
- Develop narrowly tailored written policies and procedures for screening applicants and employees for criminal conduct.
- Eliminate policies or practices with blanket exclusions of applicants based on any criminal record.
- When asking questions about criminal records, limit inquiries to those records related to the job in question, consistent with business necessity.
- Training. Training. And, more training.

[^1]: Ponticas v. K.M.S. Invs., 331 N.W.2d 907 (Minn. 1983);
[^5]: See Green v. Missouri P.R. Co., 549 F.2d 1158 (8th Cir. 1977).
[^8]: Ponticas at 915.
[^10]: Green v. Missouri P. R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).
The plot is a familiar one to movie fans – the heart-of-gold employee stumbles upon information that her employer is taking dangerous shortcuts and putting lives at risk. She tries to alert her supervisor and manager, but her livelihood and her very life are threatened by the powerful and heartless executives. Although she would like to forget what she knows and resume her happy life, her conscience intervenes. She outsmarts the evil executives, blows the whistle, and saves the day. The movie ends with the heroine bask- ing in the adoration of those who were spared as a result of her courageous actions. But when real life intervenes in the Hollywood fantasy, the circumstances are rarely as dire, the whistleblower is rarely as heroic, and the ending is rarely as happy. In real life, the whistleblower files a lawsuit seeking to recover money damages in payment for her good works.

Whistleblowing has become ingrained in American culture as a result of the glorification of whistleblowers in the media and the current anti-business sentiment in this country. Virtually every state in the union has adopted some form of whistleblower protection, and many of these statutes have been enacted within the last ten years. Individual state whistleblower statutes vary wildly in their application and scope, and it is important for employers and their representatives – everyone from legal counsel to first-line managers – to understand the potential exposure in their jurisdiction(s).

What type of employer is covered by the statute? What exactly qualifies as whistleblowing? Are there administrative procedures for whistleblower complaints and, if so, are they binding? How long does an employee have to bring a whistleblower claim? What types of damages are available to whistleblowers?

As with all other areas of employment related litigation, forewarned is forearmed when dealing with potential whistleblower claims. Here are a few questions that every employer should be able to answer about the whistleblower statute in its jurisdiction(s):

1. **WHAT TYPE OF EMPLOYER IS COVERED BY THE STATUTE?**
   Of the fifty states and the District of Columbia, thirty-three states have enacted whistleblower provisions that protect only public and/or state employees. Some statutes apply strictly to employees of the state, while others extend to employees of municipalities and political subdivisions. The remaining seventeen states have adopted laws that protect both public and private employees. For those states that extend protection to private employees, several states exclude very small employers (for example, an employer with less than ten employees), requiring that a private employer have a minimum number of employees to be covered by the statute. Only one state has no formal whistleblower statute in place.
2. DOES THE SPEECH OR ACTION QUALIFY AS WHISTLEBLOWING?

Not every disgruntled employee who disagrees with a supervisor or employer is a whistleblower. Although the statutes vary somewhat in how they define whistleblowing, there is general agreement that the subject of the whistleblowing has to be a violation of a law, rule or regulation that is of concern to the public. Disputes that are personal to the employee, such as disputes over the terms and conditions of employment, do not qualify as whistleblowing. Moreover, if the employee’s position requires that he report misconduct of others, those reports may not constitute whistleblowing in some states.

Generally, whistleblowers must show (1) that he or she reasonably believed that his or her employer’s conduct was violating either a law or a rule or regulation promulgated pursuant to law; (2) that he or she performed a whistleblowing activity; (3) that an adverse employment action was taken against him or her; and (4) that there exists a causal connection between the whistleblowing activity and the adverse action. Many states utilize the familiar McDonnell-Douglas burden-shifting framework, requiring the plaintiff to make a prima facie case before shifting the burden to the employer to show a legitimate, non-retaliatory reason for the adverse action. If the employer can do so, the burden shifts back to the employee to show that the employer’s reason is pretextual.

3. MUST THE PLAINTIFF EXHAUST ADMINISTRATIVE REMEDIES OR OTHER PREREQUISITES BEFORE FILING SUIT?

Many states provide no administrative framework within which to file a whistleblower claim and instead provide for a private right of action for whistleblowers in the state court system. Some of these states, despite the lack of any administrative process, do impose certain prerequisites upon whistleblower plaintiffs. For example, a few states require that the putative whistleblower provide the information to his supervisor, or at least make a good faith effort to do so. Other states require a written report by the whistleblower to either a supervisor or a specified officer within a government agency, such as the Attorney General. Those states that do have these prerequisites often impose a time limitation within which the whistleblower must report the allegedly wrongful conduct.

Another possible prerequisite exists in those states that require whistleblowers to follow the provisions of any collective bargaining agreement or employment contract that may govern the employment relationship. Frequently, those agreements will specify a grievance or similar procedure that provides an exclusive remedy for all employee complaints, including whistleblower complaints.

In contrast, several states do require exhaustion of administrative remedies before a whistleblower may file a civil action. A precious few states provide only an administrative remedy and do not authorize a whistleblower to pursue damages in the state court system. The administrative scheme stands as the only avenue through which the whistleblower may seek compensation. For those states that require administrative exhaustion before filing a civil action, there is typically a limitations period for filing with the administrative body from the alleged act of retaliation and a limitations period for filing a civil action that begins to run from the conclusion of the administrative process.

Somewhere between the states that allow the whistleblowers to go immediately to court and the states that require exhaustion of administrative remedies are a handful of states that employ a hybrid approach, providing an administrative avenue for redress of whistleblower complaints which the employee may, or may not, utilize before going to court. In addition to providing a time limit within which the whistleblower must file with the administrative tribunal, these jurisdictions usually provide a statute of limitations that begins to run at the conclusion of the administrative process.

4. WHAT IS THE STATUTE OF LIMITATIONS?

The statute of limitations applicable to whistleblower claims varies widely from state to state, from ten days to three years. However, despite these broad differences, a significant majority of jurisdictions have a statute of limitations of 180 days or less for whistleblower claims. While ten days is the shortest limitations period, there are several states with 30, 90 and 180 day periods. As a general rule, the statute begins to run at the time of the allegedly retaliatory action by the employer and not at the time of the alleged whistleblowing activity. There are, however, a small handful of states that require a complaint to be made within two years of the whistleblowing activity, as opposed to two years from the date of the retaliatory action. It is much more common for the statute to establish a statute of limitations that begins to run with the first act of alleged retaliation.

5. WHAT DAMAGES ARE AVAILABLE?

There are two schools of thought regarding damages available to whistleblowers. The first school believes that damages should be awarded to make the whistleblower whole and limit damages to actual lost wages, lost benefits, and equitable relief such as reinstatement and/or restoration of seniority. The states subscribing to this school believe that the whistleblower should not suffer a loss because of his actions and should be returned to his pre-whistleblowing status. In contrast, the second school believes that, not only should the whistleblower be made whole, but there should be a windfall to the whistleblower as a reward for revealing wrongful conduct and a punishment to the employer for the retaliation against the whistleblower. Therefore, the second school authorizes the full panoply of tort damages, including compensatory damages, front and back pay, fringe benefits, attorneys’ fees and costs, and some type of punitive or treble damages. These states reward whistleblowers for taking the risk of revealing wrongful conduct in the workplace and punish employers who retaliate against these employees. In addition to damages recoverable by the whistleblower, some statutes authorize imposition of a civil or criminal fine against the employer, payable to the state, for violation of the whistleblower protection statute. Typically, these statutes provide for a fine that is imposed for each violation.

An employer’s awareness of the contours of the whistleblower protection statute in its jurisdiction(s) will assist the employer in managing employees who seek to cast themselves as whistleblowers. If an employer can accurately assess the claim, the response to the employee can either avoid or advance the employer’s position in subsequent litigation.

Robyn Farrell McGrath is a partner in the Employment Practices Group at Sweeney & Sheehan, P.C. in Philadelphia. She represents both public and private employers in a wide variety of employment and civil rights litigation at the administrative, trial, and appellate court levels. In addition to her litigation practice, Ms. McGrath counsels clients on workplace issues and is a frequent lecturer to insurers and employers on issues in employment and civil rights law. She can be reached at robyn.mcgrath@sweeneyfirm.com.
After termination of an employment relationship, the former employee sometimes makes a claim for discrimination or retaliation. While investigating the claim, the employer may discover the employee engaged in criminal or illegal activity, or other illicit misconduct. This information may surface through interviews of former co-workers, investigation of criminal court dockets, or formal discovery. However the information is discovered, the employer will try to use the information to limit the claim for damages.

Courts have long recognized the doctrine of "after-acquired" evidence in situations where the misconduct occurred while the employment relationship was still intact. This article addresses what happens when the former employee’s misconduct occurs after termination.

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), an Age Discrimination in Employment Act (ADEA) case, the United States Supreme Court confirmed an employer who discovers additional grounds for discharging a terminated employee may rely on newly found, or after-acquired, evidence to minimize the claim for backpay and frontpay.

The Court concluded the misconduct could not be a total bar to recovery because the evidence was not known at the time of the discharge. Therefore, it could not be deemed the reason for the discharge. However, the Court acknowledged the employee’s misconduct must be considered in determining the appropriate remedial relief and ultimately held neither reinstatement nor frontpay is appropriate. The Court declined to preclude backpay as a remedy altogether, but concluded backpay should be subject to a shortened calculation, from the date of the actual termination to the date the after-acquired evidence was discovered. To take advantage of these limitations, the employer must establish the misconduct rose to a level that would have supported termination if the employer had found out about it. While McKennon was an ADEA case, the Court acknowledged its reasoning would apply to Title VII cases, as the laws share the goal of eliminating discriminatory acts in the workplace, and the “substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII.”

