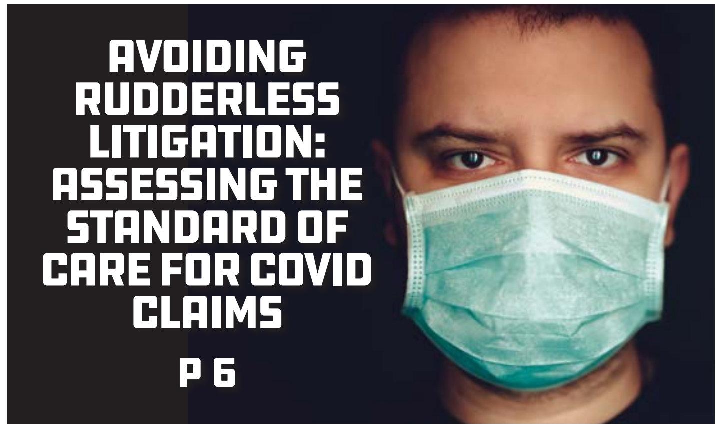
SPRING • 2021

USLAW PLUS+

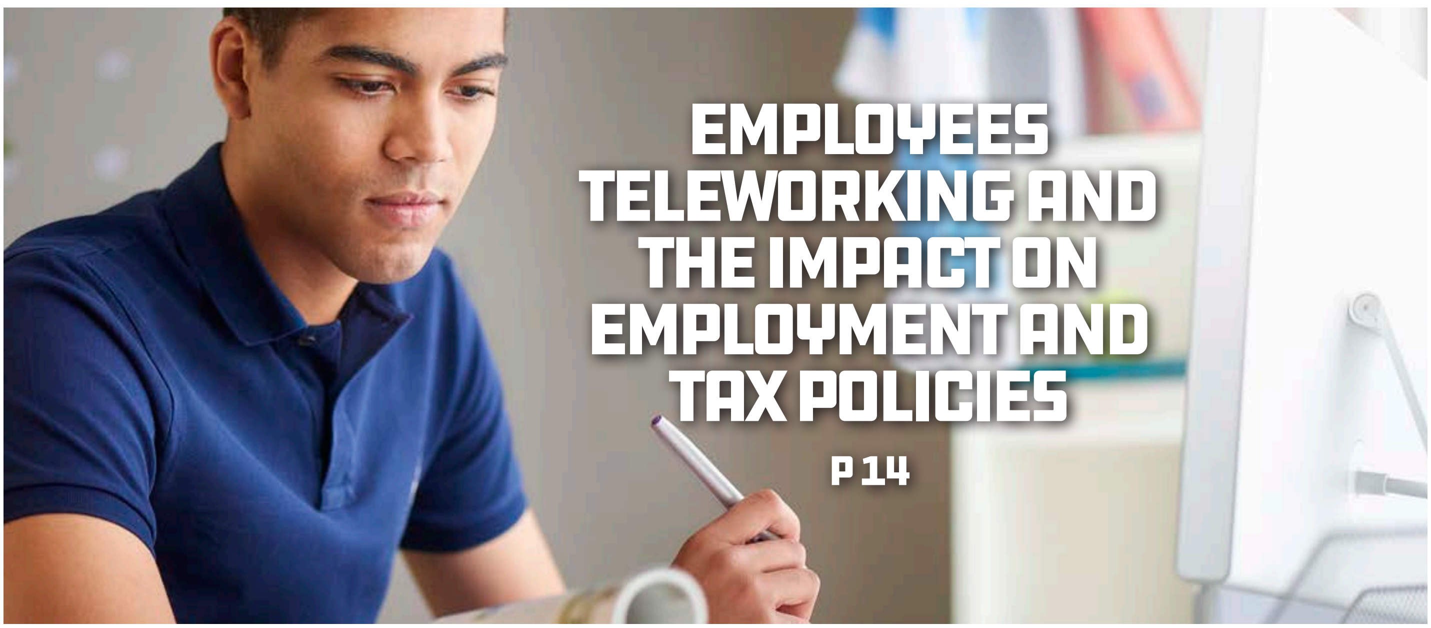
DIVERSITY, EQUITY AND INCLUSION IN THE BOARD ROOM: NASDAQ PROPOSES NEW BOARD DIVERSITY REQUIREMENTS

P 26



AVOIDING RUDDERLESS LITIGATION: ASSESSING THE STANDARD OF CARE FOR COVID CLAIMS

P 6



EMPLOYEES TELEWORKING AND THE IMPACT ON EMPLOYMENT AND TAX POLICIES

P 14

YOU'RE CANCELLED: A LITIGATION PRIMER ON CANCEL CULTURE & JURY BIAS

P 10

IT'S WORTH A SHOT: THE COVID-19 VACCINE FROM AN EMPLOYER'S PERSPECTIVE

P 12

table of CONTENTS

FEATURES:

DEPARTMENTS:

from the CHAIR'S DESK

meeting the MOMENT 2001 - 2021

As we publish the March issue of *USLAW Magazine*, we are marking one year since the onset of the COVID-19 pandemic. Much has happened in the last 12 months and much will continue to be impacted by the effects of the pandemic, but I remain hopeful for our future. We are stronger together, and this has been exhibited in many ways in the past year.

