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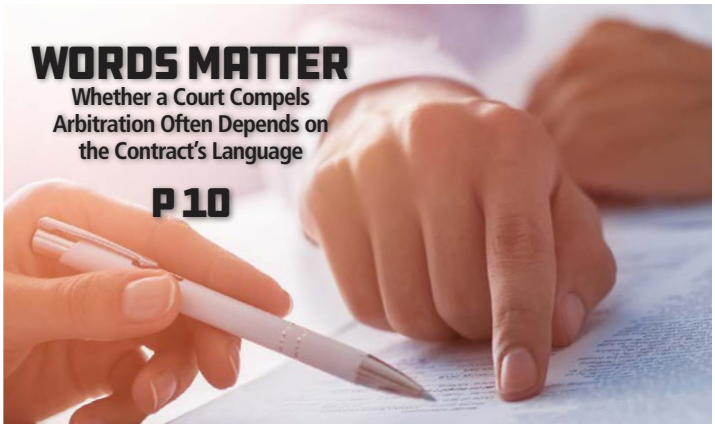

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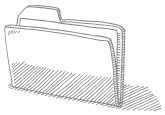

from the CHAIR'S DESK

We are months into the COVID-19 pandemic and the global community has been experiencing unprecedented times. On behalf of the USLAW NETWORK community, we hope you and your family are staying safe and healthy.

In this deep sea of COVID-19 uncertainty, one of the reassuring points for me has been the great reservoir of USLAW information made available through our members and through the relevant resources that are regularly created across the NETWORK, including **several new COVID-19 compendia of law.**

Among the hallmarks of USLAW NETWORK are our collective client focus, client service and collaboration among our members. This has been on display more than ever in recent months as members, corporate partners and clients have joined forces to support each other, serve as resources and answer questions on a range of new and complicated issues in the spirit of moving business forward. Discussions have centered on initial business closures and work-from-home situations to re-opening, and now are including subjects that many businesses and in-house legal decision makers will need to tackle and be focused on in the months to come.

As we face the evolving impacts of COVID-19, we ask ourselves *what does the rest of 2020 look like and how do we plan ahead for 2021*? The current issue of USLAW Magazine is just one of the many resources to help answer some of these questions. As you peruse the pages, you will see a COVID-19 Resources Hub where you are just one-click away from important state and industry-specific information. As always, if you need additional information, **please contact us for assistance.**

Please enjoy the current issue of USLAW Magazine. Please connect with us and take advantage of the many complimentary resources available via **uslaw.org.** As always, thank you for your support of USLAW NETWORK.

Sincerely,

Dan Longo

Dan L. Longo
USLAW NETWORK Chair
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SHORT-TERM SOLUTIONS, LONG-TERM IMPACTS?

The Fluidity of Federal Hours of Service Regulations in the Time of COVID-19

Rodney L. Umberger, Jr. and **Brendan T. Vandor** Williams Kastner

One of the few constants during this period of unprecedented turmoil and economic uncertainty in America has been the steady and unwavering dependability of truck drivers, who continue to transport crucial goods and products across a country that needs them more than ever. Recognizing the indispensable role that truck drivers play in ensuring that all Americans continue to receive essential services during the COVID-19 pandemic, the Federal Motor Carrier Safety Administration (FMCSA) issued an Emergency Declaration on March 13, 2020, exempting motor carriers and drivers from federal regulations governing hours of service requirements when providing "direct assistance" in support of relief efforts related to COVID-19.[i]

The FMCSA has also announced other modifications, relaxations and suspensions of various federal trucking regulations in response to the COVID-19 outbreak, such as greater flexibility for employers to document why a drug and alcohol test could not be administered, a waiver of the expiration of annual inspection decals on intermodal chasses, a suspension of weight limits, and a waiver for drivers whose commercial driver licenses (CDLs), permits, and/or medical cards have expired or are set to expire.[ii] Interestingly, the agency has done so all while continuing to contemplate and discuss regulations that were changing well before the world encountered COVID-19, such as a new hours-of-service rule that was first proposed in August 2019 and is expected to be published later this year. The current fast-moving landscape has demonstrated the importance for motor carriers and other actors in the transportation industry to quickly track and accurately analyze the recent emergency regulations.

HOURS OF SERVICE: THE DETAILS

The hours of service requirements contained in the Federal Motor Carrier Safety Regulations (FMCSR) include the following:

- Limit of driving 11 hours after 10 consecutive hours off duty;
- Prohibition against driving beyond the 14th consecutive hour following 10 consecutive hours off duty, regardless of whether any time was spent off duty during that 14-hour period;
- Window of 8 hours to drive after last off-duty period of at least 30 minutes;
- 30-minute break required before resuming driving after 8-hour period has passed;
- Limit of 60/70 hours on duty in 7/8 consecutive days; and
- Reset of 7/8 day period only after going off duty for 34 consecutive hours.

The FMCSA's declaration suspends or significantly reduces all of these requirements when a truck driver is providing "direct assistance" to the COVID-19 crisis through the transportation of certain supplies and materials. The declaration also exempts truck drivers from all recordkeeping requirements (i.e. keeping paper logbooks or ELDs). Furthermore, drivers are not required to carry any paperwork or documentation proving that they are engaged in direct assistance. If a driver is fatigued or sick, however, he or she is not permitted to operate a commercial motor vehicle, regardless of whether that individual is providing "direct assistance."

The time spent engaged in direct assistance begins when the commercial vehicle is loaded and continues until the empty truck and/or trailer is returned to the motor carrier's terminal or place of business. In other words, a driver is not exempt while travelling to the site of a pickup but continues to enjoy the benefits of the exemption after making a delivery and/or while driving an empty vehicle following a delivery.

Direct assistance has been defined to include the transportation of the following materials or things:

(1) COVID-19-related medical supplies and equipment;
(2) Supplies and equipment necessary for community health and safety, such as masks, gloves, hand sanitizer, soap and disinfectants (as well as household waste and medical waste);
(3) Food for emergency restocking of stores (including livestock);
(4) Equipment, supplies and persons necessary to establish and manage facili-

ties related to COVID-19;
(5) Persons designated by federal, state or local authorities for medical, isolation, or quarantine purposes;
(6) Persons necessary to provide other medical or emergency services, the supply of which may be affected by the COVID-19 response;
(7) Liquefied gases to be used in refrigeration or cooling systems; and
(8) Gasoline and/or fuel.

Furthermore, raw materials used as "immediate precursors" to any of the essential items listed above, such as wood pulp used to create paper products for the emergency restocking of grocery stores, are also covered. The extent to which other raw materials qualify as "immediate precursors" is one of several gray areas regarding the scope of the declaration.

The FMCSA has clarified, however, that the declaration does not cover so-called "routine" commercial deliveries, including those transporting only a nominal amount of emergency relief supplies. Specifically, motor carriers may not obtain the benefits of the emergency declaration simply by adding small quantities of COVID-19 relief materials to otherwise standard commercial loads. Generally, however, FMCSA has indicated that "mixed loads" (i.e. relief supplies mixed with non-relief supplies) entitle the driver of the load to take advantage of the suspension of the hours of service requirements.

Once the "clock strikes midnight" and the commercial vehicle arrives at its terminal or place of business following the delivery of direct assistance materials, the driver must take a 10-hour break and immediately becomes subject once again to the hours of service requirements.[iii] The hours worked while providing direct assistance, however, do not count towards any subsequent hours of service requirement (such as the 60/70-hour rule or the 34-hour mandatory reset).

LIABILITY CONSIDERATIONS

First and foremost, the FMCSA's declaration is clear that exempt drivers and carriers must continue to comply with 49 CFR § 392.2 and operate commercial motor vehicle in accordance with state laws and regulations, including compliance with applicable speed limits and other traffic restrictions. In no way, then, should the hours-of-service exemption be seen as a defense against any traditional negligence arguments or claims. Moreover, plaintiffs' attorneys will be paying particular attention—and will surely apply retroactive scrutiny if and when the emergency declaration is lifted—to the conduct and operation of truck drivers and motor carriers purportedly engaging in emergency direct assistance.

Motor carriers should also expect the plaintiffs' bar to attempt to exploit the confusion regarding the contours and limits of the hours-of-service exemption. For example, drivers transporting mixed loads while taking advantage of the exemption may face liability exposure if they are involved in accidents while transporting some amount of goods that are not considered to be of the direct assistance variety. Carriers should take particular caution when preparing to engage in direct assistance transportation and should seek guidance, when necessary, directly from the FMCSA, as well as DOT officers and transportation attorneys. Other best practices include obtaining assurances from shippers and brokers that a load is covered under the direct assistance framework and maintaining thorough recordkeeping and documentation of each trip and load in order to withstand future scrutiny.

Driver logs and recordkeeping will also continue to be critical, even if, paradoxically, the requirements for such practices are temporarily suspended for exempt drivers. For example, if a carrier is unable to show, years later, that its driver was engaged in direct assistance transportation at the time of an accident, the carrier may face unexpected exposure. Carriers and drivers should take precautions to clearly label business records, such as bills of lading and fuel receipts, to indicate that they were created during the provision of direct assistance. Furthermore, carriers should consider implementing company-wide protocols to standardize the logging of "exempt" miles, such as by training drivers to manually record the hours they work while operating under the exemption or by deactivating electronic logging devices when the driver is transporting an exempt load, in which case the carrier can later easily track and record the exempt miles.

Finally, the hours-of-service exemptions are ripe for abuse and/or misuse. Safety in this context is more important than ever, both for the drivers themselves as well as for the public travelling on the roadways. Working as a truck driver is stressful and physically taxing enough in normal conditions. Now, with the nation's health and safety largely on their shoulders amidst crumbling supply chains and remote work constrictions, drivers should explore ways to more closely and more frequently monitor their mental and physical conditions, and furthermore should be trained, instructed and encouraged to take particular precautions in order to guard against fatigue, sickness, and the further spread of COVID-19.

CONCLUSION

With the nature and scope of emergency federal trucking regulations—and the varied state implementation and enforcement of those regulations—changing daily during the COVID-19 pandemic, it is incumbent on carriers and their drivers to closely monitor their business operations, training regimens, and overall safety practices to ensure that they continue to be in compliance with the constantly shifting regulatory landscape. As encouraging as the FMCSA's flexibility with respect to the hours of service requirements has been, the various pitfalls and obstacles facing truck drivers are as widespread as ever, especially as each individual state begins to open up its economy on a highly specific, region-by-region basis. Truck drivers have proven during the past few months that they are a crucial part of the lifeblood of America's economy. They must continue to receive the widest possible network of support if America is to recover from this devastating pandemic.

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[i] 49 CFR Parts 390-399.
[ii] The waiver extends renewal deadlines for documents set to expire on March 1, 2020, or later to June 30, 2020 (and that date may be extended further into 2020).
[iii] The FMCSA has advised that if a rest stop or area is not immediately available for the driver's 10-hour break, he or she may proceed to the nearest "reasonable, safe location."

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RETAIL BANKRUPTCIES RAISE COLLECTION QUESTIONS FOR LANDLORDS

Kevin Newman, Nic Ferland, and **Scott Fleischer** Barclay Damon LLP

Anyone can read the provisions of the federal Bankruptcy Code that apply most often in a retail bankruptcy case. For landlords, however, it's not that simple when their tenant is now a debtor (the party filing a bankruptcy case) and they are left wondering what they can (and cannot) collect. Many of the most important concepts in retail bankruptcies are colored by interpretations of the Bankruptcy Code and play out differently depending on where a bankruptcy case is filed.

There are two approaches taken by bankruptcy courts around the country when it comes to interpreting the Bankruptcy Code's collection-related provisions for commercial landlords. They are "performance date," where collection depends on when the charge *came due*, and "proration," where collection depends on when the charge *accrued*. These inconsistent approaches may have a dramatic impact on what a landlord can collect from its bankrupt tenant.

When a retailer files a bankruptcy case, landlords must immediately assess the law in the court where the case is pending. Two popular venues for such cases are Delaware (which utilizes the performance date method) and Virginia (which utilizes the proration method).

When it comes to assessing the collection of lease charges, the focus is on the period following the filing of the bankruptcy through the date the retailer determines what it intends to do with the lease. The Bankruptcy Code provides that, generally, debtors must "timely perform" their commercial lease obligations from the bankruptcy filing through the date a decision is made on the treatment of the lease (with a notable exception discussed below). If a charge under the lease is considered a post-bankruptcy obligation, the debtor must timely perform—but this determination differs by approach and touches on many bankruptcy concepts.

AUTOMATIC STAY

The Bankruptcy Code generally prohibits attempting to collect a pre-bankruptcy debt or seeking to obtain possession of the debtor's property (including the debtor's interests in its unexpired leases) and imposes penalties for violations.

It is essential to know which charges are considered post-bankruptcy obligations that must be paid, and which are considered pre-bankruptcy charges that cannot be sought from the debtor. Therefore, having a proper understanding of the approach utilized where the bankruptcy case is pending is critical to understand what can and cannot be collected.

STUB RENT

One of the most talked about concepts in retail bankruptcies is "stub rent," the rent and related monthly charges calculated on a pro-rated basis from the date the case is filed through the end of that month.

Under the proration method, stub rent is a post-bankruptcy obligation that must be timely performed under the lease, as it accrued post-bankruptcy.

Under the performance date method, however, stub rent is not considered a post-bankruptcy obligation because the rent for that month was most likely payable in full on the first of the month, prior to the bankruptcy filing. However, as long as the debtor was occupying the premises as of the day they filed for bankruptcy, landlords often assert that stub rent must be paid to

account for the benefit the debtor received by occupying the premises and, generally speaking, conducting business.

The dispute between the debtor and its landlords over the payment of stub rent generally comes to a head when the debtor is seeking approval of post-bankruptcy financing or use of cash collateral, where there is a proposed budget that the debtor must adhere to. In some cases, the debtor will agree to pay stub rent by a reasonable date certain as set forth in the budget. In other instances, though, landlords and other parties in interest must assert various rights under the Bankruptcy Code to seek payment of the stub rent, often over the objection of the debtors.

Keep in mind that under either approach, the pre-bankruptcy portion of the rent due for the month of the bankruptcy filing (the first of the month through the day before the bankruptcy filing) is not payable as a post-bankruptcy expense. If the debtor rejects the lease (similar to terminating it), absent a security interest or security deposit, the landlord can assert pre-bankruptcy arrearages only as unsecured claims, which typically yield a small recovery. If the debtor assumes (retains) or assigns the lease, however, the debtor must pay any pre-bankruptcy amounts owed as part of a requirement to "cure" all arrears under the lease.

REAL ESTATE TAXES

As is the case for stub rent, the approach, whether performance date or proration, dictates whether real estate taxes are considered post-bankruptcy charges a landlord can recover from the debtor-tenant, or pre-bankruptcy charges that may only be asserted as an unsecured claim (unless the lease is assumed or assigned, in which case all arrears must be paid).

In a proration jurisdiction, the analysis is simple: real estate taxes are considered a post-bankruptcy charge collectible by a landlord when they accrue during a post-bankruptcy, pre-rejection period, irrespective of when they were billed or became due.

In a performance date jurisdiction, the key in determining whether a real estate tax charge is collectible is the actual due date under the lease (not to be confused with the billing date). For rent, it is almost universally the first of the month, but for taxes, this can vary significantly.

In many cases, a landlord pays real estate taxes to the municipality, and the tenant reimburses the landlord as a part of its rental obligations under the lease. In that scenario, the due date under the lease will dictate whether the tax payment is a post-bankruptcy obligation.

Where the tenant is billed directly by the municipality for its share of real estate taxes, both the lease terms and tax invoice must be considered. While the lease may provide for a specific due date—for example, within a certain number of days of receipt of an invoice—the lease may instead be more vague, providing, for example, that real estate taxes are payable when due.