In McKennon, and in most of the cases which followed, the employee’s conduct occurred during the employment relationship. What happens when the employee’s misconduct occurs after the termination?

Federal Courts have ruled, under certain circumstances, employers may limit a former employee’s claim for damages where the former employee engages in behavior after the termination if the behavior would have resulted in termination if it occurred while the employee was still employed. The Eighth Circuit Court of Appeals first considered the issue in the case of Sellers v. Mineta, 358 F.3d 1058 (8th Cir. Mo. 2004). In this case, Wendi Sellers, a former Air Traffic Controller with the FAA, sued the Secretary of Transportation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.
(2000), alleging sex discrimination and retaliation. The jury returned a verdict in favor of Sellers, and she moved for reinstatement or frontpay. The district court denied reinstatement but awarded frontpay. The government appealed on the basis that after Sellers’ termination from the FAA, she was terminated from a subsequent position at a bank for attempting to process an unauthorized loan application. Sellers admitted to the improper conduct, explaining she completed the application to obtain her spouse’s ex-wife’s credit history. The government argued the district court abused its discretion in awarding Sellers frontpay because her post-termination conduct— falsification of a loan application for personal reasons—rendered her unsuitable for reinstatement (thereby precluding frontpay).

The Court in Sellers cited McKennon as having significant precedential value, as the Supreme Court in McKennon acknowledged an employee’s misconduct is relevant to the question of remedies. The Sellers Court noted as particularly germane the Supreme Court’s holding that where, after termination, it is discovered the employee engaged in wrongdoing, neither reinstatement nor frontpay is appropriate. The McKennon Court noted it would be both “inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.” McKennon, at 361-62.

The Sellers Court acknowledged few courts had addressed whether the McKennon rationale extends to situations of employee misconduct occurring after termination. The Tenth Circuit confronted the issue in Medlock v. Ortho Biotech, Inc., 164 F.3d 545 (10th Cir. 1999), where former employee Medlock was allegedly terminated in retaliation for pursuing a claim of race-based discrimination. At his unemployment benefits compensation hearing, Medlock verbally abused defendant’s counsel. The Tenth Circuit recognized post-termination conduct could, arguably, limit a plaintiff’s remedies, but declined to extend the logic of McKennon to Medlock, as the misconduct occurred as a direct result of the retaliatory discrimination. See also, McKenna v. City of Philadelphia, 636 F. Supp. 2d 446 (E.D. Pa. 2009), wherein the Court held to cut off Title VII equitable damages, a plaintiff’s post-termination wrongdoing must not be attributable to the defendant’s conduct).

The Court in Sellers agreed with the Tenth Circuit’s reasoning in Medlock, despite its ultimate ruling, and held the logic of McKennon is applicable in the context of a Title VII plaintiff’s post-termination conduct. Under appropriate circumstances, the conduct may limit the remedial relief available to the plaintiff. The Court theorized a discharged employee may be convicted of a crime unrelated to his or her former position as a result of post-termination misconduct. In such a situation, the incarceration would render the former employee ineligible for reinstatement, and therefore, render an award of frontpay inequitable. A plaintiff’s post-termination conduct is relevant in determining whether a frontpay award is available, and if so, in determining the extent of the award.

The Sellers Court expanded on the employer’s burden in raising the defense. McKennon held the employer bears the burden of establishing, by a preponderance of the evidence, the wrongdoing was “of such severity that the employee in fact would have been terminated on those grounds alone.” After Sellers, the employer must present evidence of actual employment practices to prove this point, and may not rely on standards articulated in employment manuals.

The Sellers Court did not specifically address backpay limitations where post-termination misconduct is at issue, presumably because the backpay award was not appealed in that case. However, the Court clearly extended the reasoning and holding of McKennon to instances involving post-termination misconduct. Therefore, it logically follows McKennon’s holding limiting backpay would also apply in situations involving post-termination misconduct, and in fact, Courts have construed the Sellers opinion as establishing this concept. See McKenna, 636 F. Supp. 2d 446, 460, footnote 4. Therefore, an employer may successfully argue backpay calculations should be limited to the period of time between the date of the allegedly unlawful termination and the date the evidence of post-termination misconduct was discovered.

If a plaintiff is incarcerated after termination, the incarceration may be used to defend damages from a different angle. It is well established that a plaintiff must attempt to mitigate his or her damages to recover backpay or frontpay. See, inter alia, Ellerbrook v. City of Lubbock, 465 Fed. Appx. 324 (5th Cir. Tex. 2012); Giles v. GE, 245 F.3d 474 (5th Cir. Tex. 2001). An employer can win the mitigation issue by showing that the employee has withdrawn from the employment market. See McKenna. If a plaintiff is incarcerated, an employer may assert plaintiff failed to use “reasonable diligence” to obtain “substantially equivalent” employment during the period of time he or she was incarcerated, and has “withdrawn from the labor market.” However, if the incarceration is causally linked to the alleged discrimination, these defenses will not apply. See Medlock, McKenna. If this argument is made, it logically opens the door for the employer to investigate the plaintiff’s past behavior to ascertain whether he or she engaged in instances of similar behavior pre-dating the employment or the alleged discriminatory act. Obviously the information can and should be sought through formal discovery, but employers also may independently discover this information through online inquiries to local law enforcement agencies or public records requests.

Once evidence of an employee’s misconduct is obtained, an employer should seek to limit damages. An employer may move for partial summary judgment asking the Court to limit Plaintiff’s damages for backpay or to dismiss Plaintiff’s claim for reinstatement or frontpay altogether. Another option for an employer is to seek a stipulation with plaintiff’s counsel regarding recoverable damages. Depending on the nature of the misconduct, a plaintiff may be motivated to waive a claim for certain damages or concede to reduced damages in exchange for keeping potentially damaging evidence of misconduct from reaching a jury.

Regardless of whether an employer suspects a plaintiff has engaged in misconduct or criminal behavior since his or her termination, it should promptly investigate the issue as a matter of course in each case. The exercise is simple and discovering post-termination misconduct can yield an effective damages defense useful both at trial and in facilitating reasonable settlement negotiations.

Christopher Barkas is a shareholder with Carr Allison in Tallahassee, Florida. He started his career as a trial attorney in Miami as a prosecutor, and defends employment, professional liability, transportation, and retail cases. He graduated from Florida State University and Cumberland School of Law, and practices in Florida State and Federal Courts.

Elizabeth “Betsy” Burgess is an associate at Carr Allison in Tallahassee, Florida. She primarily defends employment, personal injury, wrongful death, and homeowners’ association cases. She graduated from Auburn University and Florida State University College of Law, and is licensed to practice in all State and Federal Courts in Florida.
Three and a half years ago, Congress expanded the coverage of the Americans with Disabilities Act, which prohibits employers from discriminating against qualified individuals with disabilities and requires employers to make reasonable accommodation to the known disabilities of such individuals. The Americans with Disabilities Act Amendments Act (“ADAAA”) became effective January 1, 2009.

Explaining its purpose in the amendments, Congress expressed its belief that in the years since adoption of the ADA, court interpretations deviated from the statute’s intent to expand opportunities for the disabled. Far too much time and energy was devoted by the courts and litigants to arguing whether an individual was “disabled” rather than focusing on the employer’s obligations, according to legislators.

Claims arising under the amended statute have now begun to make their way through the courts. And the lesson for employers from an examination of these recent decisions is in fact old news. While more employment plaintiffs are surviving summary judgment motions based on arguments that they are not “disabled,” defendant employers continue to prevail when they can establish that their actions were motivated not by improper discrimination but by a legitimate nondiscriminatory reason such as poor performance.

The chinks in the armor of most ADA plaintiffs’ cases are in two places: establishing all elements of the *prima facie* case and meeting the ultimate burden to prove discriminatory motive. The amendments to the ADA have the affect of making it easier for a plaintiff to establish a *prima facie* case, and thus have applied a patch to one of the traditional chinks, so to speak. But the balance of the McDonnell Douglas burden-shifting framework remains, and where the employer has strong evidence that a legitimate, non-discriminatory reason motivated any adverse employment action, the employer should still prevail. This second step in the McDonnell Douglas analysis is and always has been the element of the test which is more probative of discrimination *vel non*, and this element remains unchanged. With the amendments, as they are being applied by the courts, Congress appears to have succeeded in shifting the focus of the inquiry in disability discrimination cases to the employer’s conduct rather than the nature of the employee’s physical condition.

**SPECIFIC STATUTORY CHANGES**

To shift the focus from coverage to employer conduct, Congress made a number of changes to the statute, including the following major revisions, which have been applied by courts in recent months for plaintiff-friendly findings:

**Mandate To Interpret Broadly** The amended statute retains the same language defining who qualifies as an individual with a disability, but expressly changes the way such language should be interpreted. The revised Act requires that when interpreting its terms with respect to whether or not an individual suffers from a “disability” triggering coverage, “this Act shall be construed in favor of broad coverage of individuals ... to the maximum extent permitted by the
The new statute also states that major life activities include the operation of major bodily functions including the immune system, cell growth, digestive, neurological, respiratory and endocrine functions.

The addition of “lifting” as a major life activity caused a plaintiff to survive summary judgment only to lose his case on grounds that he was unable to perform an essential job function in *Thomas v. Werthan Packaging, Inc.,* No. 3:10-cv-0876, 2011 WL 4913776 (M.D. Tenn., Oct. 17, 2011). The employee, who operated various paper cutting and labeling machines for a manufacturer of large paper pet food bags, suffered lower back problems preventing him from lifting more than 20 pounds. Although the court recognized that a number of pre-ADAAA cases had held that a 20-pound lifting restriction did not substantially limit a major life activity, because the revised statute now explicitly defined “lifting” as a major life activity, material facts existed regarding whether the employee was “substantially limited,” precluding summary judgment on that basis. The court did however enter judgment for the employer in light of the employee’s evidence that the ability to lift more than 20 pounds was an essential function of the employee’s job.