We also are celebrating USLAW's 20th anniversary. Our founding members had the vision to create a network of regionally based, independent firms that could respond quickly, efficiently, and economically to client needs. Six firms and their clients met the moment. Fast forward to today – when the world is managing the multitude of impacts from COVID-19 – and USLAW member firms are meeting the moment by delivering timely programming and resources to address clients' questions in an ever-changing pandemic, staying abreast of the changing legal landscape, and supporting clients, their legal needs plus communities near and far.

Among the many complimentary resources available to clients is USLAW Magazine. As you peruse these pages, you will find important COVID-19 updates, including the impacts of the vaccine from an employer's perspective and assessing the standard of care for COVID-19 claims. This pandemic environment has launched full-scale teleworking and you will read about how this directly impacts employment and tax policies. Beyond COVID-19, we also feature insights on cancel culture and jury bias, Canada's crackdown on data privacy and what this could mean for international business, plus mining virtual fitness data, medical billing, the new PAID Act, board diversity, and so much more.

We are ready to collaborate with you, support your legal needs, and keep meeting the moment for the next 20 years and beyond. Thank you for your ongoing support of USLAW NETWORK and for being a key part of our first 20 years. Please enjoy this issue of USLAW Magazine and connect with us if we ever can assist you.

Sincerely,

Dan Longo

Dan L. Longo
USLAW NETWORK Chair
Murchison & Cumming LLP | Los Angeles, CA

USLAW PLUS+

Publisher Roger M. Yaffe
Editor Connie Wilson
Art Director Jeff Freibert • Compass Creative

2001 20 2021
USLAW NETWORK, INC®

Roger M. Yaffe, *Chief Executive Officer*
roger@uslaw.org, (800) 231-9110, ext. 1

Michelle Besu, *Meeting and Events Manager*
michelle@uslaw.org, (800) 231-9110, ext. 2

Jennifer Randall, *Membership Services Manager*
jennifer@uslaw.org, (800) 231-9110, ext. 3

Connie Wilson, *Communications Specialist*
connie@uslaw.org, (800) 231-9110, ext. 4

Paige Thompson, *Membership Services Coordinator*
paige@uslaw.org, (800) 231-9110, ext. 5

3111 N. University Drive, Suite 400
Coral Springs, FL 33065 • Phone/Fax 800.231.9110

THE SCOTUS *RUTLEDGE* OPINION

Pharmacy Benefit Managers Cannot Duck Pro-Patient State Reform Laws Using ERISA Preemption Arguments

Linda Clark, Brad Gallagher and **Jen Cruz** Barclay Damon LLP

On December 10, 2020—in a decision decades in the making—the U.S. Supreme Court delivered its opinion in *Rutledge v. Pharmaceutical Care Management Association*, which upheld that states *are* permitted to regulate pharmacy benefit managers (PBMs). Justice Sotomayor wrote the court's opinion, which was joined by all members of the Supreme Court except Justice Barrett, who did not participate.

For years, independent pharmacies (i.e., pharmacies not owned by national chains) have been at risk of closure due to unfair practices by PBMs and competitors, which are sometimes one in the same. PBMs are third-party administrators of prescription-drug programs that affect more than 270 million Americans with health insurance. The role of PBMs is to act as intermediaries by negotiating with health care plans, drug manufacturers, and pharmacies to set drug pricing for consumers and determine how much pharmacies are reimbursed. The goal in creating these intermediaries was for them to be able to lower drug costs and spending. In practice, however, PBMs leverage their status to maximize their own profits, while simultaneously harming pharmacies and increasing patient costs.

Why did PBMs stray so far from their purpose? Because a number of the largest PBMs in the country have considerable conflicts of interest. For example, certain PBMs are affiliated with some of the largest pharmacy chains in the world, like CVS Health owning both CVS Pharmacy and CVS Caremark. PBMs also operate with little oversight by regulators and do not provide much transparency into their operations. As a result, they are able to exploit the marketplace, resulting in higher drug costs, and use exclusionary practices to eliminate competition—independent pharmacies. So, what happened when states caught wind of these practices and attempted to introduce legislation that would protect independent pharmacies from this abuse? The Pharmaceutical Care Management Association (PCMA), which represents the 11 largest PBMs in the country, commenced lawsuits, declaring that the states were restricted from regulating PBMs due to existing federal law. The U.S. Supreme Court's decision finally quashed the argument PCMA used for years that, in essence, all regulation was preempted by the Employee Retirement Income Security Act of 1974 (ERISA). This decision has opened the door for much-needed change in the pharmacy industry and hopefully will level the playing field.

One of the most significant issues that independent pharmacies face with regard to PBM practices concerns reimbursement rates. In 2015, Arkansas passed Act 900 because the reimbursement rates set by PBMs were too low to cover the acquisition cost of the drugs by an independent pharmacy. Act 900 required PBMs to reimburse Arkansas pharmacies at a price equal to or higher than the pharmacy's wholesale cost. Due to the unworkable reimbursement rates set by PBMs, many independent pharmacies—particularly those in rural areas—were at risk of being unable to cover their costs and having to close their doors for good. Obviously, a business cannot sustain itself if it is required to operate at a loss, which is exactly what was happening to these independent pharmacies.