If the lease does not provide enough guidance, the invoice itself will govern. Often, the invoice will state that the taxes are due by a date certain, but the tenant can pay by a later date certain after which a penalty or interest would start to accrue. In that scenario, the latter should be the true "due date" that governs whether it is a collectible, post-bankruptcy charge.

CURE

As referenced above, debtors have an obligation to cure defaults existing under the lease at the time the lease is assumed or assigned. All amounts that came due but were not paid are included in the cure amount.

In addition to pre-bankruptcy charges, the cure amount may also include attorneys' fees. The Bankruptcy Code provides that a debtor cannot assume a lease without first compensating the landlord for "any actual pecuniary loss" resulting from a default. Depending on the lease terms, a landlord can assert that its counsel's fees in the bankruptcy case are payable as part of the cure amount.

It is also important to note that the concept of cure may include more than just a dollar amount. Non-monetary defaults such as an outstanding maintenance obligation must also be cured at the time of assumption.

When a landlord is assessing a debtor's proposed cure amount, in addition to the liquidated amount, it should also preserve the right to collect what may come due in the future such as reconciliations of previously billed charges (for example, real estate taxes, common area maintenance, and insurance) and indemnification from the debtor as set forth in the lease. In the case of a lease assignment, this may be accomplished by the assignee affirmatively taking on those obligations or the debtor establishing an escrow account.

If a lease is rejected, however, the debtor has no responsibility to cure pre-bankruptcy defaults, and the landlord must assert such amounts as unsecured claims.

TIMELY PERFORMANCE

While the general rule is that debtors must timely perform their commercial lease obligations, there is one notable exception that has gained much popularity and media attention during the COVID-19 pandemic. With a showing of "cause," a debtor can suspend the timely performance of its lease obligations for the first 60 days of the case. Under these circumstances, bankrupt retailers have generally been able to obtain this relief with little resistance from judges. Some judges have even extended retailers' time to perform beyond the first 60 days of the case. However, there are measures landlords can take to mitigate the risk associated with this. For example, landlords can seek "adequate protection" of their interests and request that the debtor appropriately budget for the full payment of any deferred lease obligations.

CONCLUSION

This is a broad, simplified overview of the issues facing commercial landlords during the bankruptcy cases of their retail tenants. Bankruptcy cases are complex and often move extremely quickly, and your rights are at issue very early in the case. It is therefore critical to retain counsel well versed in these matters.

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CROSS-BORDER E-DISCOVERY IN THE PRIVACY ERA

Brian L. Bank Rivkin Radler LLP

A practical overview of relevant considerations for companies engaging in e-discovery collection and production from foreign offices for use in U.S. litigation

In today's global economy, it is not uncommon for U.S. litigation to include either foreign parties or domestic parties with offices abroad. When U.S. litigation counsel is tasked with representing such a party in domestic litigation, counsel must consider how to preserve, collect, transfer, and produce documents and data belonging to foreign custodians and/or maintained on foreign soil. As foreign data privacy laws and other foreign laws addressing document and data disclosure become more commonplace and more diverse, and the penalties for noncompliance become more severe, U.S. litigation counsel must be sure to keep their eyes on the big picture, carefully balancing the liberal scope of discovery applicable in most U.S. jurisdictions with controlling foreign restrictions on document and data preservation, collection, and transfer. In most instances, U.S. litigation counsel will need to plan early, oftentimes at the outset of litigation or even before, in order to ensure that a proper balance is struck. This article presents a high-level overview of what U.S. litigation counsel should consider in striking this balance.

ASSESS THE NEED FOR CROSS-BORDER DISCOVERY EARLY

As an initial matter, in order to properly plan for cross-border discovery, U.S. litigation counsel must determine early on in their assignment (i) whether the case will potentially require a need to preserve, collect, and produce documents and data either belonging to a foreign custodian or maintained and/or backed up in a foreign country, and, if so, (ii) which of the foreign laws (as well as any corporate document and data disclosure policies) may apply to the preservation, collection, and transfer of such documents and data, and the requirements thereof.

While custodian identification should be a familiar process for U.S. litigation counsel, the need to conduct this analysis early in the proceeding becomes all-the-

more critical in situations potentially requiring cross-border discovery. This is in order to ensure that the party can identify and consider which foreign laws may apply and what they require. While some foreign data privacy laws are well-covered in U.S. legal circles, such as the European Union's ("EU") General Data Privacy Regulation ("GDPR"), others – including local data privacy laws enacted by EU members and other countries that, in certain instances, impose more stringent requirements than the GDPR – are less-known. Furthermore, some countries also have blocking statutes and other laws (such as telecom or bank secrecy laws) that also impose restrictions on document and data transfer that must be considered and addressed when formulating a game plan. Thus, it is important for U.S. litigation counsel to identify precisely which foreign laws apply before engaging in efforts to collect and transfer custodial data housed in a foreign jurisdiction.

The importance of conducting this assessment early on in a litigation assignment cannot be overstated, as some foreign laws, such as the GDPR, apply not just to the collection and transfer of documents and data, but also to their preservation. When coupled with the standard for document preservation typical in most U.S. jurisdictions, this means that a party's obligation to comply with foreign data privacy requirements may arise as soon as the prospect of litigation becomes reasonably foreseeable. Since document and data preservation is generally one of the earliest tasks a party must undertake, it is critical for U.S. litigation counsel to understand whether and how foreign laws may impact the party's performance of this important obligation, and to incorporate any foreign data privacy requirements into their preservation plan.

ACKNOWLEDGE WHAT YOU DON'T KNOW

Given the potential complexities in tracking and interpreting foreign laws that may impact document and data preservation, collection, and transfer, in most instances it is strongly advisable (and in some cases required) for U.S. litigation counsel to engage local counsel and/or a local e-discovery vendor to assist in identifying and ensuring compliance with all such applicable laws. In addition, to the extent that the party has a data privacy officer, U.S. litigation counsel should also consult that individual. These experts can be crucial to aiding U.S. litigation counsel in determining: (i) which foreign laws apply to relevant documents and data; (ii) whether there is a legal basis to preserve, collect, and transfer such documents and data to the United States for use in litigation; (iii) the restrictions, if any, that apply to the format and timing of any such transfer; (iv) whether a data transfer agreement or other documentation is required and what must be included therein; and (v) how to document the preservation, collection, and transfer process for potential use by U.S. litigation counsel in the proceeding.

STRIKING A BALANCE BETWEEN FOREIGN DATA PRIVACY LAWS AND U.S. DISCOVERY OBLIGATIONS

Of course, complying with foreign data privacy law is only half the battle. Once U.S. litigation counsel, with the aid of local experts, has identified the requisite steps to preserve, collect, and transfer documents and data to the United States for use in litigation under applicable foreign data privacy laws, counsel must then consider how best to balance those requirements against the party's discovery obligations in the litigation. This includes assessing the relevance of the documents and data to the claims and defenses of the action, and, depending on the state or federal jurisdiction, whether they are proportional to the needs of the case. In this regard, U.S. litigation counsel will often be well-served (and depending upon the controlling procedural rules, may be required) to raise cross-border data privacy concerns and requirements with the court and opposing counsel early in the proceeding, thus proactively managing expectations and framing the forthcoming meet-and-confer dialogue.

DOCUMENT YOUR EFFORTS

U.S. litigation counsel should also be sure to identify and comply with documentation requirements for cross-border transfer. Depending on the applicable data privacy law, this could include sign-off by all data controllers and processors to a contractual arrangement in which the receiving controllers and processors contractually bind themselves to the data privacy obligations of the foreign custodian. This may also require certification by either the party or local counsel that the party complied with all applicable data privacy requirements and/or that the documents to be transferred have been properly sanitized of non-essential personal information.

Full compliance with the documentation requirements set forth in applicable foreign laws not only protects the party, but it also serves to highlight any obligations assumed by U.S. litigation counsel vis-à-vis the protection and use of the documents and data post-transfer.

EARLY PLANNING CAN REDUCE HEADACHES

Given the potential complexities in identifying and complying with foreign data privacy laws and other foreign laws addressing document and data disclosure, and the tension between the limitations imposed by such laws and the relatively liberal disclosure standards common in U.S. jurisdictions, U.S. litigation counsel should be prepared to carefully consider how best to manage the discovery process to minimize potential exposure under foreign laws. This could include, among other things: (i) exploring whether the party maintains the same or substantially similar documents and data through a domestic custodian or on a domestic server or back-up system; (ii) reducing the volume of documents and data for transfer through the use of analytics and other technology-assisted review tools; (iii) conducting a responsiveness review pre-transfer, thus reducing the overall volume of documents and data for transfer; (iv) using anonymization and/or redactions to sanitize non-essential personal data from documents and data identified for transfer; and (v) carefully negotiating the scope of discovery with opposing counsel to ensure that the party need only transfer those documents that are truly relevant to the claims and defenses of the action.

CONCLUSION

U.S. litigation counsel engaging in cross-border discovery must carefully consider the data privacy obligations imposed by the laws of the foreign jurisdiction in which the custodian resides and/or where such documents are maintained and/or backed up. In doing so, counsel must strike a balance between the requirements imposed by such foreign laws and the liberal discovery obligations common to U.S. laws. This can often be a complex and expensive proposition, but a necessary one considering the sometimes harsh penalties for non-compliance under certain foreign data privacy laws. As such, U.S. litigation counsel should plan early and enlist local counsel and other experts to ensure that the party's interests are protected both in the foreign jurisdiction and in the pending litigation matter.

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WORDS MATTER

Whether a Court Compels Arbitration Often Depends on the Contract's Language

Noel D. Humphreys Connell Foley LLP

A contract's arbitration clause is not boilerplate. The specific words there actually matter. Some recent decisions have made clear that the words drafters chose may imply hidden or unexpected, maybe unintended, meanings. For example:

- If the parties intend to exclude injunctive relief from arbitration, how that exception is expressed may make a difference to how the matter proceeds if a dispute arises.
- Enforceability of an arbitration provision may hinge on whether the parties specify a particular arbitration source such as AAA or JAMS rather than specifying no service provider. Whether an arbitrator or a court decides what is arbitrable may hang in the balance.
- There is a difference between a provision that makes all disputes between the parties subject to arbitration and a provision that make only disputes arising out of the agreement subject to arbitration. To facilitate a court's decision regarding whether to compel arbitration in a particular case, a contract drafter seems well-advised to include explicit statements with as few exceptions and limitations as possible regarding what the parties intend if a dispute arises.
- In a recent Third Circuit decision involving rental cars, the arbitration clause appeared in the paper wrapper headed "Rental Terms & Conditions," but the rental agreement incorporated terms from the "rental jacket."[i] The court decided the "Agreement does not incorporate the rental jacket beyond doubt," because the printed form failed to call the wrapper by the name on the wrapper. That simple drafting error made a difference.

Take this fairly simple-seeming arbitration clause:

> *Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina.*

The clause has generated multiple decisions from a federal district court, the Fifth Circuit Court of Appeals[ii] and even the U.S. Supreme Court.[iii]

The still-pending case arose when a dental supply firm, Archer & White Sales, accused some other firms of colluding against it in Texas. The agreement that contained this clause was with one of the accused colluders, now a predecessor in interest of the remaining defendant.

Initially in front of a magistrate judge, defendants invoked the Federal Arbitration Act and moved to compel arbitration. Archer & White opposed that motion, arguing that its complaint sought injunctive relief (as well as damages), and the arbitration clause explicitly excluded actions seeking such relief. The magistrate judge granted the motion, determining that the arbitrator should decide whether the matters in arbitration should be decided by the arbitrator or a court pursuant to this clause. The magistrate's idea was that the clause incorporated the AAA rules, which, in general, permit the arbitrator to decide what he or she is empowered to decide. The magistrate said defendants presented at least a "plausible construction" that would compel arbitration.

Three years later, the district court vacated that order and held that the court could decide the threshold arbitrability question. The district court reasoned that this action fell squarely within the arbitration clause's express exclusion of actions seeking injunctive relief.

The Fifth Circuit affirmed, asserting

that they perceived no plausible argument that the dispute was outside the scope of the exception.[iv] The Supreme Court rejected the circuit court's "wholly groundless" rationale.

Instead, the Supreme Court held that if a "contract delegates the arbitrability question to an arbitrator, a court may not override the contract."[v] The Supreme Court reaffirmed its holding in its decision in *First Options*,[vi] that "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable' evidence." On remand, therefore, the Fifth Circuit considered whether the arbitration clause set forth above was "clear and unmistakable" evidence that the parties had delegated to the arbitrator the question of whether the arbitrator's authority extended to determining whether plaintiff's claims were subject to arbitration.

The standard pattern for a court involves, first, a determination that there is a valid agreement including a valid arbitration provision and, second, a determination that the dispute falls within the arbitration clause. The presumption is that, without "clear and unmistakable" evidence of intent to delegate arbitrability to the arbitrator, the court should decide arbitrability. Here, the parties were not disputing that there was a valid arbitration clause, even though defendant was not a party to the contract.

Precedent in the Fifth Circuit, the Third Circuit and other Circuits[vii] holds that a clause identifying AAA rules as the manner of arbitration constitutes sufficient "clear and unmistakable" evidence of intent to delegate the arbitrability question to the arbitrator. Under AAA Rule 7(a), "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."[viii]

Ignoring the parenthetical in the contract language, defendants argued that the sentence stated clearly that disputes were to be arbitrated under AAA rules, meaning that the arbitrator decides his or her jurisdiction and authority. On the other hand, plaintiff argued that what was "clear and unmistakable" was that injunctive relief was outside the scope of the delegation to the arbitrator. Defendant asserted that what the court was not permitted to do was determine the scope of arbitrator's authority after the parties had invoked the AAA rules which give that power to the arbitrator. Allowing the court to determine the scope of delegation to the arbitrator, defendant said, was contrary to the parties' intent.

Plaintiff sought both money damages and injunctive relief. As a result, the court had to consider whether the contracting parties' intent, as expressed in the arbitration clause, meant bifurcation of the claims. In other words, did the parties intend that the arbitrator should consider the money damages portion of the case, while a court should consider the injunctive relief portion of the case? In part, based on the construction of the sentence where the language appeared, the Fifth Circuit decision held that the arbitration provision's exclusion of "actions seeking injunctive relief" meant that the court should hear all of plaintiff's action for damages and injunctive relief.

Consequently, the Fifth Circuit decision did not compel arbitration, because the parties had intended that the dispute as presented was not to be resolved by arbitration.

The court did not reach the question of whether the defendant could successfully invoke the arbitration clause even though the defendant was not a party to the agreement.

The Supreme Court may let us know how properly to read this provision. The Court in June agreed to hear the case this fall. [ix]

The recent Third Circuit decision in *Richardson v Coverall North America*[x] was more cursory than the Fifth Circuit's *Archer & White* decision. The Coverall North America decision involved claims that workers were misclassified under New Jersey law as independent contractors, rather than as employees. This decision followed other Circuit Court decisions that calling for a decision under AAA rules in an arbitration clause manifests "clear and unmistakable" evidence that the parties had a meeting of the minds intending that the arbitrator must determine arbitrability issues.

This decision can be compared with the 2017 Third Circuit decision in *Moon v. Breathless*,[xi] which involved a similar claim under the federal Fair Labor Standards Act (the "FLSA"). The agreement under consideration in that case included the following clause, which did not name an arbitration provider:

> In a dispute between Dancer and Club under this Agreement, either may request to resolve the dispute by binding arbitration. THIS MEANS THAT NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL — DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION. ARBITRATION MUST BE ON AN INDIVIDUAL BASIS. THIS MEANS NEITHER YOU NOR WE MAY JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS.

The panel in that matter decided that Ms. Moon's FLSA claim did not arise out of "this Agreement," but instead arose out of the statute. In that decision, the court did not compel arbitration.