**Claims arising under the amended statute have now begun to make their way through the courts.**

**And the lesson for employers from an examination of these recent decisions is in fact old news.**

A police cadet’s claim that he was “regarded as” disabled by a police department that fired him as unfit for duty despite a return-to-work physician certification survived summary judgment where the employer argued the cadet’s blood disorder was “transitory and minor.” In *Lapier v. Prince George’s County Maryland,* No. 10-cv-2851, 2012 WL 1552780 (D. Md., April 27, 2012), the court held that Lapier succeeded in establishing that his employer regarded him as disabled as a result of a blood disorder that periodically caused his oxygen levels to plummet, resulting in fainting. Citing the language of the revised statute and noting that plaintiffs need not show their employers perceived the impairment as substantially limiting, the court rejected the police department’s claim that the plaintiff’s blood complaint was transitory and minor. The evidence showed the plaintiff’s blood condition in fact was chronic and impacted several bodily functions and life activities. The court refused to enter judgment for the department on plaintiff’s “regarded as” claim.

**CONCLUSION**

The good news is that while each of the revisions to the statute make it easier for plaintiffs to establish a *prima facie* case, that doesn’t necessarily translate into wins for the employee at the end of the day. In each of these illustrative decisions, interpreting three different aspects of the revised statute, the employee was able to survive a legal attack to his *prima facie* case. These plaintiffs survived a hurdle upon which plaintiffs historically have faltered. The tipping point in each of these cases however remained in the proof regarding whether discrimination motivated the termination. Put otherwise, the cases continue to turn on whether the employer’s documentation and other proof demonstrate a decision based upon legitimate non-discriminatory considerations.

In that regard, what’s old is new again.

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**expanded list of major life activities**

In the pre-amended Act, the ADA contained a representative list of major life activities in which a plaintiff could be substantially impaired in order to qualify as having a disability under the Act, including caring for oneself, seeing, hearing, speaking, walking, breathing, performing manual tasks, and learning. The amended statute expanded the list of “major life activities” in which an individual could be limited to include new activities such as: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. That list is augmented by the EEOC’s final regulations to include the additional life activities of sitting, reaching and interacting with others. The new statute also states that major life activities include the operation of major bodily functions including the immune system, cell growth, digestive, neurological, respiratory and endocrine functions.

**changed definition of “regarded as”**

Under the pre-amendment statute as interpreted by the courts, an individual could not meet the definition of being “regarded as” having a disability unless they could demonstrate that their employer perceived them as having a substantial limitation to a major life activity. Under the amended statute, an individual can show he or she was regarded as disabled if he or she was subject to an adverse action based on an impairment that merely is not transitory and minor.

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Joan C. McKenna is a partner at LeClairRyan in Richmond, Virginia, where she concentrates her practice on employment law. She represents employers ranging from small start-ups to national companies in a wide variety of employment-related matters ranging from administrative proceedings to federal litigation. She is a graduate of Brown University and the University of Virginia School of Law. Contact her at joan.mckenna@leclairryan.com or (804) 783-7512.
In a recent Supreme Court decision, *Astrue v. Capato,* the Court ruled that children born after the death of a parent *via in vitro fertilization* could be entitled to Social Security benefits, but only if the deceased’s state allowed it. Social Security is a federal program that gives benefits to survivors of deceased individuals who have paid into the program. Children eligible to obtain benefits are generally described as those who are unmarried and under the age of eighteen.

Mr. Capato and his wife had his sperm frozen after he was diagnosed with cancer. His wife became pregnant naturally and the sperm was kept in a sperm bank. Capato later died of his cancer and his wife was inseminated nine months later, leading to the birth of twins eighteen months after Capato’s death. When Mrs. Capato applied for Social Security benefits for her twins, Social Security looked to state law for the definition of “child.” It was determined that the family was domiciled in Florida at the time of Mr. Capato’s death and that Florida law does not allow posthumously conceived children to qualify for inheritance if they were conceived after the death of the decedent and therefore, Capato’s children did not qualify for Social Security benefits.

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Social Security benefits to families of deceased employees were initially established to ensure that dependents were protected from hardship after the death of the wage earner. The Court in *Astrue* admitted that Social Security Administration deference to state law was reasonable and that the same deference would create different outcomes in different states and in different situations. This ruling means that if you live in a state, such as Massachusetts, that recognizes “children” born after the death of a parent, they are eligible to collect Social Security benefits. In other states, like Florida, that do not recognize posthumous children conceived after the death of a parent, such children would be ineligible for benefits. The Court often shows deference to an agency’s statutory interpretation when that interpretation has been deemed reasonable and when it is clear that Congress intended for the agency to make rules that should be followed as law. Therefore, the Court found that the Social Security Administration’s decision to look to state laws for guidance was one reasonable interpretation of the statute and should not be disturbed.

Several questions about fairness arise from this case. Is it fair that children in some states get benefits, while children in other states are barred from collecting? While federalism is embedded into the fabric of American society, should a federal benefit be unequally distributed based upon a state’s definition of “child”? If Congress decided to change the definition of “child” for the purpose of making Social Security benefits uniform, thereby including children conceived or implanted using in vitro fertilization after the death of one or both parents, the change could have unintended consequences. Such changes could affect abortion rights, inheritance rights and “family law” as we know it.
ARE DIFFERENT RESULTS IN EACH STATE ACCEPTABLE?

One of the most important things to consider moving forward from the Astrue decision is whether it is good for a federal law to produce varying results based on which state’s definition of child applies. To say that you will receive a federal benefit if you live in Illinois but will be denied that same federal benefit if you live in Florida looks fundamentally unfair. When it comes to federal programs, it seems that there should be one result: either all posthumous children receive benefits, or none do. Allowing for unequal results creates more cost to the system by forcing litigation to interpret ambiguous state statutes along with challenging which state a person is domiciled in at the time of their death or whether residency at time of death is the appropriate time frame for determining benefits. At a fundamental level, it is natural to think that a federal agency issuing benefits would operate from one set of rules that offer predictable outcomes in all states, no matter where a “father” or “mother” lives or dies.

STATE LAW ISSUES

Worker’s Compensation is a state-run program that functions similarly to Social Security. Each state has a unique set of laws governing the program, which invariably leads to different outcomes. Every state determines who can qualify as a beneficiary under Worker’s Compensation in the event of an employee’s death and what benefits children of the deceased are allowed. Variance by state could complicate claims for companies that operate in multiple states.

Illinois, Wisconsin, New York, and Florida have different definitions of “child,” leading to varying outcomes for posthumous children attempting to collect Worker’s Compensation benefits. In Illinois, “child” is defined as “a child whom the deceased employee left surviving, including a posthumous child, a legally adopted child, a child whom the deceased employee was legally obligated to support or a child to whom the deceased employee stood in loco parentis.” Illinois leaves open the possibility for implanted embryos to recover a Worker’s Compensation death benefit.

Wisconsin takes the opposite view. The Worker’s Compensation statute defines a Wisconsin child as “a child by their marriage or domestic partnership…who is living at the time of the death of the employee and who is likewise wholly dependent on the deceased employee for support.” There is no room in the statute to allow for posthumous children to collect money from their deceased parent. In fact, the statute describing what a “dependent” is ensures no posthumous child can receive benefits because it states that children must be living at the time of their parent’s death. This means that, in Wisconsin, a child born the day after the death of a parent would be unable to collect benefits because they were not “living” at the time of the parent’s death.

The New York legislature has taken a similar approach to Illinois by defining “child” to include posthumous children outright, with no qualifiers. This would almost certainly allow any child, even those born years after their parent’s death, to collect Worker’s Compensation benefits from the state. State definitions are important because they supposedly reflect the views of local residents. There is the potential for both federal law and state law to re-define their definitions of “child” to reflect advancements in science and fertility. State definitions of “child” are most important because they are what federal agencies defer to when benefits questions arise.

IMPACT ON EMPLOYERS AND INSurers

The Social Security Administration’s deference to state law in order to decide which posthumous children get benefits could potentially leave it open to equal protection discrimination claims because posthumous children would be treated differently in each state than would other natural children. An employee’s spouse could potentially say that an employer disagreed with their lifestyle and maliciously transferred the employee to a state that did not recognize posthumous children leading the Social Security Administration to unfairly deny benefits. Employers that operate in multiple states and have uniform benefits policies may subject employees and their families, in the rare event of a death on the job, to uncertainty because of the government’s policy of state deference interacting with company benefit programs. A surviving spouse could conceivably sue the employer for a “discriminatory transfer.”

For example, the child of a same sex couple who’s DNA does not come from the deceased employee may not be able to collect Social Security Insurance because the state may not recognize posthumous children. Even if the state did recognize posthumous children, there could be challenges as to whether a posthumous child not sharing the DNA of the deceased could still be considered a descendent since the child had not yet been adopted by the deceased.

An unreasonable result could also be imagined if a male employee is transferred from Illinois to Florida, his wife becomes pregnant and then he dies. Though the child was “contemplated” in Illinois, the child would be barred from collecting Social Security benefits in Florida. Had the employee not been transferred before his death, the posthumous child would have been entitled to benefits. A similarly unfair outcome could be imagined if a woman lives in one state, moves with her husband to another state and then is inamminated in a third state after the husband’s death. The courts would need to decide what criteria should be used to determine where the deceased employee was domiciled or resided.