In response to Act 900, PCMA alleged that the state law was preempted by ERISA. PCMA argued that Act 900 created inefficiencies in employer-sponsored health plans, threatened access to prescription drugs, and eliminated important tools that help employers manage prescription drug costs and provide access to medications. PCMA also asserted that these matters were central to plan administration and protecting ERISA's promise of uniformity is more critical than ever, as ERISA had long enabled employers to provide uniform benefit plans to employees nationwide due to ERISA's preemption of state laws. While it is true that ERISA broadly asserts that it preempts state laws that relate to employee benefits—which is why previous PBM regulations have been such an uphill battle—Justice Sotomayor wrote that "[s]tate regulations that merely increase the costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not preempted by ERISA." Therefore, the *Rutledge* decision establishes that price regulation is not an issue that can be considered as preempted by ERISA. In this monumental win for independent pharmacies, the Supreme Court unanimously held that Arkansas's law was *not* preempted by ERISA and overturned the Eighth Circuit's decision that held the opposite. By doing so, the Supreme Court effectively ruled that PCMA's ERISA arguments, which have been victorious for PBMs in numerous other cases across the country concerning state laws regulating PBMs, do not hold up. This is a huge blow to PBMs because they have relied on ERISA preemption to avoid meaningful oversight by states for decades.

Significantly, Justice Sotomayor's opinion sweeps broadly enough that it is not limited to the particulars of only Act 900. Applying the logic of *Rutledge*, PBM laws are a form of health care cost regulation, and PBMs are not health plans, but rather their administrative contractors, so ERISA should not preempt states' PBM regulations. However, the *Rutledge* decision does not stop there. It is also a win for pharmacies and consumers to the extent that it broadens states' protective powers. Significantly, the Supreme Court upheld Arkansas's requirement that PBMs participate in the pharmacy appeal process and abide by its enforcement mechanisms, including recalculating and reprocessing how much they pay the pharmacy. This is in stark contrast with the seemingly unlimited power PBMs have previously held where independent pharmacies were often at the mercy of the not-so-transparent PBM audit process and frequently denied due process. It seems as though the Supreme Court has taken notice of these predatory practices and provided states the tools to finally combat it.

Following *Rutledge*, the ongoing lawsuits brought by the PCMA against states like Arkansas that sought to regulate PBM activities will be greatly impacted. For one thing, more than 45 states have passed PBM regulations that will now have the backing of U.S. Supreme Court precedent. Among other things, some of these regulations ban PBM gag clauses that prevent pharmacies from telling consumers about lower-cost options, while others limit patient cost sharing and require PBMs to disclose their price lists and manufacturer rebates to improve transparency, or prohibit spread pricing, which is when PBMs charge plans more than they reimburse pharmacies.

Even though *Rutledge* was just decided in December 2020, its effects are already being significantly felt. For example, the 2021 New York Executive Budget Bill included requirements that PBMs register and become licensed by the Department of Financial Services (DFS). DFS may set minimum standards for issuance of a PBM license, including standards of conduct that may address things like prohibitions on anticompetitive conduct and spread pricing. DFS also has the authority to suspend, revoke, or refuse to renew or issue a PBM. With the Supreme Court's ruling in *Rutledge*, it is more likely than ever that this PBM reform will pass. Additionally, on January 21, 2021, North Dakota petitioned the Supreme Court to vacate a different, yet similar, Eighth Circuit decision, which found North Dakota's PBM regulations to be preempted by ERISA—PCMA even supported the state's position that the ruling should be vacated.

As a result of their loss in *Rutledge*, PBMs are now scrambling to change public opinion. The National Community Pharmacists Association (NCPA) has stated that "when the Supreme Court declared states can regulate PBMs, the PBMs launched campaigns in 18 states to date to besmirch community pharmacies, lie to patients, and avoid overdue state legislation AND regulation." On January 12, 2021, PCMA also filed a lawsuit against the Trump Administration for its executive order Lowering Prices for Patients by Eliminating Kickbacks to Middlemen, which would directly affect rebates to PBMs, aiming to save patients money on prescription costs. Following this lawsuit and the transition of the Biden Administration, which called into question the legality of several last-minute Executive Orders, the rebate rule has been postponed pending a 60-day review period, but a recent court order has postponed the effective date of the discount safe harbor provision of the rule until January 1, 2023. It is unclear at this time whether the new administration will adopt this rule, which would undoubtedly be another blow to PBMs, or whether it will succumb to pressure brought on by the PCMA and rewrite or veto the rule.

Without state laws like Act 900 that underlie the precedent set by *Rutledge*, pharmacies would have a harder time operating in an already challenging marketplace and from a disadvantageous position. Now, states have the ability to push back against draconian PBM practices. With the Supreme Court behind them, states can end PBM greed and get them on track to do what they were originally tasked with—lowering the cost of prescription drugs and making it easier for the average American consumer to have access to necessary medication at their pharmacy of choice. Although this important battle has already started, it is far from over. It is imperative that states take this opportunity to make real change for the sake of consumers, independent pharmacies, and the health care system.

Barclay Damon assists independent pharmacies in all aspects of their business operations. If you have any questions or would like to schedule a legal and compliance checkup, please contact Linda Clark, Health Care Controversies Team leader, at lclark@barclaydamon.com, or Brad Gallagher, counsel, at bgallagher@barclaydamon.com. Special thanks to Jen Cruz, law clerk, for her assistance in writing this article.