Recent decisions such as these suggest that courts are more likely to compel arbitration if a dispute arises if the arbitration clause clearly and unmistakably names an arbitration service provider and explicitly indicates that the parties intend to delegate to the arbitrator threshold questions of arbitrability.

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i *Bacon v. Avis Budget Grp., Inc.*, No. 18-3780, 2020 BL 184123 (3d Cir. May 18, 2020),
ii Most recently, *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019).
iii *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 , 528 , 202 L. Ed. 2d 480 (2019) ("Schein").
iv *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 497 (2017), rev'd, 139 S. Ct. 524 , 202 L. Ed. 2d 480 (2019).
v *Henry Schein*, 139 S. Ct. at 529
vi *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 , 944 , 115 S. Ct. 1920 , 131 L. Ed. 2d 985 (1995).
vii *Richardson v. Coverall N. Am., Inc.*, No. 18-3393, 2020 BL 157077, 2020 Us App Lexis 13568, 2020 WL 2028523 (3d Cir. Apr. 28, 2020) ("*Richardson*"); *Brennan v. Opus Bank*, 796 F.3d 1125 , 1130-31 (9th Cir. 2015) ("Our holding today should not be interpreted to require that the contracting parties be sophisticated . . . before a court may conclude that incorporation of the AAA rules constitutes 'clear and unmistakable' evidence of the parties' intent [to delegate arbitrability]."); see also McGee v. Armstrong, 941 F.3d 859 , 863 , 865-66 (6th Cir. 2019); *Arnold v. Homeaway, Inc.*, 890 F.3d 546 , 548-49 , 551-52 (5th Cir. 2018); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766 , 767-69 (8th Cir. 2011).
viii Am. Arbitration Ass'n, Commercial Arbitration Rules and Medication Procedures 13 (2013), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf .
ix *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19-963., 2020 BL 220261, 2020 Us Lexis 3181 (U.S. June 15, 2020)
x *Richardson v. Coverall N. Am., Inc.*, No. 18-3393, 2020 BL 157077, 2020 Us App Lexis 13568, 2020 WL 2028523 (3d Cir. Apr. 28, 2020).
xi *Moon v. Breathless, Inc.*, 868 F.3d 209, 27 WH Cases2d 725 (3d Cir. 2017).

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A SETTLEMENT TEAM APPROACH

Porter Leslie Ametros
Richard Regna, CSSC Arcadia Settlements Group

When settling workers' compensation or liability cases, you are bound to run into some that are difficult to close. Whether it is addressing the value of the offer, complex benefit issues, a claimant's comfort with managing ongoing medical issues, or other odd and unique issues, sometimes you need to get creative about your settlement strategies.

In these situations, it is important to have a team of partners that you can trust to bring the unique benefits of their services to help get the cases settled. Two such important settlement partners are structured settlement firms and professional administrators.

"Receiving a response of 'no' to an offer of settlement is not a reason to shelf a file," says Thomas S. Thornton III, attorney at Carr Allison, and a member of the USLAW Board of Directors. "It should motivate you to dig deeper to determine what hurdles need to be overcome to achieve claim resolution. Having the right team put together to provide those services empowers us as attorneys to achieve those goals."

The right structured settlement consultant can help you get creative with a structured settlement to alleviate concerns on both sides about funding and ensure a secure tax-free income for injured individuals. What you can expect from a "best-in-class" settlement consultant is a holistic approach, leading to a "better settlement." These experts know a well-designed structured settlement addresses all current and future needs – the certainty of lifetime payments, tax-advantaged income, a desire for growth, the need for liquidity and, where appropriate, the preservation of public benefits and ongoing medical management. A Structured Settlement Specialist helps settle more cases, faster, delivering growth and liquidity alongside spendthrift protection using multiple settlement tools which include:

- Tax-Free Annuity
- Growth Structured Settlement
- Trust Accounts
- Cash

An experienced professional administrator can help assure the injured individual will have a resource for their future medical care after settlement. The professional administrator can explain available services, and the medical treatment discounts they can offer the claimant as part of the settlement proposal. Adding this healthcare concierge as an ongoing resource can help make the injured person more comfortable with the idea of settling the claim.

Additionally, the best professional administrators offer services that go above and beyond and can be used creatively to help move cases towards resolution.

Banking Solutions: Often these partners help overcome banking problems by setting up checking and saving accounts or by issuing prepaid cards to provide solutions for receipt of a claimant's settlement funds. These solutions are tailored specifi-

cally to the resources available and can be established even if the injured party has a poor banking history. These solutions can be made available in cases where the claimant may not have a Social Security Number (SSN) or Tax ID.

Complex Benefit Issues: In some cases, a claimant will need to retain government benefits, but is concerned about the possible loss of these benefits if the settlement is not properly handled. This potential loss can hold up or complicate a settlement. These partners have resources available who advise on government benefits. They know how a settlement could potentially adversely impact valued government benefits and can help the carrier or employer to ensure their offer considers these sensitive issues, resulting in the case settling.

Medicare & Health Plan Options: Many professional administrators are experts in coordinating all things healthcare related. They can enroll the claimant in health insurance plans, including Medicare and Medicare Advantage plans. These services include consultations with licensed agents answering questions and helping the injured person maximize their options so they know support will be available to them after the case settles.

In a case where the injured person may not understand what life will be like post settlement, offering this additional support with benefits through professional administration and structuring of the settlement proceeds is another way to make settlement appealing.

Having these two partners work together creatively can overcome and resolve issues impeding settlement, the result being more successful outcomes and savings for your client.

"When working in the fast-paced world of claims, it is nice to partner with a group who is proactive as opposed to reactive in achieving cost savings for our clients," says Thornton.

REACHING A SUCCESSFUL WORKERS COMPENSATION SETTLEMENT:

A 35-year-old laborer fell from the rooftop of a three-story home when installing shingles. The injured worker underwent multiple back surgeries, and though he survived the fall, he was diagnosed with T12 paraplegia. He was young and should have a long life ahead of him since he had no significant preexisting injuries or medical conditions. He was a high school graduate with on the job training as a roofer. His life changed drastically as his young family adapted to his post-injury lifestyle. His wife had to leave her job to help with his medical needs and daily concerns, and his children no longer enjoyed the active father they once knew.

Under workers' compensation, payments for lost wages were limited by statute to two-thirds of his average weekly wage (which was tight already). His finances were in chaos as medical bills and other expenses piled up. The injured worker retained counsel and applied for Social Security Disability Insurance (SSDI). The application process took some time but was ultimately successful and he became eligible for Medicare. Complete resolution of his case did not appear possible any time soon due to the high cost of future medical care and the need for a Medicare Set-Aside. He also incurred significant expenses for non-Medicare covered items such as a modified home, attendant care, handicapped-accessible vans over his life expectancy, and other ancillary lifetime costs.

Thinking ahead, the claims professional knew the case involved considerable future medical and settlement would be so costly that the best chance of meeting these large anticipated costs would be with a structured settlement. She contacted Arcadia to work with a settlement consultant early in the process. This resulted in months of collaboration between the settlement consultant, the injured worker, counsel and the claims professional. At the same time, the defense attorney engaged Ametros to ensure a team of experts could help the injured worker's family with all MSA-related reporting to ensure Medicare benefits would be available to the injured worker if the allocated settlement funds were exhausted. In addition, the administrator would pay all non-Medicare-covered expense, too, including attendant care and transportation. Ultimately, the case settled on a full and final basis due to the savings provided by the structured settlement and the comfort and support provided by the professional administration.

COORDINATION TO HELP SETTLE AN AUTO CLAIM

In 2019, a defense client was trying to settle the case of a 58-year-old truck driver who had a below-the-knee amputation. The client invited the structured settlement firm to attend the mediation to speak with the plaintiff.

In this case, there were liens for Medicaid and a disability carrier, there was no plaintiff-side settlement consultant, no MSA allocation opinion, and the plaintiff would be applying for Social Security Disability Insurance (SSDI), so Medicare involvement was likely.

The structured settlement firm assisted both sides, keeping direct communication with the plaintiff and their attorney to help them understand the benefit of a structured settlement, while sorting through some of the more complex benefits and helping to make determinations around the allocation.

Since he was applying for SSDI, Medicare's interests would need to be taken into consideration and a Liability Medicare Set Aside (LMSA) allocation was secured. With the post-settlement responsibilities of an MSA, the structured settlement firm also engaged a professional administrator. The administrator explained their services and the savings they could provide for the plaintiff. This helped eased the plaintiff's settlement fears, as they would have a support system in place for their medical needs. The administrator would also take care of ordering the plaintiff's prosthetics and other equipment outside of the MSA while still securing a discount on those items.

Together, the advantages of the structure and the benefits of the professional administration helped the case settle.

Settlements can be very complex, and it can be easy to view them as zero-sum game, but it is worth considering if partners can bring value to the table with their years of experience and unique services. Addressing the difficult issues and engaging with experts to talk through solutions can often lead to outcomes that make all sides comfortable and make settlement an achievable option.

Porter Leslie, president of Ametros, directs the growth of Ametros and works with its many partners and clients. He built his career leading customer-focused businesses in healthcare and financial services. Prior to Ametros, Porter worked in investment banking, private equity and corporate development. He resides in Boston with his wife and two children. Ametros is USLAW's official future medical fund management partner.

Rich Regna is president of Arcadia Settlements Group, formerly SFA. Rich has a long-standing reputation as a leader and high-volume producer, bringing over 20 years of experience in the structured settlement business to his role as president of Arcadia Settlements Group. He focuses on helping plaintiffs design comprehensive settlement plans to establish a solid post-settlement foundation. Arcadia Settlements Group is USLAW's official structured settlement partner.

A Litigator's Guide to REMOTE DEPOSITION BASICS

James B. Drimmer, Esq. U.S. Legal Support

By now, the COVID-19 virus has caused major shifts in our daily lives, from personal interaction to the way we conduct business. The technological capability to work virtually through web-based meetings and conferences is moving at full speed to support many industries that previously eschewed such technology in favor of an in-person meeting—depositions, in our case. For litigation attorneys, it is time to get with the times; in fact, it is already past that time.

There is no doubt that, by now, you have been provided with information by your litigation support services provider, including our company, U.S. Legal Support, about the ability to conduct depositions remotely. This is exciting news for all of you, as litigators, to be able to proceed with what we feel is ultimately the most important part of the discovery process: the development of your case through the sworn testimony of a witness at a deposition. Yes, we can do this!

The somewhat infrequently used

"remote deposition" will quickly become ubiquitous. As practitioners, we will need to develop agreed-upon processes and procedures to follow at remote depositions that will be prescribed either by custom, statute or court rule. But in the meantime, it is helpful to bear a few considerations in mind to make your deposition run as smoothly and efficiently as possible.

WORK IT OUT WITH OPPOSING COUNSEL

Make sure you are in communication with opposing counsel and the witness in terms of agreeing on conducting a remote deposition. This may seem obvious, but there are details to be worked out, such as timing of the proceeding for parties, witnesses and counsel located in different time zones; agreement on the admissibility of the deposition (U.S. Legal Support's reporters will perform a read on stipulation at the beginning of each deposition); which platform will be used; and who will bear certain costs.

For example, depending upon which service you choose to conduct your remote deposition, merely attending the deposition "virtually" may come with some added costs for the witness, opposing counsel, etc. If a third-party witness needs equipment to be shipped to them to partake in the remote deposition, who is paying for that? Be sure that these issues are worked out ahead of time, so there are no surprises.

DON'T IGNORE THE TEST CALL

As is true with U.S. Legal Support's RemoteDepo™ offering, most providers offering remote depositions services will send all attendees an email invitation to perform a test call. During this call, you will have the opportunity to make sure your internet service is sufficient for the remote deposition, ensure that your device will work, ask questions, and possibly even test some of the functions. If you take advantage of this opportunity to make sure everything will run smoothly, you will be able to participate with confidence. Remember, test the specific equipment you intend to use and at the location you intend to be when participating in a remote deposition.

SOME CONSIDERATIONS TO THINK ABOUT WITH EXHIBITS

The best practice for dealing with exhibits is to have them scanned in PDF format, and in a folder dedicated to the deposition on your computer's desktop. With RemoteDepo™ and InstantExhibit™ by U.S. Legal Support, you can drag and drop the exhibits into your remote deposition, introduce them during the proceeding, and publish them to all parties and the witness.

If possible, name document exhibit files using a description of the document, so that you can quickly search for it without having to open up multiple files to find what you are looking for and put your exhibit files in numbered order before introducing them. Some software (Acrobat Pro) permits you to quickly make an exhibit sticker yourself. If you prefer to leave it for the reporter to take care of, that is fine as well. If you wish to have a paralegal or other support staff attend virtually and manage the exhibits during the deposition, that can be easily arranged.

You should also give some thought to how you might handle third-party witnesses, who will show up with documents to their deposition; these may include, for example, a police officer with a report or his notes or an expert witness. It will be incredibly helpful—if not absolutely necessary—to have those items in electronic form in advance of your remote deposition.

Finally, U.S. Legal Support's InstantExhibit+™ product is an ideal solution for multiple depositions and complex litigation matters, where all of the exhibits in a case can be organized in one place. Parties will be given permissions to manage and organize their own documents privately until they are introduced during a deposition. Call U.S. Legal Support for a demonstration of this or any other product or service related to remote depositions.

GIVE ME A BREAK

Taking a break during a remote deposition is the same as taking a break during a normal deposition, with one thing to keep in mind: you are potentially still on camera and can possibly still be heard. If you are having a private conversation, make sure that your phone and computer audio are muted and that you are off camera. Attorney-client conversations or discussions that are intended to be private with co-counsel should be handled outside the presence of this public video and audio, completed through either the private chat functions included with the service or completely off-line through your personal devices.

RECORDING THE CONFERENCE – DO I NEED A VIDEOGRAPHER?

Most services providing remote depositions will allow you to make a video recording of the proceeding. If you intend to use this recording at trial in lieu of a videotaped deposition, you may want to consult with your provider as to just how to accomplish this. For example, if you want a recording of just the witness, you should make this clear, so the recording focuses only to the witness' face.

At least in California, under CCP 2025, there are rules for a legal videographer to make very specific read-on announcements during the proceedings to make sure the work product is easily identified. Query whether the lack of such formalities would make such a video recording inadmissible. The safest play would be to have a legal videographer record the proceedings. They can even reach out to the witness and discuss backdrops and other issues to ensure a usable video product at trial.

As everyone settles in and becomes familiar with the process, we will make further recommendations on our website and in our collateral. Stay tuned.

To learn more about U.S. Legal Support's remote solutions, visit our RemoteDepo™ resource page at: https://www.uslegalsupport.com/remotedepo-resources/.

James Drimmer is a former practicing attorney who specialized in litigation matters. He currently serves as a director of client relations within U.S. Legal Support. Prior to working for U.S. Legal Support, James owned and operated his own court reporting firm, Litivate Reporting + Trial Services, where he served as the firm's corporate counsel. U.S. Legal Support acquired Litivate in September of 2019.

TRUST BUT VERIFY

Best Practices in Standard and Non-Standard Contracts and Agreements

Sarah Thomas Pagels and **John W. Halpin**
Laffey, Leitner & Goode LLC

What a difference a (calendar) year makes. When business leaders sat down at the end of 2019 to talk about the coming year, it is unlikely that many of them predicted a global pandemic and widespread civil unrest in the United States. The possibility of multiple contract partners breaching their agreements in Q2 was probably considered negligible. But times have changed, and as the saying goes, "Those who cannot remember the past are condemned to repeat it." Smart companies will learn their lessons and amend their contracts. This article offers some considerations and suggestions for doing just that.

CONDITIONAL PERFORMANCE

First, determine what triggers performance. Are additional steps necessary before the parties can perform? Is the ability of a seller to source raw materials from an outside vendor or the ability of the buyer to secure financing for the purchase a prerequisite?