CONCLUSION

The Social Security Administration’s deference to state intestacy law is problematic. Congress needs to fix the uncertainty by legislating and the Social Security Administration needs to create its own set of guidelines detailing who is entitled to Social Security benefits when the death of a sperm donor or egg donor occurs before the birth of a child. Either all posthumous children should be afforded benefits or none should because varying results are unreasonable. Re-defining “child” will not be easy and will have ramifications on inheritance, abortion rights, insurance issues and health law. In vitro fertilization is a scientific marvel, but the legal questions that it has raised, and will continue to raise in the future, are numerous and complicated.

1. 631 F. 3d 626.
2. 820 ILCS 305/7 (2012).
PREFERENCES IN A NUTSHELL

In an effort to achieve equality of treatment among similarly situated creditors, Section 547 of the Bankruptcy Code gives the debtor or trustee authority to avoid transfers or payments made by the debtor to a creditor within 90 days before the debtor’s bankruptcy petition date. Creditors who received comparatively more than their brethren are forced to disgorge pre-petition payments in exchange for a pro rata post-petition distribution to all creditors.

The Bankruptcy Code defines a preference as:

1. Any transfer of the debtor’s property;
2. To or for the benefit of a creditor;
3. For or on account of an antecedent debt owed by the debtor before such transfer was made;
4. Made while the debtor was insolvent;
5. Made on or within 90 days before the date of the filing of the petition; or between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;
6. That enables such creditor to receive more than such creditor would receive if the case were a case under Chapter 7 of the Code; the transfer had not been made; and such creditor received payment of such debt to the extent provided by the provisions of Title II of the code.

ONCE BITTEN, TWICE SHY

RESTRUCTURING PAYMENT OF PAST DUE ACCOUNTS TO AVOID BANKRUPTCY PREFERENCE LIABILITY

Lisa P. Sumner and Jill C. Walters Poyner Spruill LLP

“Let me get this straight: They filed bankruptcy owing us $250,000, and now they’re suing to recover the pittance they paid us just before they filed? Are you serious?!?!?” If you’ve ever found yourself yelling similar words to your attorney, or if you’re the attorney who held the phone at arm’s length until your client calmed down, then you probably wondered what could be done differently next time to avoid costly preference litigation. Given the rising number of bankruptcy filings since the “Great Recession” began and the attendant risk of preference claims, it’s more important than ever to understand the effect that a debt restructuring agreement with a potential debtor may have on preference exposure.
A typical preference is a payment made by an insolvent debtor to an unsecured creditor within the ninety-day preference period. The debtor or trustee ordinarily has two years after the petition date within which to file the preference “adversary proceeding” in bankruptcy court. In theory, the risk of preference liability discourages creditors from using aggressive collection tactics that might push their debtor into bankruptcy.

One of the most common statutory affirmative defenses to a preference action is the “ordinary course of business” defense. To succeed, the defending creditor must prove that:

- the debt was incurred in the ordinary course of business or financial affairs between the creditor and the debtor, and
- the payments made to the creditor in the ordinary course of business or financial affairs between the creditor and the debtor (“subjective test”) or the payments were made according to ordinary business terms (“objective test”).

The ordinary course of business defense is intended to protect recurring, customary trade transactions, not payments in the ordinary course of business or financial affairs between the creditor and the debtor (“subjective test”) or the payments were made according to ordinary business terms (“objective test”).

THE CREDITOR’S DILEMMA

Imagine that a customer is in financial distress and has fallen behind on payments due to a creditor, but the customer is not ready to enter bankruptcy. The creditor may be willing to continue providing goods or services to the customer on credit terms, but only if the customer enters an agreement to pay the past due balance in full or in part. The agreement will provide the customer with a longer term for repayment than originally contracted and induce the creditor to forbear a collection action. The customer may be asked to sign a promissory note payable to the creditor in the amount of the past due balance, and the creditor may insist on receiving a lien or guarantee to secure payment.

The question that arises in this situation is whether any of the payments made under the debt restructuring agreement could fall within the ordinary course of business defense and be insulated from preference recovery if the customer subsequently enters bankruptcy. In other words, is it worth the creditor’s effort to pursue and implement a debt restructuring agreement?

MAKING THE BEST OF A BAD SITUATION

While preference plaintiffs often argue that payments made on past due debt pursuant to a debt restructuring agreement are per se outside of the ordinary course of business, many courts have disagreed. The decisions tend to be fact-specific, and the applicability of the defense tends to turn on whether the terms of the debt restructuring agreement are ordinary when compared to the ways that other participants in the debtor’s and creditor’s industry have dealt with financial distress. The burden of proving whether the terms are “ordinary” rests with the creditor. For example, the Second Circuit remarked that “[i]t is not difficult to imagine circumstances where frequent debt rescheduling is ordinary and usual practice within an industry, and creditors operating in such an environment should have the same opportunity to assert the ordinary course of business exception.”

The Bankruptcy Code provides creditors with considerable latitude to establish what terms or practices are ordinary in the relevant industry. In fact, one particularly broadminded court stated that “[o]nly a transaction that is so unusual or uncommon ‘as to render it an aberration in the relevant industry,’ falls outside the broad range of terms encompassed by the meaning of ‘ordinary business terms.’”

Case law reveals numerous factors that courts are likely to consider when evaluating whether payments made under a debt restructuring agreement fall within the ordinary course of business defense. Creditors can use these factors to guide their negotiations and draft debt restructuring terms to their advantage. The factors include:

- Commonality of restructuring agreements in the particular industry.
- Typical terms of such agreements (including payment frequency, duration of repayment period and interest rate).
- Whether credit enhancements such as collateral or guarantees are commonly procured by creditors in the industry in conjunction with such agreements.
- Whether new debt instruments such as a promissory note were executed.
- Whether the parties actively negotiated the agreement.
- Whether the debtor provided value (e.g., a restructuring fee) in consideration for the agreement.
- Whether the creditor agreed to compromise the balance due in exchange for the agreement.

- Whether the creditor used unusual pressure or threats to compel the debtor to enter the agreement.
- Comparison to terms of restructuring agreements entered into by same creditor with other customers.

In addition, it is important to review any recent case law on restructuring agreements in the state or states where the customer might file for bankruptcy. Even though preference actions are governed by federal law, the prevailing attitude toward allowing payments under such agreements to qualify for the ordinary course of business defense varies by jurisdiction.

CONCLUSION

Accepting payments under a debt restructuring agreement with a financially distressed customer will leave an unsecured creditor with preference liability exposure if the customer subsequently enters bankruptcy. This risk can be mitigated, but never eliminated, by carefully tailoring the agreement to track closely the applicable industry’s customary terms and practices to the extent they can be identified, documented, and later proven. Most creditors would rather be paid now and live with the risk of potential disgorgement later, but savvy creditors will explore the optimal terms of repayment to minimize preference risk and structure their deals accordingly.

Lisa P. Sumner is a partner in the Raleigh office of Poyner Spruill LLP and leads the firm’s Creditors’ Rights and Bankruptcy practice group. She concentrates on representing secured and unsecured creditors with workouts of commercial debt, Chapter 11 bankruptcy claims, and related litigation. Lisa can be reached at lsumner@poynerspruill.com.

Jill C. Walters is an associate in the Raleigh office of Poyner Spruill LLP, where she advises clients regarding consumer and commercial collection and bankruptcy cases. Jill previously served as a staff attorney for the United States Bankruptcy Administrator in the Eastern District of North Carolina. She can be reached at jlwalters@poynerspruill.com.
As the 2010 census has shown, culture and language throughout the United States has been shifting away from an English-only environment at an increasing pace. Nearly 25 Million Americans are considered to have Limited English Proficiency (LEP), meaning they speak English less than “Very Well.” Among the most affected groups, the Hispanic community has seen a 43% growth over the past decade, accounting for 74% of total population growth within the United States. This leaves over 8 Million Hispanics, many of whom actively participate in the labor market, unable to communicate effectively.

An intensive analysis of the most recent reports released by the Bureau of Labor Statistics shows that many of the greatest increases in these numbers and percentages have occurred outside of the traditional border states of California, Arizona, Texas and Florida. With these factors in mind, Lawyers, Carriers and Claims Providers must be on alert for how increasing diversity will affect the Workers’ Compensation and Legal communities in the United States.

On March 17, 2011, the California Worker’s Compensation Appeals Board (WCAB) produced an En Banc decision on Jose Guitron vs. Santa Fe Extruders and State Compensation Insurance Fund (Case No.: ADJ 163338; LAO 0873468) that has created a tremendous amount of nervous chatter within the insurance community. This case amends the California Labor Code to state that, “… The employer is required to provide reasonably required interpreter services during medical treatment appointments for an injured worker who is unable to speak, understand, or communicate in English.” In short, the decision states that any treatment related to the industrial injury may require the adjuster to provide the injured worker with an interpreter.

With this in mind, it is important to note that 3iCorp.com’s independent review of trends in literacy and language proficiency have shown that the Hispanic community also composes the largest group scoring in the lowest category on literacy proficiency tests. Should a claimant not fully be able to read and comprehend the materials translated to their language,
Guitron points to the fact that these injured workers are deprived of necessary benefits should language services not be an integral part of their care and recovery. A case such as this is “of broad concern to the Workers’ Compensation community, and that the issue has not, until now, been addressed in a precedential decision.”

Language services had traditionally and informally been only used in the medical-legal arena. Adjusters have often authorized language services for litigated cases involving LEP injured workers for hearings, depositions and AME/QME medical-legal appointments, but not for general, medical treatment appointments. The Guitron ruling now requires adjusters to provide authorized language services to injured workers that state a need, or desire, for assistance in understanding the directions and instructions from all medical treatment providers (including doctors, physical therapists, chiropractors, acupuncturists, etc.) and formalizes “the rule (to) also include payment for interpreting services at depositions, hearings, conferences and arbitration.”