Linda Clark is the Health Care Controversies Practice Area chair and a partner at Barclay Damon LLP. She advises health care providers, pharmaceutical companies, and pharmacies nationwide in resolving high-stakes disputes and government investigations. She represents health care professionals and entities in administrative proceedings, hearings, and appeals before various federal and state regulatory agencies.

Brad Gallagher is a partner at Barclay Damon LLP. He counsels pharmacies nationwide relating to their relationships with PBMs and other vendors, helping them in disputes relating to network participation rights, audits, and network terminations. He also assists in fraud, waste, and abuse investigations by PBMs and government agencies.

Jen Cruz is a law clerk at Barclay Damon LLP. Jen assists the firm's Health Care Controversies Practice Area and Health & Human Services Providers Team with a wide range of matters. Her experience includes conducting legal research and editing memoranda and other documents.


INVESTIGATIONS
FRAUD
Proud Corporate Sponsor
USLAW
NETWORK, INC

AVOIDING RUDDERLESS LITIGATION: ASSESSING THE STANDARD OF CARE FOR COVID CLAIMS

J. Michael Kunsch Sweeney & Sheehan, P.C.
Albert B. Randall, Jr. Franklin & Prokopik, P.C.

The COVID-19 pandemic has left a wide-ranging spectrum of devastation in its ongoing wake. Businesses have fought through mandated closures, constantly changing guidance, inability to secure PPE and cleaning supplies, and staffing issues to open and continue to serve their customers. Waiting on the other side of that fight are hundreds of already filed lawsuits, and the threat of an avalanche of more, claiming injury and damage due to exposure to the virus. Among the first issues to be addressed is the standard of care Courts will apply to those claims to determine whether appropriate care was rendered by the business.

As of mid-January 2021, there were 24.3 million confirmed cases of coronavirus in the United States, resulting in 402,000 deaths. Worldwide, there were 96.2 million cases and 2.06 million deaths.

While it seems an eternity, it has been a little over a year since the coronavirus first appeared. It is important to remember a few seminal dates regarding the virus and efforts to mitigate its spread. On January 9, 2020, the World Health Organization ("WHO") announced that there was a mysterious coronavirus-related pneumonia centered in Wuhan, China. On January 21, 2020, the CDC confirmed the first U.S. coronavirus case in the United States in a Washington state resident who had returned from Wuhan. On January 31, 2020, the WHO declared a global public health emergency, and the United States followed with a declaration of a public health emergency on February 3, 2020. The CDC and OSHA (*Guidance on Preparing Workplaces for COVID-19*) issued initial guidelines on March 9, 2020.

Since the appearance of coronavirus, the WHO, CDC, and others have "followed the science" to learn about the disease and its transmission and offered guidance for preventing its spread. Some of that guidance has been unhelpful, and on occasion it has been wrong. For example, on January 14, 2020, the WHO issued a now-infamous tweet claiming that Chinese authorities had "found no clear evidence of human-to-human transmission of the novel #coronavirus." Thereafter, guidance from the WHO and CDC was equivocal about the efficacy of wearing masks to inhibit the spread of the virus. The business community has struggled to adapt to this changing guidance and to establish and follow best practices to protect their employees and customers. With litigation continuing to be filed alleging exposure to coronavirus, businesses are now faced with the task of determining what standard of care will be applied, and what burden of proof will be required. To date, a legislative answer to this quagmire has proven elusive, though efforts to find a solution are ongoing.

In the absence of a statutory definition, the determination of standard of care under the common law is informed from a variety of sources to determine what a "reasonable" business should have done to mitigate the risk of exposure. It is likely that Courts will look to governmental safety regulations to determine the standard of care. Such reliance is well established. *See In Re City of New York,* 522 F.3d 279, 285-286 (2d Cir. 2008) (governmental safety regulations can shed light on the appropriate standard of care); *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1014 (3d Cir. 1992) (holding OSHA regulations were relevant to the standard of care). In *Ebaseh-Onofa v. McAllen Hospitals, L.P.*, 2015 WL 2452701 (Tex. Ct. App., May 21, 2010), which involved the death of a nurse from H1N1, plaintiff argued that the standard of care was determined by the CDC's purported requirement that healthcare workers wear n95 masks when treating patients suspected of having the virus.

Analysis of litigation already commenced informs us as to the thinking of the plaintiff's bar on the standard of care issue. In May 2020, a lawsuit was filed in Philadelphia County, Pennsylvania, arising out of the death of a union steward at a meat processing plant due to respiratory failure caused by COVID-19. In the Complaint, plaintiff cited the January 31, 2020, WHO declaration, and the CDC and OSHA guidelines issued on March 9, 2020. The Complaint alleged that the employer: (1) failed to provide sufficient personal protective equipment; (2) forced workers to work in close proximity; (3) forced workers to use cramped and crowded work areas, break areas, restrooms, and hallways; (4) discouraged workers from taking sick leave in a manner that had sick workers in fear of losing their jobs; and (5) failed to properly provide testing and monitoring for individuals who may have been exposed to the virus that causes COVID-19. Interestingly, plaintiff also alleged that after the spread of H1N1 in 2009, meat processing plants were on notice of the danger of the airborne spread of the virus. Plaintiff specifically alleged that the employer ignored guidance from the CDC and OSHA by not mandating: (1) use of masks and PPE; (2) social distancing guidelines; (3) that workers who were feeling ill report their symptoms to their superiors; (4) that workers who were feeling ill stay at home from work and self-quarantine. It was further alleged that the plant violated OSHA regulations, including OSHA 1910.132, related to the use of PPE.