These are real problems in the current environment, and if your contract does not spell out these contingencies and account for third-party delays, your company could be faced with losses or litigation. Pay close attention to what your contracts—including the terms and conditions of any invoices or purchase orders—say about performance triggers and delays. Are extensions possible?

DEALING WITH DELAYS

Many contracts attempt to address unanticipated delays through *force majeure* or "Acts of God" provisions. While the language varies in each agreement, the general concept is that a party may be excused from performance if certain unanticipated events occur that are outside that party's control. If the relevant clause endeavors to list examples of qualifying events rather than using general language, wars and natural disasters will probably make the list, but what about pandemics, civil unrest, or governmental orders? The goal is always to honor the parties' intent, so most courts narrowly interpret *force majeure* provisions. Less is more here; detailed language hampers a court's ability to fashion an equitable result.

Also consider invoking the doctrines of impossibility, impracticality, or frustration of purpose, if possible. These defenses are broader than any specific contract provision and can even provide relief where performance is technically still possible, but not practical or economically feasible.

CHOICE OF LAW

Many states have adopted the U.C.C., which affords some predictability in contracting. Courts differ in determining things like foreseeability, whether performance is truly impossible or just more burdensome and less profitable, and causation (e.g., did the pandemic itself cause the disruption, or were there intervening factors, such as a change in supply or demand or a stay-at-home order).

And what about international contracts? Civil law jurisdictions such as Canada, France, and Germany have codified *force majeure* and similar concepts, while common law jurisdictions such as Australia, India, and the U.K. generally recognize related doctrines like frustration and impracticality. If your contract does not spell out what happens in the event of unanticipated delays, it is important to consider what options are available under the applicable law.

LIMITING EXPOSURE

When issues arise, are you protected? When it comes time to renew or renegotiate your agreements, talk to your trusted advisors and consider the following: Do you have the right insurance coverage in the right amounts? Do you have indemnity

agreements in place so that you do not get caught in between your supplier and your buyer, and whipsawed for delays that aren't your fault? Is your liability limited to compensatory damages and capped at the value of your contract, or are you susceptible to claims for consequential damages?

RIGHT TO TERMINATE

Assume the pandemic or the civil unrest have affected commerce so drastically that one of the parties to an agreement claims *force majeure*. Can the entire contract be cancelled or are additional steps required, such as the submission of a mitigation plan? Must you allow for alternative performance or reasonable extensions? Subsequent action or inaction by the parties can be used to show waiver or modification of the agreement, especially if the behavior is inconsistent with contract terms.

If your contract does not have *force majeure* language, consider alternative ways of leveraging the best result for your particular circumstances. Compare UCC § 2-615, which allows cancellation when performance becomes unforeseeably impracticable, with Restatement (Second) of Contracts § 269, which allows for the temporary suspension of contract obligations, but does not generally excuse performance. U.S. Courts relied on Section 269 in the period following the 9/11 attacks and the 2008 financial crisis, and they could do so again in pandemic-related litigation.

If current events have taught us anything, it is that contracting parties should not only know the process for dealing with delays and disruptions under their current agreements, but they also must think proactively about how to handle the issue in future contracts.

RISK TOLERANCE AND DAMAGES

Proactive thinking requires a careful consideration of all parties' tolerance for risk. What modifications, delays or mitigation efforts can you all tolerate? Can you invoke a liquidated damages clause, a provision for lost profits or business interruption costs, or set new conditions to allow for performance, such as an allowance for increased overhead or expenses?

If you are already in the dispute or resolution stage, what are the respective goals and expense tolerance? Weigh the merits of the specific dispute vs. the importance of the overall contract relationship. Is the upside worth the risk?

COMMUNICATIONS

More than ever, communication is critical. Proactive companies can control the message and the messengers, identify what platforms or devices are used to communicate, and take steps to preserve relevant data. Do you need to consider modifying default deletion rules, implementing an archiving system, or copying personal or mobile devices?

As always, it is important for clients to share information with counsel in a way that protects any privileges. If warranted, take steps to qualify communications as settlement communications. Although privilege rules vary greatly by jurisdiction, involve your legal team in the process early and often; don't just copy them on emails.

WHAT ABOUT GOOD FAITH?

Most states do not require good faith during the negotiation phase, but once an agreement has been reached, a duty of good faith and fair dealing is usually implied between the parties to the agreement. In the broadest sense, every party has a duty not to hinder any other party's performance. Choice of law is again important and should guide the decision-making process.

There is little reason to believe that courts will ignore this important concept because of a global pandemic or widespread protests or demonstrations. To the contrary, good faith cooperation may be more important now than ever before in the parties' relationship and (if you do wind up in a dispute) efforts to work together on extensions and modifications will likely be viewed much more favorably than a tenuous or self-serving attempt to terminate contracts based on Acts of God or claims of impossibility.

ETHICAL CONSIDERATIONS STILL APPLY

Finally, ethical rules apply even during a global pandemic or in times of civil unrest or economic turmoil. Modifications or changes to your contracts and discussions regarding changes should take place within ethical boundaries.

When considering modifications, be aware of jurisdictional variations in ethical rules, including global cultures and norms. Confidentiality rules always apply, and counsel must protect confidential information provided by clients during negotiations or even discussions of extensions or modifications of the contract terms, to address possible breaches.

To protect confidential information, look to the original letter of intent, or consider a mutual confidentiality agreement, limiting the scope of persons with access to confidential information or cloaking it under settlement negotiation rules. Remember that even if settlement negotiations are inadmissible, they may not be protected from discovery.

Remember, too, that ethical duties may apply to a lawyer's relationship with the corporate entity rather than its employees—this is especially true when directors, officers or employees violate the law or engage in behavior that could potentially harm the organization. Counsel and business leaders should work together to ensure that the corporation's interest is protected even during times of economic stress.

Even in tense times, lawyers are not permitted to knowingly advance a contract claim or defense that is unwarranted or has no basis in the law, unless that position is warranted by a good faith argument for extension, modification, or reversal of existing law. Lawyers also have a duty of honesty to courts and tribunals, as well as to adversaries and third parties. In working through contract delays and disruptions, a lawyer may not make false statements or directly mislead another party.

CONCLUSION

We are living in a strange new world. There are myriad ways for companies and the lawyers who represent them to legally and ethically negotiate or modify contracts to help prevent anticipated problems (or even address unanticipated ones) by being proactive. In fact, now may be the perfect time to not only examine your existing contracts, but also to reach out to key business partners to discuss ways to assist and cooperate on accommodations and extensions, so that we can all get through this together.

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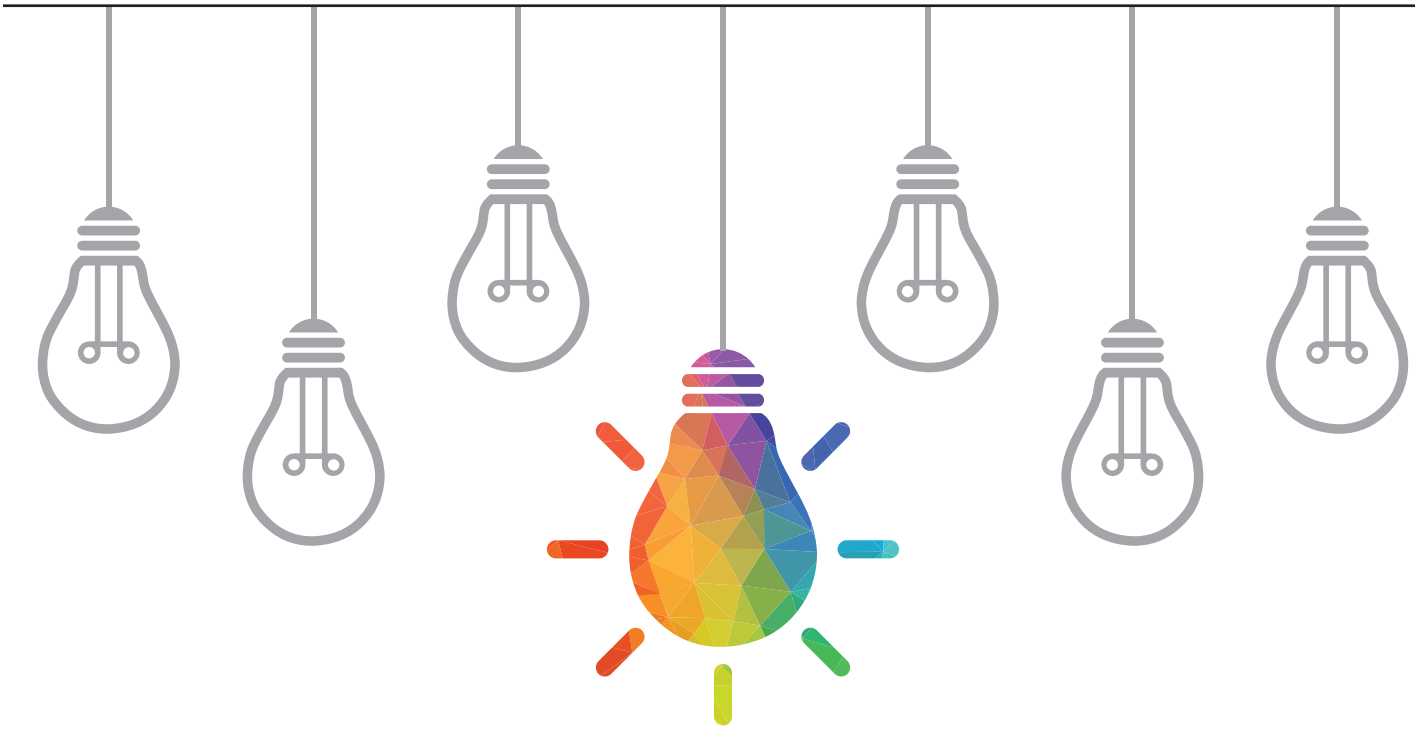

PROTECTING YOUR COMPANY'S INTELLECTUAL PROPERTY

Robert H. Eichenberger and **Robert J. Theuerkauf** Middleton Reutlinger

Managing your company's assets during tough economic times can be challenging. But as easy as it may be to focus only on tangible assets, companies should pay particular attention to their intellectual property ("IP") assets during lean times, as IP assets often constitute a significant proportion of a company's value, and can be the engine for growth as the economy improves.

When it comes to reducing costs and increasing efficiencies, companies often focus on the relative costs and benefits of their various assets. These include tangible assets, such as real property and personal property (physical assets) as well as intangible property, such as IP. Intellectual property is the form of intangible property related to the various creations of the human mind. There are four types of IP: patents, trademarks, copyrights, and trade secrets, and companies should understand and evaluate each to ensure allocation of proper resources to the acquisition, protection, and use of the IP asset. This analysis turns, in part, on the type of IP involved. The various forms of IP, even for a purely domestic IP asset, involve differing laws and regulations, and therefore different costs and benefits. An understanding of each type of IP can help a company make informed decisions regarding its portfolio.

Patents are governed by federal statutes and protect inventions related to any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. An invention comprises two components: conception (the idea for solving a problem or satisfying a perceived need) and reduction to practice (the details of how the solution proposed by the idea is achieved). Three types of U.S. patents exist: utility patents, design patents, and plant patents. Utility patents, likely the most familiar, can protect things such as the structure and function of an apparatus, steps in a method for achieving a particular result, pharmaceuticals, computer-implemented processes, and many other inventions. In order to be patentable, however, each invention must satisfy the statutorily mandated criteria of novelty (it must be new), non-obviousness (it must not have been obvious to someone skilled in the art), and utility (it must be useful or be likely to do what is claimed). Utility patents, once issued, require three main-

tenance fees to be paid over the life of the patent if the owner intends to keep the patent alive. With exceptions for certain types of inventions, and for delays by the United States Patent and Trademark Office in examining the patent application, a utility patent can have a term of 20 years from the earliest effective filing date of the application.

Design patents protect any new, original, and ornamental design for an article of manufacture. A design patent protects the surface ornamentation, shape, or appearance of an article (think Coca-Cola® bottle). Design patents issuing from applications filed on or after May 13, 2015, have a duration of 15 years from issuance (14 years for older applications) and require no maintenance fees.

Plant patents protect asexually reproduced new and distinct varieties of plants, other than tuber propagated plants. Plant patents also generally have a term of 20 years from the earliest effective filing date.

In general, to obtain any rights to enforce a patent, the patent owner must first obtain an issued patent. That is, patent rights do not generally inhere from the moment of creation. So, for this and other reasons, it is important for a company to keep track of its inventions internally and to file a patent application as soon as possible on any that could potentially provide a business advantage.

Trademarks can involve both federal law and state law. A trademark is any word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods or services of one party from those of another party. The term of a trademark can be as long as the owner of the mark continues to use the mark in commerce associated with the respective product or service. One must generally use a trademark in commerce in order to obtain a federal trademark registration. Trademark rights can arise prior to issuance of the federal registration, as soon as the owner uses the mark in commerce associated with the relevant goods or services. Also, one can file an application based on a bona fide intent to use the mark in commerce even before using the trademark commercially. While trademark rights can arise from use alone, owners of trademarks receive several significant benefits related to protecting the asset with federal trademark registration. Therefore, companies should evaluate its product and service offerings to determine if a trademark registration could bring value.

Copyrights, like patents, are governed by federal law. A copyright is a form of protection granted to authors of original works of authorship. The types of original works suitable for copyright are many, and include such things as literary works (including computer software); musical works; dramatic works; pictorial, graphic, and sculptural works; motion pictures; sound recordings; and architectural works. Copyright protection extends only to the expressions of these ideas, not to the ideas themselves. The duration of copyrights varies greatly depending on the type of work, the identity of the author, and the dates of creation and publication, but in general for works created on or after January 1, 1978, the term of the copyright is the life of the author plus 70 years. For some works created by an employee or pursuant to a written contract, the duration is the shorter of 95 years from publication or 120 years from creation. Copyright rights arise as soon as an original work of authorship is fixed in a tangible form, but, like trademarks, additional benefits related to protecting the asset come with federal registration. Therefore, companies should consider the relative benefits of applying for a federal registration.

Trade Secrets are governed by both federal and state laws, with most states having adopted statutes similar to the federal Uniform Trade Secrets Act. Trade secrets comprise information that derives value from the very fact of being kept secret. Basically, any form of valuable information can be the subject of trade secret protection, including formulas, recipes, programs, devices, methods, customer lists, and the like. In general, trade secrets can protect many of the same types of innovations that the patent laws can protect, so a company must decide which type of protection is best for each asset. Patent laws require inventors to provide a publicly available disclosure of their invention in exchange for the 20-year protection afforded by the issued patent. But once the patent has expired, the invention claimed no longer has any protection. Trade secrets, on the other hand, can last indefinitely, limited primarily to how long the owner can maintain secrecy. Therefore, certain types of information might be better protected as a patent or a trade secret, depending on various business and competitive issues.

Apart from considering the different types of IP a company might possess, companies must also consider whether they have policies in place to protect their IP with respect to their employees. For example, there is a presumption that an invention developed by an employee belongs to the employee, not the employer, unless the invention was developed in the ordinary course of the employee's job duties or there is an express agreement to the contrary. However, even under the former exception, ownership of that invention can often be open to debate. Consequently, companies should have employment agreements, regardless of an employee's job duties, that expressly provide that ownership of the employee's inventions resides with the company. Further, such an agreement should be drafted to encompass any copyrightable works or trade secrets as well. Additionally, to aid the company in keeping track of such IP the employment agreement should require the employee to disclose to the company the development of any protectable works or inventions. And, to minimize possible disputes regarding ownership later, the employment agreement should provide that the employee presently assign, upon execution of the employment agreement, any and all rights, including future rights, to any IP.