The Guitron decision sets an immense precedent for future rulings on similar issues. While currently confined to California, with the national shifting of demographics in all nationalities and cultures, similar case rulings are likely to spread across the United States.

In reaching the decision in Guitron, the WCAB judges include language services as an amendment to Labor Code section 4600, which requires employers to provide the reasonable amount of medical treatment to “cure or relieve the injured worker from the effects of their industrial injury.” The WCAB judges reasoned that an injured worker is only able to recover from these injuries and illnesses if they can truly understand and follow the directions given to them by their medical service providers.

Employers, insurance carriers, claims providers and legal professionals have been initially concerned that this ruling seems to uncontrollably increase the cost associated with the application of language services. However, Guitron addresses the fact that if the injured worker cannot understand the instructions of medical professionals, they are not likely to recover from their injury or illness, thus prolonging their duration of the claim by increasing litigation, lost time from work and other unnecessary increases associated with the cost of LEP claims.

Upon further analysis, although Guitron mandates a much broader use of language services than ever before, it also provides a number of stringent requirements for providers of language services. Giving stricter guidelines to protect carriers from abuse, the case points particularly to those that are assigned by applicant’s counsel in litigated cases.

Although conventional wisdom might have suggested that Guitron would provide a surge of business for language services firms, many Lienholders of language services are finding it increasingly difficult to have their bills paid or adjudicated in their favor. At a recent Northern California industry symposium, one WCAB Judge opined that the early indications from rulings since Guitron have shown that Lienholders are having increasing difficulty collecting, now having to prove all service-related detail in their bills.

Whereas prior bills and liens for language services may have been lacking in detail, Guitron sets forth the burden that, among other things, language services providers must prove:

1. that the services provided were reasonably required
2. that the services were actually provided
3. that the interpreter was qualified to provide the services
4. that the fees charged were reasonable (further broken down by element)
   a. Hourly rate stated
   b. Amount of time spent interpreting
   c. Travel charges clearly listed and substantiated
   d. Any other additional charges listed and substantiated

While the decision establishes the requirement for Employers, Carriers, and Claims Administrators to provide language services as part of medical treatment, it is unfortunately, mostly silent on the items of what constitutes “reasonableness” in provision of service or to give a true “market rate” value. However, the ruling does voice a strong preference towards “preauthorization” and “pre-negotiation” of both terms.

In response to the confusion, there is a movement afoot within California to consolidate and define all of the payment issues related to language services, as well as to rapidly adjudicate the overwhelming burden of language service liens that are currently clogging many WCAB regional offices. This proposition has caused a rift between many occupational language service providers and the insurance provider firms with contention as to what constitutes fair payment practices.

In response and preparation for the impending revisions to Workers’ Compensation guidelines, Employers, Carriers, and Claims Providers should establish a working relationship with reliable and trustworthy language services firms, establishing agreements for reimbursement rates, as well as authorization protocols.

Proactive carriers who recognize the significant impact of this case will have an advantage when the effects of this decision, and others like it to come, weave their way into future underwriting decisions. Legal professionals must have a full understanding of their LEP claimant’s rights to language services to ensure that the claimant is receiving adequate care and instruction from their medical providers to expedite the recovery process.

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5 Jose Guitron vs. Santa Fe Extruders; and State Compensation Insurance Fund, (Calif. WCAB 2011.). p. 6.
6 Jose Guitron vs. Santa Fe Extruders; and State Compensation Insurance Fund, (Calif. WCAB 2011.). p. 8.
At the heart of nearly every insurance loss or legal dispute, large or small, is a failure of some kind. Sometimes the failure is human, the result of one or more decisions that lead directly to the loss. Other times, the failures are literal, and result from decisions made prior to the loss. They can be failures to use an item or part correctly, failures to install a part correctly, failures to manufacture them correctly, or even failures to design them correctly. On the other hand, it could be that the component is perfectly suited for its intended purpose, but it has been used for another purpose for which it is not well suited. Oftentimes, a failure is a literal one, and parts of a system are broken, bent, cracked or degraded so that their intended function can no longer be fulfilled. In these cases, materials science is a tool that may shed light on the cause.

Materials science is a discipline which sometimes seems mysterious, with a specialized jargon that consists of common words applied to new concepts, such as “grain boundary,” “dislocation,” “band gap,” or “inclusion” (which have nothing to do with wheat, shoulder injuries, missing musicians, or social harmony), and unique words like “eutectic” or “martensite.” The language is specialized enough that even other engineers often think that their materials brethren, the metallurgists, ceramists, and polymer scientists, are speaking a different language. Ask a materials scientist or materials engineer why your tile counter top cracked when you put a hot pan on it and you’re likely to get a long explanation involving sintering, voids, and their impact on thermal conductivity. Ask why a rope failed

THE MATERIAL IMPACT OF MATERIALS

Nicholas Biery, Ph.D., P.E.  S-E-A, Ltd.
and you might get a discussion of common antioxidants and anti-UV agents in plastic fibers. But such obscure knowledge can be of great use when it comes to understanding the cause of a failure.

Materials science can be summarized in many ways, but one (relatively) simple definition is that it is the study of the relationship between the structure and composition of materials and the resulting properties and performance. It also encompasses the methods used to impart or modify the structure and thus the properties, the art and science of turning raw ingredients into the useful metals, plastics, and other engineering materials that are used throughout our modern world. It is the study of how and why things are put together, from the atoms in them to the glue or welds used for final assembly.

This is not to say that the materials scientist is the ultimate expert, able to address every aspect of every case where something is broken, bent, cracked or degraded. There are times where the cause of failure is clear and unambiguous, and there are times where understanding the failure mechanism is a small aspect of a large case. Caution is necessary, however. Without understanding the why and how of a failure, it is possible (and unfortunately quite common) that a component that failed as a result of an incident is interpreted as a cause. An example is a broken bolt in a motorcycle steering mechanism. The injured driver is quite likely to attribute his accident to the failure of the bolt. A materials scientist can tell you by looking at the fracture whether it was caused by years of cyclic stresses, or by hitting an obstacle at high speed. Testing may reveal whether or not it met the manufacturer’s specifications for performance. Armed with this knowledge, liability may be directed at the designer, the manufacturer, the supplier, or the user. Similar questions arise in many accidents, where the failure mode of a component, and an investigation of its properties, can determine whether it was the cause of the accident or a casualty.

Materials experts spend much of their time using microscopes, studying the fine details of fractured and broken things, using specialized tests to determine what was used to make them and how, and if there might have been some unfortunate additions to or omissions from the recipe. Established scientific methodologies enable the materials expert to examine a failed rope and determine whether the fibers were cut or broke under tension, whether it was abraded or failed due to a chemical exposure. Laboratory testing can determine the type of fiber used in the rope, as well as give an indication of how weathered it is. The same is true of broken pipes and broken welds, collapsed towers and leaking vessels—a study of the failure can tell us what caused it and oftentimes when it occurred. Testing may also indicate if the fractured component was made properly or not. If a steam pipe splits along a seam weld, a study of the fracture can determine whether it failed because it was improperly made, because it was over-pressured, or because it was exposed to a chemical that degraded it. It may also reveal if a defect in the weld should have been detected during the manufacturer’s inspection, or if it started out too small to see and grew in the field. Similarly, through appropriate testing, a materials expert may be able to ascertain if a plastic fitting fractured due to a chemical exposure or due to improper installation, whether a stainless steel connector in a fuel system failed due to the use of off-spec steel or exposure to road salt.

In addition to the straightforward analysis of failed parts, materials science also comes in handy when investigating the more unusual cases. Why is the paint on this house peeling while the paint on the neighboring house is fine? Is it because there is a problem with the paint, or because it was washed with the wrong cleaner? Why do we see cracking in this lot of hose connectors when we didn’t see it in the last, even though both meet the material specifications? Was it because they were made incorrectly, or were they exposed to something during shipping? Why is this shipment of silver plated picture frames turning purple, when the last one was fine? Is it the lacquer used to seal the plating, or the omission of a rhodium layer on top of the silver? Questions such as these often are not asked, yet can easily be answered by materials experts. And the answers can have significant dollar amounts tied to them.

So how do you know that you need a materials expert in your case? It would be easy (and self-serving) to imply that you always need one if something is broken, bent cracked or degraded (corroded), but there will be times when you may not. If you have a materials expert you trust, it is certainly worth a few minutes of your time to ask them what they can tell you, to discuss how and why it might be important for your case. If not, you can ask yourself a few questions to get pointed in the right direction.

If understanding the why, how, and when of a failure would enable you to validate one theory of the case and invalidate others, then you should call a materials expert. Their expertise could be the key to your case; engaging the materials expert as early as feasible is best to ensure that the evidence is preserved properly and that the right testing is done. If it is already well known that a part was grossly corroded, leaking, and marked for replacement, you may not need a materials expert to tell you why it failed. Alternatively, you may want one to help you determine if the system designer, the system maintainer or another party is liable for the corrosion. If your mechanical engineer tells you that the loads were several times the strength of the material, you probably don’t need to know the details, and likely don’t need your materials expert to confirm that the fractured part was overloaded.