In Florida, legislation has been introduced to provide certainty and guidance to businesses subject to litigation for COVID-19 exposure and transmission. The proposed legislation would provide liability protections where a business made a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued. The bill contains strict pleading requirements, mandating that a Complaint be plead with particularity and include an Affidavit attesting that the plaintiff's COVID-19 related damages/injury occurred as the result of the defendant's acts or omissions. Further, before discovery is permitted, the Court is required to determine whether the business made such a good faith effort. If so, the defendant is immune from civil liability. Even if a good faith effort was not found, however, a plaintiff would be required to prove their case with a burden of at least gross negligence, established by clear and convincing evidence.

Similar legislative efforts are underway in other states and in the federal government. Clear minded proponents argue that while businesses should not be exempt from liability for intentional acts or disregard of current (or then-current) guidelines, the concept of reasonableness requires protection for businesses who acted in good faith in attempting to prevent the spread of the virus. Absent specific federal or state legislation, businesses will be mired in a web of potential liabilities and standards of care.

In the meantime, even without knowing the standard of care that will eventually be applied, there are some simple strategies that businesses should employ to mitigate the threat of litigation and future exposure. They should gather and retain all documents that were relied upon when forming workplace safety policies, be they federal, state and/or local governmental executive orders, public health authority recommendations and/or agency guidance. Since those orders and recommendations often changed, maintaining those records is critical to support the rationale behind company-issued protocols and policies that were contemporaneous with such health and safety guidance. Similarly, each iteration of workplace policies must be kept establishing compliance with changing governmental directives. Communications must also be retained to demonstrate that policies were clearly and effectively disseminated to employees, customers, vendors, and other invitees. Lastly, any documentary evidence of workplace posters, fliers, trainings, PPE, etc., should also be maintained to further evidence good faith attempts at compliance and distribution of information.

Given the unprecedented threats that faced all businesses, there is reason for some cautious optimism that factfinders will be somewhat sympathetic to corporate defendants, at least those who are able to show good faith attempts when attempting to comply with changing governmental guidance. While we await further direction from the legislative and judicial branches, we remain mindful of Jerry Garcia's advice that we must "keep truckin' on."

J. Michael Kunsch, a shareholder in the Philadelphia office of Sweeney & Sheehan, P.C. is an AV Preeminent-rated attorney with a primary focus on the defense of complex litigation involving product liability, general liability, transportation, and commercial disputes. He is a graduate of the University of Arizona and the Villanova University School of Law and has been recognized from 2011-2021 as a Pennsylvania Super Lawyer®.

Bert Randall is a principal with Franklin & Prokopik, P.C., based in Baltimore, Maryland. Bert serves as the firm's president and leads its COVID-19 Advisory Group. He can be reached at arandall@fandpnet.com.

HOW THE NEW PAID ACT WILL DRAMATICALLY IMPROVE MEDICARE SECONDARY PAYER ACT COMPLIANCE

Melisa C. Zwilling Carr Allison

On December 11, 2020, President Trump signed the Provide Accurate Information Directly Act (PAID Act) into law. The PAID Act will significantly impact how companies are able to handle and resolve Medicare Advantage Plan (MAP) and Prescription Drug Plan (PDP) claims in accordance with the Medicare Secondary Payer Act (MSPA). After years of frustrated attempts at compliance amidst the looming threat of class action lawsuits, the PAID Act is a very welcome and much-needed development.

THE MOVING PARTS OF MEDICARE SECONDARY PAYER COMPLIANCE

The MSPA provides that Medicare may not be called upon to pay medical expenses for a Medicare beneficiary if another entity, known as a primary payer, exists and should pay for the same. Primary plans include workers' compensation, no-fault and liability insurers as well as self-insureds. Medicare Secondary Payer (MSP) compliance for such entities essentially fits into four categories: future medical expenses, Section 111 Reporting, Medicare conditional payment claims, and MAP and PDP claims. Each category should be considered and addressed in cases involving Medicare beneficiaries.

When settling a case with a Medicare beneficiary, arrangements for the payment for future medical expenses likely to be incurred should be discussed in settlement negotiations and explained clearly in documents. Whether through a more formal set-aside or simple designation of settlement funds for future medical payments, adequate consideration should be given to how such expenses will be paid to ensure that the burden of payment will not be shifted to Medicare.

In addition, Section 111 Mandatory Medicare Reporting rules require certain primary payers, known as Responsible Reporting Entities (RREs), to electronically report information to Medicare when a settlement, judgment, award or other payment is made to a beneficiary. This helps Medicare more easily identify entities from whom it may recover conditional payments and deny additional payment of medical expenses for which another entity is responsible.

When Medicare does make a payment on behalf of a Medicare beneficiary, such payment gives rise to a conditional payment claim. Medicare is statutorily entitled to recover amounts it has paid from the primary payer, beneficiary, provider, supplier, physician, attorney, state agency or private insurer that has received a primary payment. The MSPA gives Medicare a direct right of action to recover if repayment is not voluntarily and timely made. In addition, the MSPA allows for a private cause of action to recover payments. If a lawsuit becomes necessary, double damages may be awarded.