Moreover, a company's employment agreements should separately address the company's trade secrets. As mentioned above, for an idea to be protected as a trade secret, it must be kept secret. Therefore, employees must be bound to secrecy, not only while employed but even after they leave the company. Consequently, it is prudent for companies to have employment agreements that also contain a non-disclosure provision that binds the employee even after she or he leaves the company. Finally, if allowed under the laws of a company's particular jurisdiction, a company should consider a non-compete provision to further protect its IP from reaching the company's competitors through former employees.

Companies should identify their IP assets and weigh the benefits that each brings to the company's bottom line and, if worthy, timely seek the proper protection for such assets. In tough economic times, a company's IP, so long as it is properly protected, may be its best asset.

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HOW TO TELL YOUR COMPANY STORY

(so plaintiffs don't do it for you)

Katrina Cook, Ph.D. Litigation Insights

"I came in here with pictures of stop signs. I came in here with pictures of rampant corporate neglect. We have a duty here as a jury. We are holding corporations accountable. This is one of the things they are responsible for, but our duty as a citizen – my duty as a juror – is to bring justice. Justice for all wrongdoing by this corporation since its inception over a hundred years ago."

Words like these, from the mouth of a mock juror determined from the start of deliberations to stand by a pro-plaintiff verdict, are not unique. They resemble many other juror diatribes we have heard during jury selections and post-trial interviews across the nation. While few fall on this extreme end of the spectrum, anti-corporate bias is a problem for any company accused of wrongdoing in a lawsuit. Like this gentleman, some jurors are tempted to focus their anger on *any* perceived wrongdoing, rather than the specific case at hand or what caused the plaintiff's injuries.

For others, the bias can manifest in more subtle ways. For instance, when we ask jurors why they found for the plaintiff in post-trial interviews, the most common response is, "Because the company didn't prove…." This tendency to shift the burden is observed in our mock jurors, too; on their background questionnaires, we routinely see roughly half of the jurors agreeing that "When an individual sues a company, the company should have the burden of proving it did not do anything wrong" over the alternative, "…the individual should have the burden of proving the company did something wrong."

Although defense counsel use many methods to combat anti-corporate bias at trial, one crucial strategy for every company facing litigation is developing and polishing the company story.

WHY YOUR COMPANY STORY MATTERS

Plaintiff attorneys are skilled at spinning a story that is fraught with emotion, motive, and inaccuracies. We often say, "Plaintiffs have the easier story to tell" when they can play "loose and fast" with the facts. Thus, the temptation of many defendant companies is to focus primarily on refuting

the plaintiff's allegations to set the record straight. The presumption is that since the plaintiff bears the burden of proof, the defense need only poke enough holes to ensure that burden cannot be met for each element of the claim.

For the reasons discussed above, that's a precarious presumption to make, but there are additional reasons why it isn't enough merely to respond to the plaintiff's allegations. A purely defensive approach can lead to a disjointed case story that is difficult for jurors to follow. This can be detrimental because jurors, as humans, think in stories. They want to know the setting, who the parties are, what happened, and what motives were behind the parties' actions. Focusing solely on refuting the plaintiff's case leaves jurors to fill in the gaps of who your company is and why it does what it does. And they will do so based on their own experiences with corporations, what they've heard in the news, or worse – plaintiff's counsel's depictions.

So, rather than leaving jurors with only the plaintiff's words and their own biases to inform who your company is, it's important to think about what you want jurors to know about your company and how you plan to convey that information.

BUILDING YOUR COMPANY STORY

When considering what to include in your company story, we recommend conducting a brain-storming session between trial counsel and company representatives, with the option of including an experienced consultant to facilitate theme development. Questions to ask when building the company story include:

- **Who are you?** Let jurors know who your company truly is. It is very easy to think of corporations as faceless entities who will always put their bottom line above their customers. As such, it is vital to humanize your company. Carefully consider your corporate designee; the person selected should be prepared to incorporate messages about the company's history, people, and values throughout their deposition testimony and at trial.

- **What distinguishes your company?** Separate your company from the pack. In our surveys, we frequently find that while jurors often have a negative view of corporations generally, they tend to have much more positive views of individual corporations, particularly if they perceive that corporation as having good practices and good products. Combat plaintiffs' often-used "macro" approach – e.g., lumping your company's behavior with all corporations, preying on jurors' broad negative attitudes – by focusing them on the "micro" elements that make your company unique and likeable. How are you different from other companies in your industry? What initiatives and practices has your company enacted? The more positive and proactive associations the jurors have with your company, the more likely they are to set aside previous assumptions and view your company as an exception to the rule.

- **How do you go "above and beyond"?** Time and time again, jurors tell us that meeting industry or federal standards is the "bare minimum" for corporations. Jurors want companies to go "above and beyond" what others in the industry are doing. So, where are the areas your company has exceeded expectations? How is your company seeking to be better than others in the industry? Where are your standards tighter? What safety improvements have you made? These are all ways to help jurors further distinguish your company's commitment to its employees, its customers, and the public.

CONVEYING YOUR COMPANY STORY

Communicating your company story begins in discovery. It will be important for counsel to accumulate information during the discovery process that can flesh out the company story. Early theme development is useful precisely so that counsel can be sure to seek out evidence to support it and think about ways to increase the likelihood that the information can be admitted should the case proceed to trial. We can't stress enough how important it is to start building the company story early; there is nothing more frustrating than developing a thematic story *after* discovery is over only to realize there isn't a witness who can testify to reinforce a key theme.

Speaking of which, witnesses should be taught how to affirmatively communicate your themes, even when responding to plaintiff's counsel's questions. Ideally, a practice Q&A between the witnesses and defense counsel affords witnesses an opportunity to reinforce these habits. For example, in a recent trucking case we assisted on, it was important for the company to emphasize the experience of its drivers. So, when faced with "reptile" questions such as, "Would you agree safety is a top priority?", we taught the witness to respond with phrases such as, "We only hire drivers with at least five years of CDL experience because safety is an important goal for us, yes."

When it comes to trial, focusing only on the plaintiff's claims gives the plaintiff the power to set the agenda and cement their story, at the expense of your company. This defensive stance communicates to jurors that "the company has something to hide" or that "it is guilty of something." As advocates for a defendant, it is only natural to want to hit the plaintiff's claims head on; however, we recommend fighting that natural urge and moving away from developing an opening statement that simply lists the plaintiff's claims followed by a discussion of each one.

Instead, we recommend formulating the opening in a manner that first seeks to tell the *affirmative* defense narrative, which incorporates the company story. Our research has shown that by being affirmative about your company, who it is, and its actions, counsel not only gains credibility with the jury, but so does its client. Presumably, the narrative will refute the plaintiff's claims without having to recite them, and when that's not feasible, responses to the plaintiff's allegations come to light organically, as a side comment within your defense story.

CONCLUSION

By humanizing your company, you have more control of the story jurors are developing in their heads and can more easily avoid getting cast as the faceless villain. This gives your company more control over the narrative as a whole and exchanges a reactive strategy for a proactive one.

Not every juror can be swayed by a good company story, and not all the good information you want to tell the jurors can be admitted, especially if there are concerns about opening the door to the bad. Nevertheless, framing your case with an affirmative case narrative can be a powerful weapon for battling anti-corporate bias.

Dr. Katrina Cook of Litigation Insights has 11 years of practical application, study, and research in legal communication, jury research, and cognitive psychology. She has conducted and designed mock trials and experimental studies assessing juror attitudes toward the facts of a case and how other factors, such as attorney gender, may influence jurors' judgments. Further, she has assisted counsel in implementing themes discovered during this research into their case argument.

ADVANCEMENT RIGHTS IN OFFICER AND DIRECTOR LIABILITY CASES

Jennifer M. Barbour Middleton Reutlinger

Advancement and indemnification rights can radically change the analysis and strategy in bringing or defending officer and director liability cases. As such, it is critical to understand the potential rights and liabilities in such cases. Indemnification and advancement rights are corollary rights, both providing mechanisms by which a company may reimburse its officers, directors, or managers for expenses incurred in legal proceedings. Indemnification provides for an officer, director or member to have his or her legal fees and expenses, and perhaps a judgment against him or her, paid by the company at the conclusion of the legal proceeding. Most statutes governing corporations provide for mandatory indemnification of an officer or director who is successful in defending an action. In contrast, most limited liability company statutes lack similar mandatory indemnification provisions.

However, all states grant corporations and limited liability companies discretion to expand indemnification and advancement rights. Thus, companies can assume obligations to indemnify an officer, director or manager even if not successful on the merits. Companies may also elect to provide advancement rights to officers and directors pending the outcome of the legal matter. Unlike indemnification rights, advancement rights provide for interim relief

from the legal costs to an officer, director or manager during the pendency of a legal matter. Because the costs associated with a legal matter can be staggering, any attorney representing an officer, director or manager should consider whether advancement rights are available.

Companies frequently exercise their discretion to offer expanded indemnification and advancement rights to officers, directors, managers, and sometimes even other employees. When recruiting competent and capable officers, directors, managers and employees, indemnification and advancement rights can be a recruiting enticement. Additionally, indemnification and advancement rights can deter frivolous claims by shareholders or corporate officials against officers, directors or managers because of the knowledge the fees and expenses of the officer, director or manager would be borne by the corporation.

WHAT IS AN ADVANCEMENT RIGHT?

Advancement refers to the right provided to an officer, director or manager to have certain legal fees and expenses paid by the company in specific circumstances when the officer, director or manager becomes involved in a legal matter. While similar to indemnification rights in many respects, advancement rights are distinct rights. Unlike indemnification rights, advancement rights do not require the officer, director or manager to be successful in the legal proceeding before she may enforce her advancement rights. The primary goal of advancement rights is to provide interim relief from the financial pressures a legal action may put on a company official.

The scope of the advancement right is determined by the governing documents of the company that provide the right. Companies frequently provide advancement rights in their articles of organization, articles of incorporation, by-laws and/or operating agreement. If those documents are silent as to whether the company has assumed advancement obligations, there may be other documents affording the rights to the officer, director or manager. Attorneys should inquire into the existence and contents of other contracts or agreements between the company and the official, such as employment contracts or director indemnification agreements.

Companies considering adopting advancement rights should ensure their governing documents are carefully crafted to afford rights as intended. This is particularly important given two things. First, the only prerequisite to receipt of the advancement rights is a written document whereby the officer or director agrees to repay the advanced expenses and attest that the facts known to him or her at the time would not preclude indemnification. The obligation to repay triggers only if he or she is later determined not to have met the appropriate standard of conduct for an officer or director. Further, the officer or director need not demonstrate he has the means to repay the company. Second, advancement rights are enforced in summary proceedings with many presumptions afforded the officer or director in favor of advancement.

Because of the summary nature of the proceeding, the scope of it is narrow. The court will only inquire into whether the claims asserted against an officer or director fall within the category of claims that the corporation agreed to advance. The officer or director is not required to prove that he or she will be indemnified in order to obtain advancement. Therefore, if the advancement right is not carefully crafted, the company could find itself extending advancement for claims or expenses that were not intended due to the nature of the enforcement proceeding.

Companies and their attorneys should also consider whether advancement or indemnification rights afforded to officers and directors may extend to wholly owned subsidiaries of the company. Some courts have held a parent company's advancement provisions applied to officers and directors of a wholly owned subsidiary when corporate formalities are not well-observed between the parent and subsidiary.

Beyond drafting corporate documents, a company considering a claim against an officer or director should consider whether any of the claims asserted would be subject to advancement. If so, the company and its shareholders or members could be responsible for not only its own litigation costs, but also those of the officer or director it is suing. Companies can minimize some of those costs by obtaining Director and Officer liability insurance, but the economic impact of litigation can extend beyond those limits.

Additionally, shareholders or members of a company considering claims against an officer, director or manager should be aware that advancement of expenses may be due to the officer, director or manager. This potentially results in the shareholder or member depleting cash or assets available for distributions.

Finally, companies and attorneys should carefully consider whether to challenge an officer or director's request for advancement. Courts tend to resolve disputes in favor of advancement benefitting the officer or director, despite the nature of the alleged misconduct on the part of the officer or director. Importantly, an officer or director who brings an advancement action to enforce her rights is frequently awarded her fees in bringing the advancement action, resulting in an award of fees on fees. Accordingly, unless fees on fees are expressly excluded under the organizational documents or agreements giving rise to the advancement rights, companies should carefully consider the benefits versus costs of denying a request for advancement.

CONCLUSION

As one court aptly stated: "Litigation is an occupational hazard for corporate directors." Thus, savvy individuals considering service on a company's board or as an officer will frequently ensure the company affords not only indemnification rights, but also advancement rights. Companies seeking to attract talented leaders often choose to provide these rights to attract the best managers, officers and directors. Companies should carefully craft advancement provisions to ensure the scope of advancement obligations is considered. Further, any attorney involved in a legal proceeding involving companies should be aware of the advancement right and its implications for the official and the company. Any attorney representing an officer or director in a legal proceeding should carefully determine whether advancement rights are available. If so, those rights can provide a significant financial benefit to the officer and director to avoid out-of-pocket expenses in defending the proceeding. Similarly, a company considering any claim against an officer or director should weigh the costs and benefits of pursuing the claim if advancement rights are afforded. Otherwise, the company may find itself fronting not only its own litigation expenses, but also those of the individual against whom the claim is asserted. It is important, therefore, for attorneys to carefully investigate the existence and scope of advancement rights for their clients.

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"[A]s many as 80% of jurors make up their mind immediately after hearing the opening statements."[1]

"About 80-90 percent of jurors make up their minds about how they are going to vote at the conclusion of opening statements."[2]

DO JURORS DECIDE AFTER OPENING STATEMENTS?

Nick Polavin, Ph.D. Litigation Insights

You may have seen or heard grand claims like these over the years, from a variety of sources.

Granted, few would disagree that opening statements are crucial; they are an opportunity to start telling your story, introduce case themes, and provide jurors a framework to make sense of the information they will hear throughout the case. We have certainly seen first-hand the influence they can have on jurors. However, in our decades of studying juror behavior, these 80%-or-so claims always seemed inflated. To examine their validity, we first conducted a literature search, revealing multiple sources citing numbers like these. However, none of these sources conducted research to back the claim, and many could not provide a reliable citation (or any citation at all) for the statistic.

As far as we can tell, it is likely that the 80% number originated from a 1966 study[3] or a 1959 study[4] – either way the statistics were taken entirely out of context. Rather than investigating the effects of opening statements, these studies examined the consistency in decisions between judges and jurors as well as changes in decisions during deliberations. In fact, one puzzled author from the 1966 study eventually penned an article to address the resulting myth. As he pointed out, "Nowhere in *The American Jury*'s 438 pages can one even find the words 'opening statement.'"[5] Although his clarification was made years ago, the general myth has persevered and seemingly entered the legal conscience as a kind of vague "wisdom."

Meanwhile, the question endures as to how open-minded jurors *actually* remain following opening statements. To examine this issue ourselves, we turned to our database of mock trial statistics to analyze how many of our jurors stuck to their leaning after opening statements and the factors that may have affected their consistency.

STUDY 1

In our first study, we used juror data from 12 mock trials, which included 337 participants, to examine the percentage of jurors who do not change their opinion at all after opening statements. Jurors had been asked to indicate their "leaning" in the case – which we coded as either "defense," "plaintiff," or "unsure" – at several points throughout the exercise, including after opening statements, after plaintiff and defense case presentations, after the plaintiff rebuttal, and after deliberations. To answer our question, we assessed the variance of jurors' leanings throughout the mock trial – that is, whether their leanings

deviated after the opening statements.