When should you avoid calling a materials expert? The easy answer is never since everything is made from a material; if a product has failed in any fashion it is usually a materials issue. However, there may be other engineering aspects to the failure that need to be considered. A reliable materials scientist or engineer will direct you to that discipline. Since materials are such a pervasive aspect of our world and because the materials discipline touches so many of the other engineering disciplines, a good place to start your inquiry is with a materials scientist or engineer. If you have a materials expert whom you trust, you should feel confident that they will direct you elsewhere if they cannot help you. There are cases, however, where you may want to call another expert first. If the system is complex, then the first engineer you talk to should understand the system—it’s a mechanical issue or involves piping, speak with a mechanical or chemical engineer; if it’s a building, talk to a structural engineer; if it’s an electrical system, talk to an electrical engineer. Of course, there are materials experts who are going to know each of these systems, but not every materials engineer is going to understand every system. Once you hire an expert who understands the system, they will be able to advise if and when it is time to bring in a materials expert.

Dr. Nicholas Biery earned degrees in Materials Science & Engineering from the University of Tennessee (BS) and Carnegie Mellon University (MS and PhD). After school, he joined the ExxonMobil Upstream Research Company where he worked for seven years on cryogenic steels, high-strength pipelines, and other projects. Since joining S-E-A, Ltd. in 2008, he conducts failure analyses and testing for metal, composite, ceramic, and plastic components.
THE LAW GOVERNING APPRAISALS IN CALIFORNIA AND OTHER STATES:

Fire Insurance policies have long been required to use standard policy provisions. They provide that, when the insured and insurer fail to agree as to the actual cash value or amount of a loss, they must participate in an appraisal. Each party selects a competent and disinterested appraiser, who together select (or the court appoints) a competent and disinterested umpire. The party-appraisers appraise the loss and, in the event of disagreement, submit their differences to the umpire. Courts have enforced appraisal clauses in fire insurance policies for a hundred and twenty five years. (See Old Saucelito Land & Dry Dock Co. v. The Commercial Union Assurance Co., 66 Cal. 253 (1884).)

Code of Civil Procedure § 1280, which governs the conduct of arbitrations, provides that agreements to arbitrate include valuations and appraisals. (Coopers & Lybrand v. Schwartz, 212 Cal.App.3d 524, 534 (1989).) An appraisal is an arbitration and, prior to 2001, appraisals were subject to arbitration provisions regarding subpoenas, depositions, and document discovery. A court reporter could transcribe testimony.

As a result, the procedures governing appraisals have been significantly changed and adjusters and defense counsel should change their practices accordingly.

THE “APPRAISAL CLUB”:

The name “Appraisal Club” was coined by this author to describe a group who have formed a clique to dominate appraisal procedures in California and other states. Some Appraisal Club members were drawn to California by the Northridge earthquake. The legislature was persuaded to extend the limitations on claims arising out of that 1994 event, and litigation of claims continued five years into the 21st Century. Appraisal Club members can be identified by their disclosure statements. He will have alternately served as an appraiser, umpire, or expert in hundreds of appraisals with other members in the alternate positions. If he is a party-appraiser, he names another club member as umpire or calls them to testify as experts – thereby insuring members full employment. These “experts,” who have no personal knowledge of the loss, argue the award must be based on pricing provided by the “unchallengeable” computer program, Xactimate, even though an item can clearly be replaced for less than that set by Xactimate personnel in Orem, Utah. (Xactimate is a widely used efficient program; but “garbage in, garbage out” applies to any computer program.) Appraisers are to fix the amount of loss based on their own skill and expertise – not that of a computer program.
THE EXPANDING AND EVOLVING CLAIM:

Appraisals conducted by Appraisal Club members expand during the process. New claims appear. Why? Because the Adjuster failed to pin down the extent of the claimed loss prior to the appraisal. When an Appraisal Club member values a simple claim for interior water damage, a need for extensive emergency services, code upgrades, additional living expenses, and loss of income is triggered. They argue that, under Kacher v. Allstate Ins. Co., 140 Cal.App.4th 1025 (2006) the appraisers must value all the insured's claimed damages and accept the insured's description of the quality and quantity of damaged items. A $150,000 claim, evolves to $450,000; and, when a $300,000 award is made, the appraiser claims he saved the insurer a lot of money.

What can be done to prevent an expanding claim? First, obtain a Proof of Loss and the insured’s definitive estimate of the claim prior to appraisal submission. Don’t allow the insured to submit several estimates without identifying which one constitutes the claim. An insurer’s appraisal demand should clearly state the extent of the dispute. Seek an umpire ruling that new estimates and evidence may not be submitted during appraisal. Make sure photographs are digitally dated.

APPRAISE THE ENTIRE LOSS:

What about line items the Adjuster agreed to pay before the appraisal? Insureds argue the right to dispute value of items the insurer agreed to pay is waived. Contractors' bids are higher on small projects. The fair market value of a portion of a loss is extremely difficult to accurately determine.

Policy provisions require appraisers to “appraise the loss.” They do not contemplate appraising only the disputed portions.

APPRAISAL SCOPE IS LIMITED TO DETERMINING THE VALUE OF A LOSS:

An arbitration encompasses questions of fact and law; but appraisers only have power to determine questions of fact, namely the actual cash value and replacement cost of the claimed loss. (Jefferson Ins. Co. v. Superior Court, 5 Cal.3d 398 (1970).) Appraisals are not designed to resolve issues of coverage or causation, and insurers should ask themselves, “Is this really a dispute over value?” In a dispute over value, the Adjuster believes the insured inflated the loss and the insured believes the Adjuster is “low-balling” it. The line between over-valuing, under-valuing and fraud and “bad faith” is fine.

APPRAISAL IS NOT THE PLACE TO CONFIRM SUSPICIONS OF FRAUD:

The fact that a fraudulent claim should not be submitted to appraisal is heightened by the 2001 changes emphasizing informality, eliminating discovery and prohibiting court reporters. The insured may tell lies to explain questionable aspects of the claim, and there is no record of the falsehoods. As stated in Safeco Ins. Co. v. Sharma, 160 Cal.App.3d 1066, 1066 (1984):

“When an insurer disputes an insured’s description in identification of the lost or destroyed property, it necessarily claims the insured misrepresented – whether innocently or intentionally – the character of the loss… this claim opens the door to allegations of fraud. Were an insurer permitted to include the former issue within the scope of an appraisal, a determination in the insurer’s favor would foreclose a court from determining… fraud in any subsequent litigation.”

Appraisal Club members expand Sharma to mean appraisers must accept every claim an insured makes regarding the loss. But, Sharma involved a claim that stolen paintings were a matched set. Appraisers did not have access to them to make that determination. Sharma does not mean that appraisers must accept the insured’s claims about the condition and quality of items when the items involved are available to view.

ISSUES OF FRAUD AND COVERAGE SHOULD BE RESOLVED PRIOR TO APPRAISAL:

The Court of Appeal recently held in Kirkwood v. California State Automobile Association Inter-Insurance Bureau, 193 Cal.App.4th 49, 63 (2011) that an appraisal was properly deferred until the insured obtained a court declaration as to whether the insurer improperly applied blanket depreciation based on the item’s age without regard to condition. The Kirkwood court said, “judicial economy favors resort to declaratory relief” as to questions of coverage before appraisal. It “heads off duplicative future actions.” Kirkwood equally supports an insurer’s request to defer appraisal until coverage and fraud issues are determined.

THE IMPORTANCE OF THE LANGUAGE OF THE AWARD:

Devonwood Condominium Owners Ass’n v. Farmers Ins. Exchange, 162 Cal.App.4th 1498 (2008) illustrates the importance of the language of an award when coverage is in dispute. An appraisal panel’s authority is limited to the amount of a loss, coverage is left to the court. The dilemma for the appraisal panel is how to resolve valuation issues without imposing on the court’s authority to determine coverage. The Devonwood appraisal was complicated by Farmers’ claim it did not cover interior painting, while the association maintained it did. The appraisers set forth two categories of replacement cost – one exclusive of interior painting and one for the painting, stating the award was made without consideration of any coverage or other policy provision which might affect the insurer’s liability. The court confirmed the award and entered a money judgment for the combined value of the two categories. The court of appeal reversed, holding the money judgment did not conform with the appraisal award and the court lacked authority to enter it. The appraisers expressly acknowledged they were not resolving coverage questions, and, without a determination of coverage, the money judgment was invalid.

IN CONCLUSION:

• Deny claims that are clearly not covered.
• If a claim is suspect, have the insured examined under oath.
• Don’t use appraisals to determine coverage or prove fraud.
• Seek deferral of appraisal until a judicial determination of coverage and/or fraud is obtained.
• Establish the extent and scope of the claim before an appraisal, and define values in dispute.
• Look carefully at your party-appointed appraiser’s affiliations and disclosure statement.
• Obtain an itemized award that identifies the value assigned to disputed line items and contains the appraiser’s disclaimer of consideration of coverage and pertinent issues.

Carolyn A. Mathews is an Associate Partner in the Los Angeles office of Murchison & Cumming, LLP. A member of the firm’s Insurance Law practice group, Ms. Mathews focuses on first and third party insurance coverage claims and litigation involving complex coverage issues and evolving areas of the law.
Carr Allison (Birmingham, AL)
Carl K. Dowdey, III, attorney with Carr Allison and Lieutenant Colonel in the U.S. Army Reserves, was recently assigned as the Chief of Administrative Law and Boards with the 87th U.S. Army Reserve Support Command (East). Prior to his current assignment, Dowdey held the position of Staff Judge Advocate at the Deployment Support Command which provides transportation and logistical support for deployed soldiers overseas. Following graduation from Cumberland School of Law, Dowdey was commissioned as a First Lieutenant and served in Germany and at Fort Rucker, Alabama. After serving on active duty for four years, he entered the Reserves where he has been serving for nearly a decade.