In addition to granting traditional Medicare a right to recover conditional payments made on behalf of a beneficiary, the MSPA extends that same right of recovery to MAPs and PDPs. Though challenged several times, courts across the country, including the Third and Eleventh Circuits, have almost always upheld the right of MAPs and PDPs to recover.

WHAT EXACTLY ARE MAPS AND PDPS?

Once an individual reaches the age of 65, he or she becomes entitled to Medicare. Additionally, after an individual has been a Social Security Disability recipient for 24 months, he or she becomes entitled to Medicare benefits. Upon Medicare entitlement, beneficiaries are able to receive traditional benefits which include Part A, hospitalization coverage, and Part B, medical treatment coverage.

Once an individual is enrolled in Medicare, he or she may opt to pay an additional premium to obtain coverage by an MAP, which is Part C and covers medical treatment expenses plus hospitalization, and/or a PDP, which is Part D and covers prescription medications. MAP and PDP benefits are provided by private insurers and oftentimes include coverage for treatment that traditional Medicare does not include. For example, many MAPs provide for fitness and dental benefits, eye exams and glasses, hearing aids, over-the-counter items and more. One study conducted by the Kaiser Family Foundation indicates that there are 3,550 MAPs available to beneficiaries in 2021, more than ever before, and the average beneficiary has access to 33 plans. In some states, more than 40 percent of beneficiaries, or 24.1 million individuals, opt for MAP and/or PDP coverage.

If a primary payer exists and a settlement, judgment, award or other payment is made to a beneficiary, MAPs and PDPs are entitled to be reimbursed for any amounts expended for medical care and treatment of that beneficiary. If reimbursement is not made timely, the MAP or PDP may exercise its right to file a direct cause of action against the primary payer to recover. Many such claims have been successfully brought nationwide.

In addition to several direct causes of action filed by MAPs across the country, a group known as MSP Recovery has filed more than 110 lawsuits through the private cause-of-action provision contained in the MSPA. As with traditional Medicare, if an MAP or PDP must sue to recover, double damages are available. The same holds true for claims brought under the private cause of action provision. As such, filing these claims could potentially be a fairly lucrative business. To date, however, many claims filed by MSP Recovery under the private cause of action provision have been dismissed on technical or procedural grounds.

IDENTIFYING MAPS AND PDPS

Knowing that an MAP or PDP is due to be reimbursed is one thing. Determining the identity of an MAP or PDP that has paid for medical expenses on behalf of a beneficiary, however, is another. For years, primary payers have struggled with this issue and process.

Through the Section 111 query process, RREs are able to determine whether a claimant is entitled to traditional, Part A or Part B Medicare benefits. In addition to Section 111 queries, Medicare has established an electronic process through which traditional Medicare conditional payment claims may be researched, disputed, and resolved. Unfortunately, however, no process currently exists which would allow a primary payer to determine the identity of an MAP or PDP or to learn whether such plans have made primary payments on behalf of a beneficiary. In order to make those determinations, primary payers are left with the litigation discovery process or simple questioning of a claimant and his or her attorney. This method is certainly not foolproof, however, and the stakes are high.

PAID ACT REQUIREMENTS

As part of an appropriations bill aimed at preventing a government shutdown, Congress recently passed the PAID Act. President Trump signed it into law on December 11, 2020. The Act requires that, in response to a Section 111 query from an RRE, Medicare must provide information concerning whether a claimant is currently, or has been during the preceding three-year period, entitled to traditional Medicare benefits. In addition, Medicare must provide the name and address of any MAP or PDP in which the claimant is, or has been, enrolled during that same period. This requirement will go into effect one year from the date of enactment, which will be December 11, 2021. At that time, compliance with the MSPA with regard to MAPs and PDPs will become much easier.

WHILE WE WAIT

Until the PAID Act goes into effect, workers' compensation, no-fault and liability employers, self-insureds and insurers should evaluate all of their policies with regard to the MSPA. A plan should be in place to ensure that accurate, timely Section 111 reporting is taking place and that any conditional payment claims are being researched and properly resolved. Simply including language in settlement documents providing that a claimant will be responsible for repaying Medicare claims is insufficient to protect a primary payer from liability. Medicare is not bound by an agreement to which it is not a party. Further, the MSPA is clear that Medicare is entitled to recover its payments from any party involved in a settlement, regardless of who the parties designate as being responsible. In addition to conditional payment claim issues, potential future medical treatment needs should be considered.

Once the PAID Act becomes effective, primary payers should immediately begin using the Section 111 process to determine the existence of MAPs and PDPs that may have paid related claims on behalf of a Medicare beneficiary. Once that determination is made, contact with those entities should immediately follow, along with efforts to resolve any potential claims.

The PAID Act will greatly improve primary payers' ability to comply with the law and avoid double damages, fines, penalties and legal expenses to defend both direct and private causes of action by or on behalf of an MAP or PDP. It will also give primary payers more confidence that settled claims are completely resolved and may be closed for good.