Analyses revealed that only 26.7% of jurors held to a consistent leaning following opening statements – far less than the oft-quoted 80% figure. Even among those who favored a particular side after openings, nearly two thirds later changed their leaning. Furthermore, 25% of jurors were unsure after openings; among them, 48% ultimately supported the defense, 42% supported the plaintiff, and 10% remained undecided.

Looking at it from another angle, when comparing leanings at only two points in time – after opening statements and after deliberations – we found that only 57% of jurors reached a final decision that matched their leaning after opening statements. That is to say, even if we just focus on jurors' final decision in comparison to their conclusion after opening statements, the figure is still substantially less than 80%. Ultimately, we found that a sizable majority do not "decide the case" after opening statements, and they can keep an open mind and adjust their opinions after hearing new information.

STUDY 2

In a second study, we examined data from 10 mock trials conducted over the past year, which included 319 participants. Jurors were asked their case leaning (i.e., defense, plaintiff, or unsure) between six and 17 times throughout the course of the exercise, depending on the case. As a result, this study assessed jurors' opinions at more points in time than our first study, allowing us to see if the proportion who remained consistent would decrease due to more opportunities to change. Again, we looked at whether jurors' leanings deviated from their initial post-openings leaning. In addition, cases were noted as either having disputed facts or not (i.e., cases where jurors were to determine intent, reasonableness, or an interpretation of undisputed facts).

Study 2 revealed that 33.2% of jurors remained consistent in their leanings following opening statements – not too far off from the 26.7% figure found in Study 1. This time, 22.3% of jurors were unsure following openings; among them, 40.8% ended up supporting the defense, 56.3% supported the plaintiff, and 2.8% remained undecided. Since these figures are quite similar to those found in our first study, it does not appear that the additional measuring points had a notable influence on consistency.

Multiple variables affected changes in leanings. First, cases with disputes over what occurred factually had significantly more fluctuations than cases calling for an interpretation of undisputed facts. This finding is likely because when facts are disputed, the evidence and testimony are more necessary to fully understand what happened. On the other hand, when jurors must rely on their subjective experiences and interpretations of the law to make judgments about intent, reasonableness, or wrongfulness, there is less room for new information to have an influence.

Younger jurors were also significantly more likely to exhibit fluctuations than older jurors. This is an effect we have seen for some time and is likely because younger jurors have less life experience and therefore fewer ingrained opinions pertaining to events at issue in trials. Again, the more that jurors rely on their previous experiences, the less their decisions will be influenced by new information. For example, in a case where investors lost a significant amount of money, jurors in their 20s and 30s may find the topic foreign, so their decisions will likely be heavily influenced by evidence and testimony. By contrast, older jurors are more likely to have experienced losing invested money, and they likely have opinions about how it happened; this experience can thus interact with the information at trial and shape their decision.

Finally, plaintiff jurors were significantly less likely to change their opinion following opening statements than defense jurors. There may be two reasons why this occurred: First, jurors who do not change their leaning throughout trial may be especially influenced by what is known as "confirmation bias." This is a bias whereby a person forms an opinion early on and filters subsequent information to reinforce that opinion. In a trial context, the juror gives more weight to evidence that supports his or her opinion and counterargues or ignores evidence that undermines his or her opinion. People who are affected most by this bias will likely favor the first side they hear – the plaintiff. The second reason why plaintiff jurors may be less likely to change their initial decision is because of the nature of cases: Plaintiffs argue that they are harmed by a defendant, and some are very emotional. Jurors on the panel who are "emotional thinkers" may be swayed by these appeals, relying more on a feeling or intuition rather than facts when reaching their decision. Therefore, these jurors will likely start out favoring the plaintiff and adjust their leaning only minimally, if at all, in response to the more fact-based defense case.

KEY TAKEAWAYS

In conclusion, the claim that 80% (or more) of jurors reach their decision after opening statements is false. This myth was miscited, unfortunately spread, and has persevered for decades. Rather, the real figure is likely closer to 30%.

Despite this much smaller figure, it nevertheless has important implications for jury selection. Of those jurors who remained steadfast in their leaning, our studies found that about one third were defense jurors and two thirds were plaintiff jurors. This means that, of all jurors, about 21% started out favoring the plaintiff after opening statements and never changed. These are the jurors defense counsel must identify in *voir dire* – obtaining cause challenges and using peremptory strikes to exclude such jurors who are not open to considering defense arguments.

Further, although the majority of jurors are open to hearing the evidence and adjusting their opinions throughout trial, the importance of a powerful opening remains. When as much as a third of the panel might stick with their decision after opening statements, those opening statements are still a vital element of one's trial strategy.

1 Lopez, K. (2011, December 15). 6 Reasons the Opening Statement is the Most Important Part of a Case. *A2L: The Litigation Consulting Report.* https://www.a2lc.com/blog/bid/50588/6-reasons-the-opening-statement-is-the-most-important-part-of-a-case

2 Opening Statement: Setting the Tone for Trial (2019). *Advocate Magazine.* https://www.advocatemagazine.com/article/2019-january/opening-statement-setting-the-tone-for-trial

3 Kalven, H. & Zeisel, H. (1966). *The American Jury.* Boston, MA: Little, Brown and Company.

4 Broeder, D. (1959). The University of Chicago Jury Project. *Nebraska Law Review,* 38, 744-760.

5 Zeisel, H. (1987). A Jury Hoax: The Superpower of the Opening Statement. *University of Chicago Law School: Chicago Unbound, 17*(4).

Dr. Nick Polavin of Litigation Insights has seven years of experience in jury research and the legal field. He uses this knowledge and experience both in court during jury selection and in developing themes and recommendations for trial based on mock trials and focus groups.






Our Readers Share With Us

WHAT'S KEEPING YOU SANE?

H. Joseph Price, Jr. Dysart Taylor Cotter McMonigle & Montemore, PC

After sharing my lessons learned during the pandemic, a few readers reached out and asked us to find out what is keeping everyone sane during this time. So, we asked readers to share the activities they've been doing more than ever during the COVID-19 quarantine as well as the literature and music that keep them sane.

And the results are in!

BIRD WATCHING

This was a little bit of a surprise. Lewis G. said, "My kids and I have taken up bird-watching. We've placed three of these houses in our yard and house sparrows have taken up residence in each of them. Our two feeders attract several northern cardinals, a handful of blue jays, too many common grackles, and at least one yellow finch, rose-breasted grosbeak and redheaded woodpecker. We bought a couple of books and John turned us on to the Cornell Lab of Ornithology eBird project. It has a mobile app and you can track birds as part of a worldwide citizen science project."

Heather told us, "I get to pay more attention to the birds. I always fed them before, but working from home allows me to watch them all day. I have a hummingbird feeder right outside my home office window. There are three bird families nesting in my backyard. I love it."

BAKING AND COOKING

This was the activity that more readers wrote about than any other. Dennis from Cincinnati said, "I've been doing a little more baking than I usually do. We are watching our carbs, but of course beer – liquid bread – does not count. Instead of eating all that I bake, we share it with our elderly neighbors."

Karin L. said, "While cooking is not something new, I am doing more of it now that we are avoiding restaurants and not traveling. We've hosted one couple at a time for socially distanced happy hours on the back deck, and for those I plan and prepare something to serve."

Jennie C. shared, "Baking cinnamon rolls from scratch with my 9-year-old daughter."

Tom N. mentioned, "We cook together most nights, exploring various beverages in the process."

ZOOM MEETINGS

This came up frequently both on the work side as well as the social side. On the work side, Ray said, "The GoTo and Zoom meetings have been oddly productive for this team, particularly since no client wants to meet live yet. Although that is changing, as older clients like to meet 'live.' Having said that, I'm tired of them now."

On the social side, Tom told us, "I've also been fortunate to have kept up communications with friends and family near and far via the miraculous Zoom and FaceTime apps, and other social media. It's reassuring to see other folks' overgrown hair, sweats and tees, novelty mugs, bedroom office ceilings, sofa art and goofy pets. Speaking of which, dogs are the best!"

Kevin, an instructor at a junior college, has been forced to use Zoom in his classroom. He said, "Teaching college classes – or any grade – through Zoom is a decent workaround, but it is a poor substitute for being in the classroom. Students are far less engaged, there is less interaction and it is hard to get to know each other. Getting back to the classroom is really important."

FRENCH

John from New Hampshire is taking French lessons; he said, "I have taken up French lessons on the Duolingo app, which is teaching me useful phrases for a trip to Montreal, like, "The cats are eating the pizza."

YOGA

John also mentioned that he was engaging in online yoga classes at glo.com.

PODCASTS

Readers told us about a number of interesting podcasts they had listened to. Heather mentioned daily podcasts, including NPR's Up First, ABC News' Start Here and New York Times' The Daily.

Ian singled out The Plot Thickens, a Turner Classic Movies' podcast about Peter Bogdanovich's life and career.

TELEVISION

Tom mentioned that he has binged a couple of series, including "Schitt's Creek," saying, "It has been a big hit here."

Dennis said, "My wife and I are also enjoying all the old movies we can watch. I just hook the laptop up to our television and voila! Last night we watched "Pocketful of Miracles" with Glenn Ford, Bette Davis and Peter Falk. My wife is a big Columbo fan."

James said, "My wife and I have watched a bunch of TV shows together – "The Hunters," "Picard," season two of "Star Trek Discovery" and "Homeland."

Mandy shared that she falls asleep to Brian Williams at night, and that is what makes her sane.

GUITAR

Tom said, "A big plus has been moving my music room/studio to our former guest room. I have a very focused iOS-based suite of apps; my keyboards, guitars, amps, noisemakers, etc. all in one location; mic selection at hand. So far, I have recorded some beats and pads only, but I can hear melodies and song structures coming. The muses are circling ..."

Dennis said he has been practicing guitar more and he finally believes he may be getting better. Since one of his favorite singer/songwriters, John Prine, passed away recently, he is currently working his way through Prine's songbook, with Angel from Montgomery, Crazy As A Loon and In Spite Of Ourselves.

RESEARCH

John said, "Having several research projects that are not necessarily 'work-related' helps me to soothe my curiosity about where we all come from and where we are going. Learning from and reading primary source (original) material about the men and women who came before us and were pioneers in this country, the difficulties and calamities they went through for us to even be here can be reassuring. They had it a lot worse, experienced vast degrees more pain, suffering, and loss than we do now. They persevered, they overcame challenges and they endured so that we can be here today."

BOOKS

John told us that he had reread three books by Alan Watts – "This Is It," "Become What You Are" and "The Joyous Cosmology." He read Watts' "This Is It" in high school at age 17. John said, "It's a collection of essays Watts wrote while living in California and forging his views on spirituality and Eastern philosophy."

"Watts was railing against tradition and order. His writing is approachable even when it suggests that there is no reality but what we believe to be real/not real." John was on board with that, and was reminded of Watts' writing when in recent years he read about scientific theorists believing that there's a better than 50% chance that this reality we are in is in fact a computer simulation.

Tom said he has read Hilary Mantel's third and final volume of the epic Wolf Hall historical novels, "The Mirror and the Light;" and all but one – so far – of Tana French's Dublin Murder Squad series. Tom called it "excellent."

James shared that he read the two latest by Tom Clancy (James said, "Well, really his successors writing under his name"), the latest Steve Berry and the start of a new series by James Haley.

Dennis mentioned that his library is closed but his library card has given him access to their e-branch, which he had never tried before now. He is now listening to his third audiobook, which has been extremely popular, Benjamin Graham's "Intelligent Investor." Before that it was "The Call of the Wild."

Ian recommended "The Cuckoo's Calling," a private investigator mystery by J.K. Rowling under the pen name Robert Galbraith.

POETRY

Lewis said, "My neighbor looped me into a group of eight or nine guys led by a history teacher at St. Theresa's who was smart as hell. In the last eight weeks we have read Blake, Wordsworth, Coleridge, Keats, Shelley, Hemingway, Carver, Chekhov, Yeats, Auden, Owen, Sassoon, Kipling and Hardy. It's been easy to tackle them in a single sitting and I see things I would not normally have noticed in poems I had never read." He also noted that it helps provide some perspective about how strange these times seem.

MUSIC

There were several mentions of particular artists or albums that our readers had been listening to. Believing that, "Variety is spicy," Tom said he was all over the map when it comes to the music he has been listening to. It includes everything from classical jazz to new electronic.

Dennis said that last night he listened to Kacey Musgraves' Golden Hour.

Ian mentioned Station to Station by David Bowie.

John brought up a number of bluegrass artists we were not familiar with: Greensky Bluegrass, Billy Strings and Michael Cleveland's Tall Fiddler.

More than 40 years into his practice, Dysart Taylor shareholder/director Joe Price helps businesses and individuals plan for their future through estate planning, tax planning, business succession planning and wealth preservation. He can be reached at jprice@dysarttaylor.com or (816) 714-3024.

THE COST OF WAITING:

THE ADVANTAGE OF EARLY INVESTIGATIONS

Tim Karlstad Marshall Investigative Group, Inc.

Claims have a lifespan. They begin with the claim for a loss. They resolve with denial/acceptance, judgement, or settlement in some form or fashion.

Liability claims generally have a longer lifespan as the parties involved have little control over one another's actions. The statute of limitations is the only clock ticking and if you are lucky enough to have received a lawsuit before the statute runs out, then claim life really grinds to a halt in terms of getting to a resolution.

Occupational injury claims generally have more urgency as injured employees and their employers hopefully have a common goal: to get the employee healthy and back to work. However, some workers' compensation claims seem to find ways to linger.

PERFECT WORLD CLAIMS

Typically, best practices include a section on investigation of a claim. Yes, the *best* practices are pretty *typical*. Obtain a recorded statement, photos/video of the scene, and medical records. This is straight forward stuff and no problem, because every incident/loss comes together smoothly; especially when:

- Reported within minutes of occurring.
- The right person is available when it occurs to make sure it is reported properly.
- You obtain all recorded statements within 24 hours of the incident.
- Photos/videos are properly secured and sent immediately (never looped over or deleted).
- You have a full witness list of people who might have photos and they are easy to contact.

REAL WORLD CLAIMS

You have 50 other files needing your attention, so you set your diary and revisit the claim when that diary comes up: 5-10-15-30 days. What has happened with that claim during that time? This is the time where the claim sits and waits. Does the following sound familiar?

- The claimant's recorded statement was pretty bland, and they haven't returned all the forms.
- Still waiting on witnesses to call back, or worse yet, phone numbers were wrong, and you have no idea where witnesses are.
- You have not heard back for sure if that video was secured.
- Co-workers thought the claimant got hurt while on vacation, but no one has followed up.
- The responding police have not provided an accident report. Or all you have on the claim is an accident report and nothing else.
- Social media of the claimant suggested they were fine, but 30 days later the profile is gone.
- No injuries were reported, but now you have a letter of representation on your desk.

What is all too familiar early in a claim lifespan could cost significant dollars and effort to resolve, but you can avoid this through early involvement of an investigator.

INVESTIGATION EXPECTATIONS

What can/should you expect from an investigator?

At the earliest involvement, within hours of an accident occurring, an investigator can:

- confirm injured parties' condition
- identify crucial witnesses
- secure video
- identify valuable social media, blogs and news articles with the associated metadata and MD5# algorithm to properly identify chain of evidence.

As the situation becomes more clear, good investigative practices can give you a better understanding of your claimant's condition, such as if they have recovered from their injuries and to what capacity. An investigator can develop current activity levels of your claimant with the proper use of old school methods and today's advanced technologies.

Additionally, developing a claimant's background can assist in identifying variables beyond the loss likely to impact the claimant and how they will or won't pursue the claim.

Let's examine how investigators should give you an advantage and have your claim working for you during that waiting game between your diary reminders.

KNOWING YOUR CLAIMANT

You receive a liability claim and the injured party is a 70-year-old individual who was transported to the hospital from the scene of a motor vehicle accident. You have the claimant's name, date of birth, and address. This was provided by the crash report completed by law enforcement on the scene. Nothing more is known about your claimant.