Dillingham & Murphy, LLP (San Francisco, CA)
In August 2012, Barbara L. Harris Chiang of Dillingham & Murphy was elected to the board of directors of the National Conference of Women’s Bar Associations (the “NCWBA”). NCWBA is a national organization of women’s bar associations representing approximately 35,000 women in the United States and Canada. It provides a national forum for the exchange of ideas and information vital to women professionals and women’s bar associations. The NCWBA promotes the advancement of women in society and the administration of justice and serves as a vehicle for the exchange and dissemination of information and ideas among women’s bar associations.

Gallagher, Callahan & Gartrell, P.C. (Concord, NH)
Charles P. Bauer of New Hampshire USLAW firm Gallagher, Callahan & Gartrell, P.C. has been inducted as a Fellow into the American College of Civil Trial Mediators (ACCTM) and as a Member into the National Academy of Distinguished Neutrals (NADN). Charlie is the only ACCTM Fellow in New Hampshire and one of just six NADN Members in the State.

Goldberg Segalla LLP (Buffalo, NY)
Goldberg Segalla was honored to receive the Minority Corporate Counsel Association’s George B. Vashon Innovator Award for the category of Pipeline Initiatives. The Innovator Awards are given annually to in-house legal departments, law firms, and bar associations that have led the way with innovative best practices to assist diverse attorneys. Goldberg Segalla was recognized for its Diversity Internship Program, which was developed by partner Joseph M. Hanna in collaboration with the Minority Bar Association of Western New York and the University at Buffalo Law School, to provide opportunities for minority UB Law students to gain first-hand experience in the legal system. It provides participants with an in-depth look at the legal process and the interaction between the bench and the bar that they would not otherwise get, along with the development of important legal research, writing, case management, and client service skills critical to their long-term success. So far, the program has placed more than 50 students in clerkships in Western New York courts as well as in several area law firms, with more judges and law firms asking to participate every day.

Picado Sneath Miller & Norton, P.C. (Pittsburgh, PA)
Kelly A. Williams of Picado Sneath Miller & Norton, P.C. in Pittsburgh, Pennsylvania was recently nominated to become a Fellow of the Allegheny County Bar Foundation. Created in 1996, the Allegheny County Bar Foundation Fellows Program was established as a formal means to honor attorneys who have shown a commitment to excellence in charitable, community, professional, and/or public service activities. The Fellows Program allows the Allegheny County Bar Foundation to enhance the delivery of pro bono legal services to low-income clients in Allegheny County, Pennsylvania.

Quattlebaum, Grooms, Tall & Burrow PLLC (Little Rock, AR)
Kristine G. Baker, a Managing Member at Quattlebaum, Grooms, Tall & Burrow PLLC, was appointed to the United States District Court for the Eastern District of Arkansas. Hon. Baker is the second partner of the law firm to be appointed to the federal bench since the firm’s founding in 2000.

Richardson, Whitman, Large & Badger (Portland, ME)
John B. Lucy, a partner in the Maine USLAW firm, Richardson, Whitman, Large & Badger, has been nominated to be a judge on the Maine District Court. The Legislature will meet regarding his nomination in early September.

Wicker Smith O’Hara McCoy and Ford P.A. (Miami, FL)
Richards H. Ford, Managing Partner with the Orlando, FL office of USLAW member Wicker Smith O’Hara McCoy and Ford P.A., was recently inducted as a Board Certified Civil Pretrial Practice Advocate by the National Board of Legal Specialty Certification (NBLSB). The Civil Pretrial Practice Advocacy is the newest division of the NBLSB, as well as the first and only national certification that recognizes proficiency in handling contested civil matters that do not go to trial. Civil Pretrial Practice includes the preparatory steps for all disputes before a tribunal, including litigation proceedings from inception through discovery, pretrial motions and hearings, and alternative dispute resolution procedures. Board Certification is a rigorous testing and approval process that officially recognizes the extensive education and courtroom experience of the attorney.
Successful Recent USLAW Law Firm Verdicts

Ahmuty, Demers & McManus (Albertson, NY)
Brian J. Donnelly of Ahmuty, Demers & McManus obtained a defense verdict in the matter of Reimold v. Coinmach after a trial in Supreme Court, Queens County. The plaintiff was a 62 year old woman who slipped and fell on water emanating from the laundry room in her apartment building. She sued the owner of the building, the managing agent, and our client, Coinmach, who supplied all the equipment for the laundry room, washers, dryers and a drainage pit from which it was argued the water backed up. The plaintiff sustained a wrist fracture and a knee injury which ultimately led to a total knee replacement. ADM argued that Coinmach’s weekly inspection the day before the accident revealed no issue with the drainage in the laundry room and that the building owner was responsible for drainage issues. The jury found the building owner and managing agent 100% at fault.

Cox Smith Matthews Incorporated (San Antonio, TX)
Cox Smith Matthews announced that Bankruptcy Judge Ronald King of the United States Bankruptcy Court for the Western District of Texas has entered a $16 million judgment for Cox Smith client Reorganized TXCO Resources, Inc. (“RTXCO”), in one of the earliest complex litigation matters arising out of the Eagle Ford development in South Texas. RTXCO is the successor entity to TXCO Resources, Inc. and affiliated entities (“TXCO”), which was a publicly traded oil and gas exploration and production company that filed a voluntary Chapter 11 case on May 17, 2009. Cox Smith served as TXCO’s debtors’ counsel. Prior to confirmation of its bankruptcy plan, TXCO agreed to sell many of its oil and gas assets to Newfield Exploration Company, headquartered in Houston, Texas, and also a client of Cox Smith. In February 2010, the plan became effective and RTXCO emerged from Chapter 11. Newfield is the only shareholder of record in RTXCO and the sole beneficiary of the Liquidating Trust. In November 2009 and prior to its bankruptcy confirmation, TXCO filed suit against Peregrine Petroleum. TXCO alleged Peregrine Petroleum misappropriated trade secrets from TXCO in breach of the terms of a confidentiality agreement and used that information to acquire oil and gas leases in the Maverick Basin of South Texas. The trial, which took place in the U.S. Bankruptcy Court for the Western District of Texas (San Antonio Division) began May 31, 2011 and lasted until September 2011. Cox Smith shareholder James “Marty” Truss headed up the energy litigation trial team for RTXCO.

Fee, Smith & Vitullo, L.L.P. (Dallas, TX)
Partners Mike Sharp and Clint Cox of Fee, Smith, Sharp & Vitullo received a trucking defense verdict in Dallas’ 44th Civil District Court. Plaintiffs Robert and Rebecca Fuller sought over $99M in past/future damages against Defendants Genuine Parts Company (NAPA Auto Parts) and their driver Carmen Mooreman. Plaintiffs argued the Defendants were grossly negligent in the operation of an 18-wheeler that struck Plaintiff Rebecca Fuller in February 2008, causing catastrophic brain and bodily injury. Plaintiffs presented testimony as to liability and damages, through five experts, seeking a life care plan in excess of $2.4MM. With only one dissenting juror, the verdict placed 100% of the negligence on Plaintiff Rebecca Fuller, thereby denying the Plaintiffs any recovery.

Goldberg Segalla LLP (Buffalo, NY)
Goldberg Segalla gained the dismissal with prejudice of a putative class action lawsuit brought against a product manufacturer in the U.S. District Court for the Eastern District of Pennsylvania. Cheryl A. Possenti and John P. Freedenberg led the team on this case. The plaintiff brought vague allegations that portable electric products manufactured by our client following two previously conducted voluntary recalls still contained the alleged design defect that led to the recalls. She brought nonspecific claims under state consumer-fraud statutes as well as for breach of express warranty, breach of the implied warranty of merchantability, and unjust enrichment. The plaintiff’s complaint alleged damages in excess of $5 million in order to obtain federal jurisdiction under the Class Action Fairness Act; in all, the potential damages alleged could have totaled over $200 million for the replacement cost of more than 10 million products. We successfully demonstrated to the federal judge that the plaintiff’s allegations were without merit and, particularly, her nonspecific allegations of design defect and other claims were insufficient to bring such claims under consumer-fraud statutes. On April 10, 2012, the court granted our team’s motion to dismiss the plaintiff’s claims on all counts, and subsequently the court dismissed the case with prejudice, ending the matter for our client.

Hall Booth Smith & Slover, P.C. (Atlanta, GA)
John E. Hall, Jr., along with his law partner, Heather S. Ware, of USLAW Georgia firm Hall Booth Smith & Slover received a defense verdict in a case in Fulton County, GA. The case involved allegations of a missed rectal cancer on a CT scan. Mr. Hall’s defendant radiologist read the scan as normal in November 2005.
The patient had another CT scan for additional symptoms in September of 2006 and cancer was found in the rectum and chest. Plaintiffs contend it was visible in the November 2005 scan. Plaintiffs brought in Dr. Arnold Friedman of California as their expert. The defense had Dr. Leslie Quint of Michigan. The defense used “Where is Waldo” cartoon to show once you know where Waldo is, then it is easy to see him. The defense contended Dr. Friedman did a retrospective review, knowing where the cancer was from a later colonoscopy and called it on the CT scan, even though the standard of care suspicious factors were not there. The defense contended that there are certain factors that must be present to report a suspicious mass. Using an aspirational safety rule, the plaintiffs contended that if you cannot completely rule out cancer as a radiologist you must suggest follow up test. HBSS noted that cancer can never be completely ruled out in the rectum in a CT scan and this was a ridiculous standard unrelated to the standard of care. Plaintiff asked the jury for $7M at closing. The jury was out under two hours and indicated that it was 12-0 for the defense on standard of care from the start, they just wanted to be thorough in reviewing the records.