Melisa C. Zwilling is a shareholder with Carr Allison in Birmingham, Alabama. Her practice has focused on Medicare Secondary Payer Compliance issues for more than 20 years and she is known as a national authority in this area. She can be reached at mzwilling@carrallison.com.

YOU'RE CANCELLED

A Litigation Primer on Cancel Culture and Jury Bias

Hailey M. Hopper and **Cathleen McMahon** Pierce Couch Hendrickson Baysinger & Green
Dr. Christina Marinakis Litigation Insights

The old adage "all publicity is good publicity" is no longer good cannon. In today's technology driven world, social media reigns supreme wielding an almost omnipotent power to control the fate and success of people, organizations, institutions, businesses, and the like. One click of a button, tweet, or social media post containing any sort of negative publicity can easily cascade into a larger movement calling for an individual or company to be boycotted or "canceled." Such cancel culture—where social media is used to create widespread withdrawal of support for a person or entity—has recently become a prevalent part of modern society.

Any person or business, regardless of size or prestige, can easily become the subject of concerted public angst. Often, a person or company becomes a victim of cancel culture based on their views or actions. This was none the more evident than in 2020, which saw a considerable increase in the amount of people and businesses subjected to cancel culture. For example, last year Goodyear Tires became a victim of cancel culture after President Trump demanded (via Twitter) a boycott of the tire manufacturer for the company's alleged policy that banned employees from wearing clothing at work that displayed certain political messages. Similarly, the food manufacturer, Goya Foods, Inc., was subjected to a boycott campaign after its CEO expressed support for President Trump.

Although common, political ideology is not the only reason why an individual or business may be targeted by a cancel culture campaign. For example, also in 2020, the food brands Aunt Jemima, Uncle Ben's, and Eskimo Pies were each boycotted en masse for utilizing racial stereotypes to sell their products. As a result of the public backlash, the aforementioned brands were rebranded by their respective parent companies. Additionally, the clothing retailer, Lululemon, was publicly derided for a hypocritical "anti-capitalism" marketing ploy. Even much beloved public figures were victims of cancel culture last year, including Ellen DeGeneres for the alleged hostile work environment at her daytime television show, and J.K. Rowling for transphobic beliefs.

Cancel culture is rapidly changing society and its sudden rise has strong implications not only for its victims but also for the microcosm of the legal world. Defense lawyers have a duty to be aware of instances of cancel culture with regard to their specific clients, and they must be prepared to address it when necessary. It is particularly important that attorneys adopt new strategies to account for cancel culture and the negative impact it can have on litigation, especially jury perception. Given that social media is a prolific part of life today, most jurors have at least one social media account. In turn, this means that before jurors enter the courtroom most will likely have some knowledge about cancel culture and some jurors may have even directly participated in it by demanding a boycott or, alternatively, showing support for the "canceled" entity's position.

It is important to remember that even small businesses and ordinary people can be "canceled" – for example, TIME magazine recently reported on local social media campaigns to boycott small businesses or professionals who allegedly participated in the January 6 insurrection at the United States Capitol building. Although the idea is to send a message to the business or professional by refusing to patronize their business or utilize their services, it is certainly possible the sentiments of a cancel culture campaign could bleed over into litigation, leading jurors to want to send a message with their verdict. Because cancel culture can cause juror bias, it is important to appropriately tackle the issue in the context of litigation.

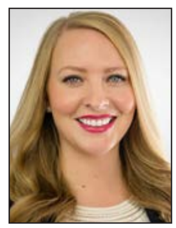
At the outset of litigation, lawyers should research whether their client has been the subject of cancel culture. If your client has been a victim of cancel culture, it is important to tailor pre-trial themes and strategies accordingly. If your client has not yet publicly addressed the offense, lawyers may want to advise their client to issue a statement in advance of trial in an effort to quash the negative publicity. Additionally, depending on the pervasiveness of and reason for the public backlash, lawyers may want to advise their client to express regret for the societal offense and its impact on the community during their deposition. Alternatively, in conservative venues, the better strategy might be to emphasize the client's right to free speech and that their ideological beliefs have no bearing on the issues involved in the case. However, when combatting cancel culture via a public statement or explanation in a deposition, it is important to understand how it will likely resonate with potential jurors in the applicable venue. In order to do so, conducting a focus group in advance of trial may be a worthwhile investment.

During the trial phase, it is especially important to use voir dire as a strategic method to counteract the negative effects of cancel culture and the subconscious bias it can cause in jurors. Emphasis should be placed on identifying jurors who have likely heard about or participated in cancel culture regardless of whether it pertained to your client or not. For instance, it may be helpful to ask jurors "Who here gets much of their news from social media sites like Facebook and Twitter?" Asking jurors what social media platforms they use, and how often they use them, may also be helpful. Jurors who are "off the social media grid" may be less aware of negative publicity spread through such platforms. On the other hand, jurors who have participated in a boycott of another company may likely have similar values and expectations for corporate conduct in general, including that of your client. Such jurors can be identified by asking, "Have you ever boycotted a company before? For what reasons?" or "Have you ever made a decision not to buy a certain product because you disagreed with something the company did or said?" or "Have you ever posted on social media to encourage others to do the same?"