Early investigation learned the claimant was hospitalized immediately following the loss, but also two other times over the next two months following the loss.

This claimant was believed to be retired, mostly based on age, but it was not known their level of activity, background, or employment status. An investigation was completed and confirmed the claimant was retired from operating a pain medication clinic that was busted up by law enforcement. The claimant was convicted of a felony and incarcerated for five years, then released and remains on probation.

The claimant's relatives posted on social media content of the accident to include scene photos taken by one relative who was nearby when the crash occurred. Other postings detailed the claimant's injuries and recovery. It was also learned relatives work in the medical field.

KNOWING THE RESPONSIBLE PARTY-TO PROTECT YOUR CLIENT

An occupational injury is claimed with one of your insureds. The employee was injured while at a location in the field, not your insured property. Your investigation learned the injury was due to an issue at the property of the other entity and you believe there is subrogation to pursue, but the entity is no longer in business.

An investigation revealed the entity was merged and became a wholly owned subsidiary of a large national corporation. The merger took place prior to the date of loss, but following the date of loss, the location was closed for other business reasons. Subrogation can still be pursued with the parent company.

KNOW THE WITNESSES

You receive a list of key witnesses, and the plaintiff attorney is pushing that these witnesses are supporting the claim. No recorded statements were taken at the outset of the claim, and now, witnesses have become unresponsive.

An investigator developed good contact information and obtained statements from two of three witnesses. The third witness is discovered to have a criminal past, and since the date of loss has become a fugitive after cutting off a probation monitoring bracelet. The witness has two warrants, so they are unlikely to cooperate with the investigation and show up to provide a statement. Thus, you feel confident in your defenses and know there is not a group of witnesses that the plaintiff attorney is threatening you with to provide adverse testimony.

CONCLUSION

Remember, the information is out there to answer the questions that jump out at you when a claim originates, as well as when flags come up during the lifespan of the claim. Investigators should be considered a crucial piece to your efforts to get those questions answered. Their involvement early and proactively will bring clarity to claim exposure, help develop defenses, provide information helpful to set reserves, and ultimately resolve the claim in a more favorable manner for you.

Tim Karlstad joined Marshall Investigative Group in 2015. He has been in the claims investigation field since 1999, working within law firms, TPAs, and corporate risk management. Tim has been working with USLAW member firms and their clients since 2009. He holds a degree in criminology/sociology from the University of Minnesota-Duluth.

MEETING ENERGY STORAGE GOALS

New York Is On Track

Danielle Mettler-LaFeir, Ekin Senlet, and Angela Sicker Barclay Damon LLP

New York State continues to accelerate its efforts to curb greenhouse gas emissions and promote increased reliance on renewable energy resources for electric generation. Energy storage is an essential piece of the power puzzle, as the Empire State aims to drastically increase renewable electric generation and have a zero-carbon emission electrical system by 2040.

The Climate Leadership and Community Protection Act, or CLCPA, passed by the New York State Legislature on June 20, 2019, expands on New York's Reforming the Energy Vision, or REV. The CLCPA establishes an energy storage capacity requirement of 3 GW by 2030, and requires the state's Public Service Commission, or PSC, to establish a program by June 30, 2021. The CLCPA further requires 70% of New York's electric generation to come from renewable energy sources by 2030, an increase from the state's current Clean Energy Standard of 50% renewable generation by 2030, and 100% greenhouse gas free electrical system by 2040. In order to meet the targets established by the CLCPA, New York must transform its electrical grid to make it able to store greater amounts of energy produced from renewables and cleaner traditional generation, so that it can meet electric demand during peak periods and high energy demand days, and make carbon-free resources viable as reliable baseload energy producers.

New York State's fiscal year 2021 state budget includes another renewable energy related bill—the Accelerated Renewable Energy Growth and Community Benefit Act—which directs the New York Energy Research and Development Authority, or NYSERDA, to find underutilized sites that have the potential for the development of energy storage facilities in an effort to further its energy storage and renewable generation goals.

ENERGY STORAGE DEVELOPMENT IN NEW YORK

The PSC and NYSERDA have already taken many actions to increase energy storage capacity in New York. To implement the state's energy storage capacity goals established prior to the CLCPA, on June 21, 2018, the PSC established a separate docket (PSC Case No. 18-E-0130) for an energy storage program. NYSERDA developed an energy storage roadmap, and in December 2018, the PSC issued an Order Establishing Energy Storage Goal and Development Policy, which includes several requirements and incentives to increase energy storage capacity in New York.

On April 1, 2020, the New York Department of Public Service (DPS) issued its first "State of Storage" annual report detailing the progress in reaching New York's statewide energy storage goal, which is 3 GW by 2030 with an interim objective of deploying 1,500 MW by 2025. Although there

is currently only about 39 MW of energy storage capacity in the New York electrical system, the report stated the total deployed or awarded/contracted projects at the end of 2019 resulted in 706 MW in capacity, or about 47% of the 2025 target and 24% of the 2030 target. The number of energy storage projects in various interconnection queues, which reflects some of these reported projects as well as potential projects in the pipeline, also indicates robust activity in the industry. These results suggest the PSC's portfolio of programs coupled with the declining costs of storage technology, as well as the ability to pair energy storage with solar photovoltaic to capture additional revenue streams, have been effective in building a market for the development and installation of qualified energy storage systems in New York.

Moreover, the combination of energy storage with utility-scale wind or solar projects has become increasingly popular among the state legislature, regulators, and developers as a way to enhance the ability of renewable energy resources to provide power to the electric grid, even when the wind is not blowing and the sun is not shining.

FUTURE OUTLOOK FOR ENERGY STORAGE IN NEW YORK

For New York to meet the ambitious renewable and greenhouse gas requirements of the REV and the CLCPA, a drastic increase in New York's energy storage capacity is essential. To meet the CLCPA target of 3 GW of installed energy storage capacity by 2030, and create a self-sustaining energy storage market in New York, the state needs to continue to provide financial incentives for energy storage development, increase investor owned utilities' (IOUs) energy storage requirements, and set in place a framework for valuation of energy storage that makes it competitive with traditional energy resources. While a market for energy storage development exists, the amount of storage capacity in the system is far from the target.

Both standalone storage and storage directly connected to renewables is necessary to allow for more renewable generation capacity on the electric system. To increase energy storage to 3 GW by 2030, New York will need to continue to increase incentives for energy storage systems paired with both large and small existing renewable generation, such as wind and solar projects that are generally located in upstate New York, which in return creates valuable opportunities for investment in energy storage in New York.

The current state of energy storage technology, and the associated costs of installing such technology, means the largest near-term opportunities for energy storage deployment are from stand-alone battery systems and battery systems paired with existing traditional electric generation resources in the most congested parts of the state, mainly in the downstate area, where peak energy use and energy prices are the highest, and the impact of these resources on meeting New York's goals will be the largest.

In order to make energy storage systems competitive with more traditional energy generation resources to meet baseload and peak electric demand, especially in the upstate area, direct state funding and a system of valuing energy storage resources that compensates them for more than just the energy they provide, will be necessary. The PSC is currently grappling with the appropriate method of compensating smaller distributed resources, including energy storage battery systems, in its VDER docket (PSC Case No. 15-E-0751). The PSC system being developed for valuing energy storage resources seeks to compensate for the ability to export their stored energy to the grid, shave peak electric demand and provide relief in certain congested areas, support renewable generation additions to the electrical grid, and provide environmental benefits. By sending these dynamic price signals to the marketplace, the PSC hopes to increase energy storage penetration in the electric grid.

CHALLENGES FOR ENERGY STORAGE

Despite the momentum for energy storage development seen in New York, there are challenges ahead. One such challenge is increasing energy storage capacity in the upstate New York region. Without significant incentives or direct IOU requirements, the current cost of installing battery systems, or other energy storage systems, makes them largely uneconomical in upstate New York, where the cost of energy during peak demand is much lower than in the downstate area.

Another challenge is having enough energy storage resources to meet most or all of the peak electrical demand in New York City. The downstate region cannot obtain the power it needs from upstate generating facilities due to transmission constraints. So, the capacity needed, including during periods of peak demand, must be generated and stored in the downstate area. As noted in a May 2020 draft report issued by NYISO, titled "Reliability and Market Considerations for a Grid in Transition," as more storage and renewables are added to the New York City electrical system, the amount (and duration) of storage needed to meet the reliability needs of the electrical system increases. Therefore, a significant increase in the amount of energy storage would be needed to meet the capacity needs of New York City currently provided by fossil-fueled peaking units during periods of high demand.

COVID-19 has also posed a huge challenge for the development of energy storage projects. Although it is too early to determine the full effects of the pandemic, the energy sector as a whole has taken a hit. There are many project delays due to New York's "PAUSE" order, which caused all non-essential businesses to close. The development of new energy storage projects is not considered essential, so construction has stalled, and for some projects financing is now uncertain. It is not clear whether the pre-PAUSE level of momentum in energy storage development will return once the order is lifted. Only time will tell.

Danielle Mettler-LaFeir, a partner at Barclay Damon LLP and a former environmental and safety staff member at Johnson & Johnson's Ortho-Clinical Diagnostics, Danielle primarily concentrates her practice on environmental law. She advises energy utilities on complex state and federal environmental laws related to the development of energy resources and operations involving electrical generation.

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Angela Sicker is an associate at Barclay Damon LLP. Angela focuses on energy, telecommunications, and environmental law. She assists generators and transmission providers in connection with the siting of new facilities under Articles 7 and 10 of the Public Service Law and provides rate-case support for utility clients.

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EXPERTISE BRINGS VALUE

COVID-19

RESOURCE HUB

USLAW is closely monitoring the global impact of the novel Coronavirus (COVID-19). We know that this is a challenging and complicated time so we wanted to provide you access to a variety of resources from across the NETWORK that might be useful to you and your colleagues. Please click the links below for contact lists, firm-specific programming and numerous resources and insights from our member attorneys and exclusive corporate partners.

USLAW NETWORK, INC | *Coronavirus Resource Center*

USLAW NETWORK, INC | *COVID-19 Workers' Comp Quick Guide*

USLAW NETWORK, INC | *COVID-19 FORCE Majeure Compendium of Law*

Primary COVID-19 Contacts within each USLAW firm

This list includes primary contacts within each USLAW and TELFA member firm designated as the COVID-19 point of contact (list is alpha by state and then by countries outside of the USA).Each individual has been designated by the firm as the go-to person best equipped to handle any COVID-19 questions and/or would be the person who could facilitate to secure an answer within his/her firm

USLAW Key Contact List: SBA loan assistance through the CARES Act

As we continue to manage the impacts of the novel coronavirus (COVID-19), USLAW NETWORK has created a list of experienced USLAW attorneys from across the country who can assist you as you navigate the SBA loan process as part of the CARES Act.



COVID-19 RESOURCE HUB

Barclay Damon LLP in Buffalo, New York, assembled a team of practitioners across disciplines to track COVID-19-related regulatory, legislative, and other governmental developments in order to provide advice and counsel on what they mean to our clients. The team can be reached at **COVID-19ResponseTeam@barclaydamon.com**. Additionally, Barclay Damon has distributed nearly 200 legal alerts and hosted over 15 webinars related to COVID-19.

Access the alert content and recording links to the webinars

Hinckley Allen's **Labor & Employment Group** helps employers plan for and navigate through the reopening/return-to-the workplace process. Some of the area's employers should consider and plan for to ensure they are ready to reopen when states lift stay-at-home orders and nonessential business closures can be found here.

Navigating the reopening/ return-to-the workplace process

To help their clients navigate the variety of emergent legal and operational issues raised by the COVID-19 pandemic and the associated government response, **Murchison & Cumming LLP** has assembled a **multidisciplinary COVID-19 Taskforce**. The Taskforce, comprised of attorneys from across the firm's practice groups, tracks legal and regulatory developments in real-time, providing insight, resources, and legal analysis related to the pandemic.

Learn more about the Multidisciplinary COVID-19 Taskforce

Connell Foley's Labor and Employment Group recently produced *The Re-Opening Handbook: A Guide to COVID-19 Workplace Policies and Procedures*. This complimentary guide offers a detailed overview of the steps employers should take to prepare their office and personnel for re-opening in the midst of the COVID-19 pandemic. Topics covered include updating policies, preparing the office, training personnel, enforcing containment and other policies, conducting health screenings, disinfecting the office, and handling employee requests for accommodations.

For more information and to request a copy of The Re-Opening Handbook

Remote Online Notarization in Iowa

Financial institutions and debt collection during COVID-19 – PDF –

Financial institutions and debt collection during COVID-19 – WEBINAR –

With work-from-home environments and social distancing guidelines, remote online notarization has been essential during this time. Click **Remote Online Notarization in Iowa** for an informative program by **Simmons Perrine Moyer Bergman PLC.**

Simmons Perrine Moyer Bergman PLC in Iowa created a **PDF** and **webinar** focusing on how financial institutions can prepare for debt collections in the coming months during the COVID-19 pandemic.

Guide for Arizona Employers: Employee Leave Requirements Under FFCRA

Prepared by **Jones, Skelton & Hochuli, P.L.C.** in Arizona

2020 Tax Law Changes and Issues

Prepared by **Simmons Perrine Moyer Bergman PLC** in Iowa

Wendy Drakes, receptionist at **Franklin & Prokopik, P.C.** in Maryland makes masks from home for local hospitals.

Also from Franklin & Prokopik, P.C. ...

Reopening Checklist COVID-19 Quick Guide

SmithAmundsen attorneys mobilized in mid-March to develop a firm-wide multi-disciplinary COVID-19 Task Force and **COVID-19 Resource Center**. Since then the firm has provided clients with timely, business critical information including dozens of webcasts attended by thousands of clients and members of organizations with whom they partner, and published more than 100 client alerts, which gained more than 200,000 reads. SmithAmundsen attorneys also joined forces with USLAW NETWORK colleagues to contribute to a number of state-by-state compendia including **Workers' Compensation COVID-19 Quick Guide, COVID-19 Force Majeure Compendium of Law** and the COVID-19 General Liability Compendium.

FROM AROUND THE NETWORK...

April Kelso, an attorney with **Pierce, Couch, Hendrickson, Baysinger, & Green, LLP** in Oklahoma City, serves as co-chair of the Service Subcommittee of the Oklahoma Bar Association's Women in Law Committee. April organized a week-long, state-wide blood drive in June with the Oklahoma Blood Institute due to low blood supplies in the blood banks statewide. Pierce Couch supports and encourages its attorneys to serve our community.

Rivkin Radler LLP in Uniondale, New York, turned lemons into lemonade while preparing for its first phase of the return to the office and adhering to the new policy. Among the policy's elements are strict limits on on-site personnel and a ban on all but essential meetings, which eliminates the need for in-office food services. Historically, Rivkin Radler's pantries have been well stocked. As food insecurity has risen due to the pandemic, the team at Rivkin Radler cleaned out the pantries donated approximately 180 lbs. of food to St. Mary of the Isle, a food pantry in Long Beach, New York.

Gene Kang, a partner in **Rivkin Radler**'s Commercial Litigation, Insurance Coverage, Insurance Fraud and Intellectual Property Practice Groups and who is president of the Korean American Lawyers Association of Greater New York (KALAGNY), performed COVID-related volunteer work through KALAGNY. The group collaborated with a couple of other non-profits to run a pro bono hotline to assist people in the Korean-American community with pandemic-related issues, such as the Cares Act and immigration law. The number of people helped is close to 1,000. The organization is also continuing to run its pro bono clinic remotely via a hotline. Finally, KALAGNY worked with Empire Justice Center to help translate COVID-related resources into Korean.