Jones, Skelton & Hochuli, PLC (Phoenix, AZ)
Kevin Neal and Erin Richardson, attorneys at Jones, Skelton & Hochuli, PLC, in Phoenix, Arizona, recently earned a defense verdict in a premises liability case on behalf of Twisted Tree Farm. Plaintiff Jill Newham, who was thirty-seven at the time of the accident, alleged that during a riding lesson at Defendants Larry and Janet Hischer’s Twisted Tree Farm she was thrown from a horse, resulting in an alleged head injury, traumatic brain damage, and harm to her marriage, business, and her quality of life. Plaintiff claimed that Defendants were negligent for having failed to force Plaintiff to wear a helmet during her lesson. To prove her claim, Plaintiff called David D. Johnson, an equine expert, who opined that all riders should wear a helmet anytime they ride a horse, regardless of their age or of the particular equestrian activity. Defendants argued in response that the facts showed Plaintiff was not thrown from the horse; rather, Plaintiff lost her balance and slid off the side of the horse, landing on her buttock and shoulder. An adult rider, Plaintiff was not required by any law or industry standard to wear a helmet during her riding lesson. Plaintiff requested just and reasonable compensatory damages, $38,000 in past medical expenses; $500,000 in future medical expenses; and $1,400,000 in future lost earnings. Plaintiff had also made a $950,000 offer of judgment before trial, and Defendants had made a $10,000 offer of judgment. During his closing argument, Plaintiff’s counsel asked the jury to award Plaintiff between $2 million and $4 million, while Defense counsel, Kevin Neal, demonstrated that Plaintiff had failed to prove liability and damages. She was therefore not entitled to recover anything. After about an hour of deliberation, the jury unanimously found for the Defense.

Murchison & Cumming, LLP (Los Angeles, CA)
William T. DelHagen, Paul R. Flaherty and Adrian J. Barrio, of Murchison & Cumming, LLP successfully represented the City of Moreno Valley and one of its employees, Mosallam Almasri, in a personal injury action brought by the employee of independent contractor Riverside Construction Company. The city hired Riverside to perform storm drain improvements and street lane widening. The plaintiff, the superintendent of construction for Riverside, suffered debilitating injuries when he was struck by a truck operated by Cesar Rosales, an employee of the defendant and cross-complainant Pipeline Carriers, Inc. At the time of the accident, the plaintiff was standing in the middle of the street, engaged in the task of performing pre-construction measurements. Mr. Almasri was on the scene at the time of the accident, but he did not direct the plaintiff’s activities in any way and was essentially an onlooker. The plaintiff argued that the city and Mr. Almasri failed to ensure that Riverside and its employees, including the plaintiff, complied with applicable Cal-OSHA regulations pertaining to traffic control at or near the job site. The Superior Court for the County of San Bernardino granted the city and Mr. Almasri’s Motion for Summary Judgment on the basis of the “Privette” doctrine and the California Supreme Court’s recent decision in Seabright v. US Airways, Inc., 52 Cal.4th 590 (2011). The court found that, under Seabright, neither the city nor Mr. Almasri owed the plaintiff a duty of care to ensure workplace safety. The court noted that, by hiring an independent contractor, the city implicitly delegated to the contractor any tort law duty it owed to the contractor’s employee, the plaintiff, to ensure workplace safety. That implicit delegation included any tort law duty the city owed to the plaintiff to comply with applicable statutory or regulatory safety requirements. In addition, the court found that the city did not “affirmatively contribute” to the plain-
Poyner Spruill LLP (Raleigh, NC)

RBC Bank (USA) was the victim of a sophisticated mortgage fraud scheme in 2008 perpetrated by a large conspiracy involving realtors, mortgage brokers, developers and 2 rogue bank employees in Myrtle Beach, South Carolina. The scheme involved the purchase of residential properties at highly inflated values by straw-buyers. Brokers submitted fraudulent loan applications, including false or forged financial documents, to procure loans from the bank. The brokers obtained inflated appraisals, which valued properties at substantially more than fair market value. Sellers agreed to pay kickbacks to the co-conspirators (often including the buyer and the broker), either at closing through fraudulent payments on the HUD-1 or after closing out of the loan proceeds. All of the loans went into default very shortly after closing, and the bank lost at least $11.6M on 24 transactions. Poyner Spruill, through the efforts of lead partner David Dreifus and assisted by Thomas L. “Tate” Ogburn, worked closely with Royal Bank of Canada’s internal fraud investigation team in a forensic analysis of the transactions to trace the flow of funds to establish the pattern of fraud and to identify the participants in the scheme, which was often difficult to determine from the face of the transaction documents. PS led the recovery effort against the bank’s fidelity bond insurer, as well as filing 3 separate lawsuits against closing attorneys, appraisers, and the mortgage brokers, sellers and other participants in the scheme. To date, a substantial portion of the bank’s losses have been recovered, and actions are continuing against some of the participants.

Rothgerber Johnson & Lyons LLP (Denver, CO)

In 2011 Rothgerber Johnson & Lyons was asked to serve as defense counsel for a company very late in the litigation process – in fact, several years after the case commenced. Over 150 plaintiffs - former residents of an apartment complex - sued the firm’s client, the complex owner, for alleged exposure to asbestos loosened during large-scale renovations of the complex. Trial was months away with no meaningful discovery had been taken. This case made the newswires when the state health department evacuated the entire complex because of the potential asbestos exposure. The plaintiffs’ settlement demand was roughly $40 million. Over the course of about six months, lead attorneys, Michael Plachy and Douglas Tuminello, along with their team, deposed virtually all of the plaintiffs – sometimes up to three depositions a day. The firm ultimately filed a variety of motions for summary judgment, and mediated the case while those motions were pending. By the time mediation rolled around the plaintiffs had dropped their settlement demand to less than 20% of what they originally were asking, largely because of a number of adverse rulings by the court. Mediation was unsuccessful, and the case was weeks away from trial when the court entered summary judgment in the firm’s favor and dismissed all claims against their client.

Wicker Smith O’Hara McCoy & Ford P.A. (Miami, FL)

Amy Millan DeMartino of the West Palm Beach office of Wicker Smith O’Hara McCoy & Ford P.A. successfully obtained a defense verdict on behalf of QBE Insurance Corporation in a first-party breach of contract action seeking damages in excess of $5 million for additional property damage allegedly caused by Hurricane Wilma. The Plaintiff provided its first notice of loss following Wilma. After receiving notice of the loss, QBE evaluated the Plaintiff’s claim and issued payment of $125,312.99, after application of the $270,818 hurricane deductible. Plaintiff had no further communication with QBE until the lawsuit filed on October 15, 2010, almost five (5) years after Wilma. The case was tried in the United States District Court for the Southern District of Florida in the Miami Division for six (6) days and the jury returned a verdict in favor of QBE. The jury found that QBE had not breached the insurance agreement.

Successful Recent USLAW Firm Transactions

Connell Foley LLP received long-time USLAW supporter, ABC Bus Companies, Inc., in connection with its opening of a facility in Jersey City, New Jersey. Connell Foley corporate partner, John Cromie, handled the acquisition by ABC Bus Companies of the stock of Hudson Body Company, a bus repair and service business and negotiation of a long-term lease with seller’s affiliate for the New Jersey site. Connell Foley real estate and land use partner, Charles Harrington, also successfully obtained approval from the zoning and planning officials in Jersey City to permit ABC Bus to expand their newly-acquired Jersey City location.

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

Steven W. Quattlebaum and Kristine G. Baker of Quattlebaum, Grooms, Tull & Burrow PLLC, represented Hortica-Florists’ Mutual Insurance Company (“Hortica”) in a declaratory judgment action seeking declaration of its contractual obligations to defend and indemnify Pittman Nursery Corporation (“PNC”) in a number of lawsuits for which PNC sought coverage. While the court ruled on summary judgment that Hortica had a duty to defend PNC in the lawsuits, PNC’s counterclaim against Hortica for negligence, bad faith, and breach of contract proceeded to trial in October 2011. After three days of testimony, the jury unanimously found that Hortica did not breach its contract with PNC but found that Hortica was negligent and acted in bad faith in the handling of PNC’s insurance claims, awarding PNC $1,350,000. On January 10, 2012, the trial court granted Hortica’s Motion for Judgment as a Matter of Law finding that there was no legally sufficient basis to support the claims of negligence and bad faith and that the jury’s verdict was unsupported by substantial evidence.

SmithAmundsen LLC (Chicago, IL)

Eric Samore and Molly Arranz of USLAW Illinois firm SmithAmundsen obtained an order from the Illinois Supreme Court vacating the judgment of the Appellate Court denying the defendant’s petition for leave, with direction that the court address the merits of the petition. The primary issue raised in the defendant’s petition in USECO Industries v. Poolman, No. 115620, concerned defining the bar that class counsel must clear in order to satisfy the adequacy prong for class certification under Illinois law.
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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 and efficiently to client needs from Atlantic City to Pacific Grove was born. In its infancy, it was little more than a possibility, 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 real.

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

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Tom Groom
Vice President
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Phone: (585) 512-3788
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Robert Ackerman
President
Email: R.Ackerman@magnals.com

Maria Hutnick
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Doug Marshall
President
Email: dmarshall@mi-pi.com

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www.mi-pi.com
416 W Talcott Road
Park Ridge, IL 60068
Phone: (855) 350-6474 (MIPI)
Fax: (847) 993-2039

Doug Marshall
President
Email: dmarshall@mi-pi.com

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OFFICIAL FORENSIC ACCOUNTANT PARTNER OF USLAW NETWORK
www.mdd.com
Kevin Flaherty
10 High Street, Suite 1000
Boston, MA 02110
Phone: (617) 426-1551
Fax: (617) 426-6025
Email: kflaherty@mdd.com

Jack Damico
750 Hammond Drive, Building 14
Atlanta, GA 30328
Phone: (404) 252-0085
Fax: (770) 452-3668
Email: jdamico@mdd.com

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