Blythe Miller, an associate in **Rivkin Radler'**s Insurance Fraud Practice Group, is on the Board of Directors for **Seafarers International House**. The guesthouse (which usually houses seafarers, those seeking asylum and paying hotel guests) was turned into temporary housing for displaced hospital patients.

Walter Gumersell, partner in **Rivkin Radler'**s Banking, Corporate, Tax and Trusts & Estates Practice Groups, and his family has been delivering food to the St. Patrick's Church pantry in Huntington, New York, during the pandemic.

The employees of **Sweeney & Sheehan, P.C**. in Philadelphia have a long history of giving back to their community. For many years, the firm has had Friday Jeans Day, using the money raised to build a fund used as needed to help the community. The employees are active in suggesting charities, families, or individuals in need. Very few things the firm does have more meaning for them.With the COVID-19 office closures, Friday Jeans Days were no more. But given the obvious and immediate need, the firm emptied its charitable fund to help two local food banks providing assistance: **Philabundance** and **Cathedral Kitchen**. Recognizing the importance of the firm's charitable efforts, Sweeney & Sheehan, P.C. has continued to make weekly contributions tied to the firm's productivity. Sweeney & Sheehan's employees take great pride and comfort in being able to continue the firm's tradition of helping those in need.

FROM NETWORK PARTNERS...

AMETROS

Ametros, USLAW's official future medical fund management partner, is closely monitoring the impact of the Coronavirus pandemic on the workers' compensation industry from multiple perspectives including regulatory, adjudicatory, and medical. **Check out Ametros webinars, state openings and closures page, and resources HERE.**

During the COVID-19 pandemic, **Ametros**, USLAW's official future medical fund management partner, has been offering online banking solutions, including free prepaid settlement cards that can be especially useful at these times. Getting injured individuals their settlement funds quickly and securely can be a challenge. The accounts are free to setup and it only takes a few minutes so you can allow injured individuals quick and secure access to settlement funds without having to go to a bank. To learn more about Ametros prepayment program, contact Mara Burns at 617-830-1059, **MBurns@Ametros.com** or visit **https://ametros.com/banking/.**

LITIGATION INSIGHTS

With jury trials suspended, there is no better time to invest in preparing for the surge of cases we all will undoubtedly face in the future. **Litigation Insights,** USLAW's official jury consultant and courtroom technology partner, is responding to clients' litigation needs remotely, by providing tools for theme development, witness preparation, jury research, and other strategies to put you in the best position for trial or mediation. They continue to offer the following services remotely: **click preparing for trial.**

S-E-A

Businesses and public spaces are reopening during this time of great confusion. As a society, we are consistently faced with more questions resulting from the COVID-19 pandemic than answers. To derive some clarity from chaos, S-E-A's professionals have developed a method of obtaining surface samples and analyzing them in accordance with CDC established protocols to help provide confidence to your employees and patrons To learn more about COVID-19 surface testing from **S-E-A,** USLAW's premier corporate partner, **click here.**

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USLAW notes

Rubin and Rudman LLP named USLAW's newest member firm representing Massachusetts

Rubin and Rudman is a full-service firm with 70 lawyers and has been a fixture in the Boston legal market for 100 years. One of Boston's oldest law firms, Rubin and Rudman boasts a wide range of services that include corporate, litigation including, insurance coverage and bad-faith, construction and class actions, real estate, labor and employment, trust and estates, life sciences, family law, and environmental, among others. For a complete profile of their practice areas, CLICK HERE.

53 charities benefit from COVID-19 relief initiatives

Through several initiatives created to support USLAW member clients directly impacted by COVID-19, USLAW NETWORK member firms supported 53 different charities from coast-to-coast across the U.S. in June. As a result of the global pandemic, everyone around the world has had to adapt. There has been significant personal and economic impact on local businesses, first responders, front-line staff and the many, many essential workers who are keeping the shelves stocked, lights on, systems running and more. Through USLAW's Give Thanks, Community Connections and COVID-19 Relief Fund initiatives, 54 different charities received support facilitated by donations made by USLAW NETWORK, its member firms, and many companies the firms represent. To view the full ist of benefitting charities, click COVID-19 relief.

Nonprofit foundation to fund scholarships for diverse law school students

USLAW NETWORK announces the creation of the USLAW NETWORK Foundation, a 501c3 charitable organization. The USLAW NETWORK Foundation is organized exclusively for charitable and educational purposes, including the funding of scholarships to provide financial assistance to diverse law students in their pursuit of a legal education at an American Bar Association-accredited U.S. law school. The Foundation's governing board will include the directors of the USLAW NETWORK. The USLAW Diversity Council, which is tasked with addressing the important issues of diversity and inclusion as they relate to USLAW member firms, practice groups, and clients, will help facilitate the scholarship application process. USLAW expects to begin accepting scholarship applications in spring 2021 for the 2021-22 academic year.

about USLAW NETWORK

2001. The Start of Something Better.

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

Fast-forward to today.

The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client's legal success. Now as a diverse network with more than 6,000 attorneys from more than 60 independent, full practice firms across the U.S., Canada, Latin America and Asia, and with affiliations with TELFA in Europe, USLAW NETWORK remains a responsive, agile legal alternative to the mega-firms.

Home Field Advantage.

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

A Legal Network for Purchasers of Legal Services.

USLAW NETWORK firms go way beyond providing quality legal services to their clients. Unlike other legal networks, USLAW is organized around client expectations, not around the member law firms. Clients receive ongoing educational opportunities, online resources including webinars, jurisdictional updates, and resource libraries. We also provide *USLAW Magazine*, compendia of law, as well as annual membership directory. To ensure our goals are the same as the clients our member firms serve, our Client Leadership Council and Practice Group Client Advisors are directly involved in the development of our programs and services. This communication pipeline is vital to our success and allows us to better monitor and meet client needs and expectations.

USLAW Abroad.

Just as legal issues seldom follow state borders, they often extend beyond U.S. boundaries as well. In 2007, USLAW established a relationship with the Trans-European Law Firms Alliance (TELFA), a network of more than 20 independent law firms representing more than 1000 lawyers through Europe to further our service and reach.

How USLAW NETWORK Membership is Determined.

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

USLAW in Review.

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

The USLAW Success Story.

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

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

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

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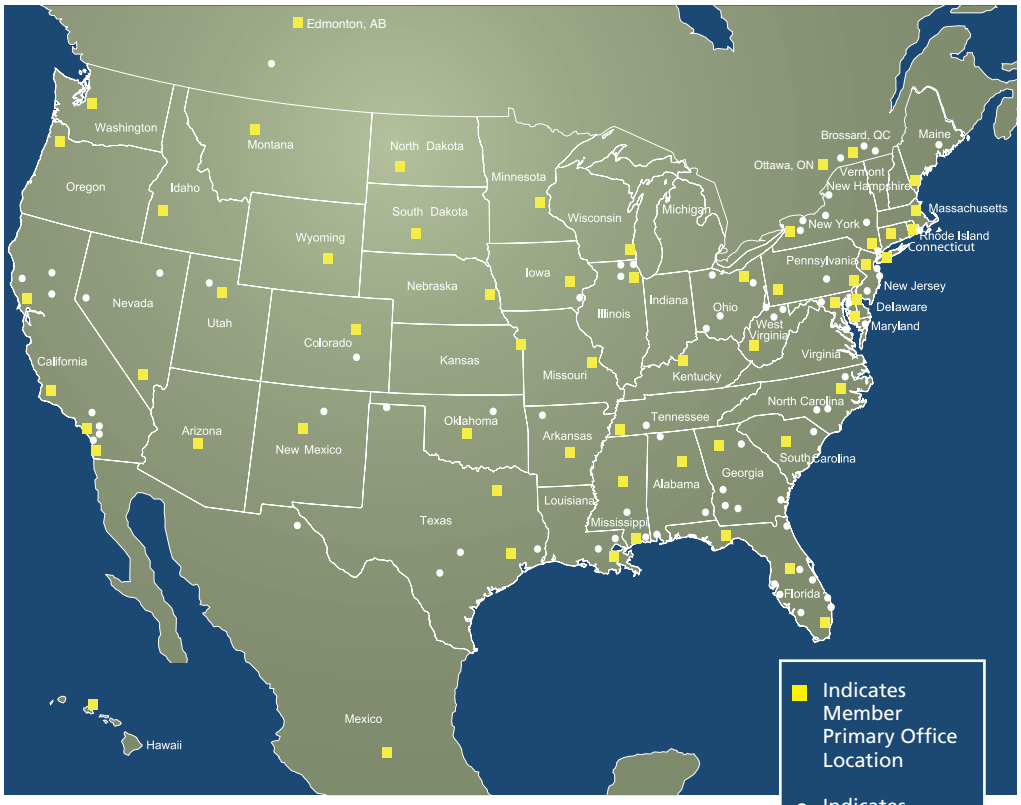

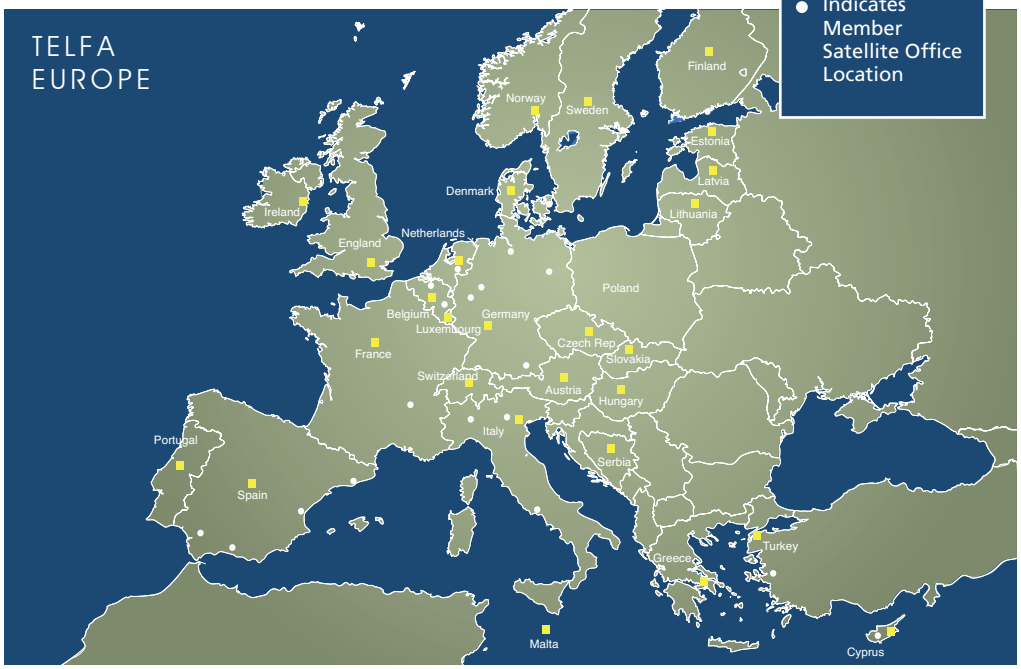

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the complete USLAW SOURCEBOOK

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

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

EDUCATION

It's no secret – USLAW can host a great event. We are very proud of the industry-leading educational sessions at our semi-annual client conferences, seminars, and client exchanges. Reaching from national to more localized offerings, USLAW member attorneys and the clients they serve meet throughout the year not only at USLAW-hosted events but also at many legal industry conferences. CLE accreditation is provided for most USLAW educational offerings.

A TEAM OF EXPERTS

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

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USLAW ON CALL

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

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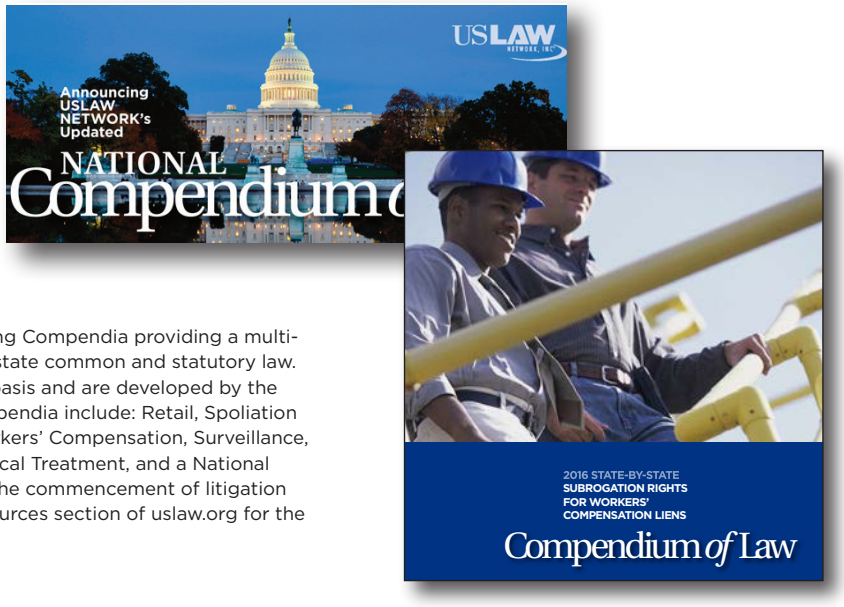

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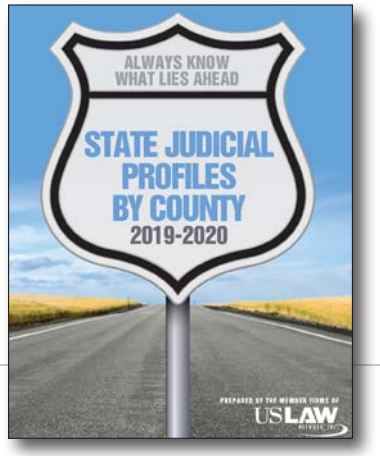
USLAW regularly produces new and updates existing Compendia providing a multi-state resources that permits users to easily access state common and statutory law. Compendia are easily sourced on a state-by-state basis and are developed by the member firms of USLAW. Some of the current compendia include: Retail, Spoliation of Evidence, Transportation, Construction Law, Workers' Compensation, Surveillance, Offer of Judgment, Employee Rights on Initial Medical Treatment, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal. Visit the Client Resources section of uslaw.org for the complete USLAW compendium library.



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

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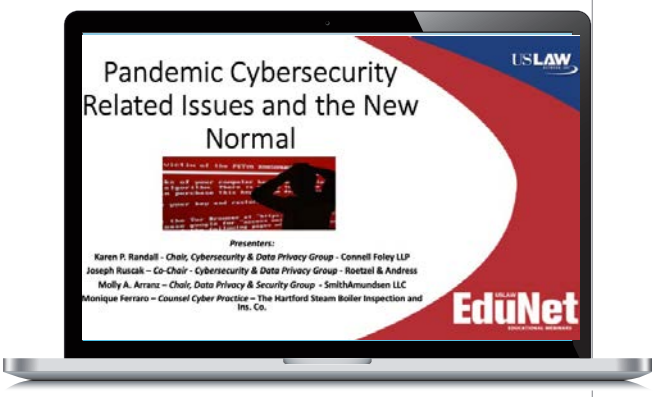

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Each year both print and online versions of our membership directory are produced. Here you can quickly and easily identify the attorney best-suited to handle your legal issue. Arranged by state, listings include primary and alternate contacts, practice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

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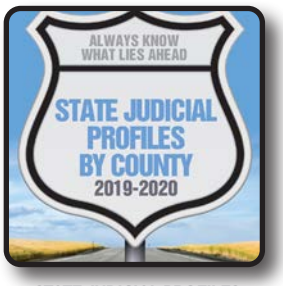

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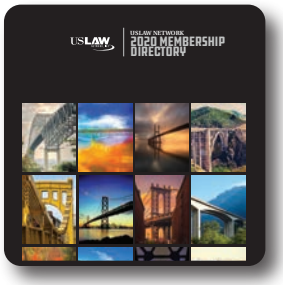

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