If your client has ever been the subject of negative publicity, it is exceedingly important to identify which jurors are aware of such publicity and whether they have formed an impression of your client as a result. However, lawyers should be mindful not to "poison the panel" by having a juror blurt out the negative publicity about your client in front of the entire venire. In these instances, it is recommended to ask questions similar to the following: "Without saying what you have read or heard, has anyone seen or heard anything negative about my client?; "Has anyone seen any references to my client in the news or on social media?"; and "Has anyone ever posted anything on social media about my client?" If any jurors answer the aforementioned questions in the positive, then ideally an attorney should seek permission from the Court to individually follow-up with each juror to obtain additional information. However, if such request is refused, use follow-up questions such as, "Without saying what you heard or read, did that lead you to form a negative impression of my client?" or "Do you think what you heard about my client might influence how you view them in this case, or how you weigh the credibility of their witnesses?" Affirmative responses to these questions should be sufficient to strike such jurors from the panel for cause. For any jurors who remain, an instruction should be given by the Court that the information they have learned should not be shared with other jurors or play any role in deliberations.

It is important to remember that during voir dire some jurors may be reluctant to admit they have a negative impression of your client. Therefore, during voir dire research should be conducted into the social media activities of the potential jurors. If any negative publicity about your client "went viral," special attention should be paid to a juror's social media history during that time period, as it may be possible to have a juror excused who posted about your client yet denied doing so during voir dire. Once trial has started, an effort should be made to reiterate the notion that jurors are there only to decide "This plaintiff, This case." Remind jurors they are not being asked to determine whether your client is a good or bad company, or whether your client has caused harm to other people.

Cancel culture may have considerable implications for its victims in the context of litigation; potentially leading to subconscious bias in jurors and distorted verdicts with no rational relationship to the merits of the case. However, being "canceled" on social media does not have to adversely impact litigation. Due to the increased risks it poses, attorneys should develop strategies and techniques to proactively combat cancel culture during the various phases of litigation, especially at trial. Careful consideration should be paid to identifying whether a client has been the victim of cancel culture, and if so, mitigating its damaging effects during both the pre-trial stage and at trial.



Hailey M. Hopper is a partner at Pierce Couch Hendrickson Baysinger & Green, LLP in Oklahoma City, Oklahoma. Hailey's practice is focused on general insurance defense, including retail and hospitality, transportation, professional liability, and personal injury matters. Hailey can be reached at hhopper@piercecouch.com.

Cathleen McMahon is an associate at Pierce Couch Hendrickson Baysinger & Green LLP in Tulsa, Oklahoma. Cathleen's practice is primarily devoted to insurance defense, including medical malpractice, premises liability, professional liability, personal injury, insurance bad faith and commercial disputes. Cathleen can be reached at cmcmahon@piercecouch.com.

Dr. Christina Marinakis is a shareholder and director of jury research at Litigation Insights. She has 20 years of jury research, study, and applied practice in law and psychology. Christina has assisted trial counsel during jury selection and with daily trial monitoring in venues across the country, helping clients obtain defense verdicts in notoriously difficult jurisdictions. Christina can be reached at cmarinakis@litigationinsights.com.

IT'S WORTH A SHOT

The COVID-19 Vaccine from an Employer's Perspective

Allison P. Sues SmithAmundsen

As the COVID-19 vaccine becomes available to more and more people, employers may grapple with how to best ensure that their workforce is vaccinated. The question raises several thorny issues. Should the employer mandate that their employees receive the vaccine? If not, what incentives can be provided to motivate employees to get vaccinated short of compelling them? Can employers arrange to provide the vaccine onsite?

Employers may mandate that employees receive the COVID-19 vaccine as a condition of their employment if the need for vaccination is job-related and consistent with business necessity, and if the failure to vaccinate the workforce poses a direct threat to other employees. Employers will have an easier time justifying a mandatory vaccine program if the employees cannot perform their work remotely, must work in close quarters with each other, have regular contact with customers or other third parties, or work in certain industries, including healthcare, travel, hospitality, and manufacturing.

Mandating vaccines is not without legal risks of which employers should be aware. Employers must consider exemptions for those employees who do not want to be vaccinated due to disability, pregnancy, or a religious belief. Employers should analyze each request for exemption on a case-by-case basis, including a review of the employee's specific job position.

For employees who object to vaccines based on religious grounds, employers should first determine if the employee sincerely holds the religious belief. Courts do not overly scrutinize this question. While the belief cannot be social or political, courts cast a fairly wide net as to what constitutes a religious-based belief and Title VII's protection extends to firmly and sincerely held moral or ethical beliefs. The religious belief may be newly adopted, inconsistently observed, not part of a formal church or sect's religious practice, or different from the commonly followed tenants of the employee's religion.

For employees who seek an exemption

from mandatory vaccines based on their disabilities or pregnancy, the employer may ask for medical documentation corroborating the medical condition. Some examples of disabilities that may prompt employees to avoid the COVID-19 vaccine include prior allergic reactions to other vaccinations, a known allergy to polyethylene glycol (an ingredient in two COVID-19 vaccines), or even a severe and well-documented anxiety associated with the side effects of receiving vaccines.

Once an employer determines that an employee is objecting to a mandatory vaccine based on a sincerely held religious belief or documented disability, the employer must determine whether allowing the employee an exemption from the vaccine creates an undue burden on the organization or poses a direct threat to its workforce.

This analysis requires the employer to consider if there are alternatives to vaccination that could sufficiently protect the employee and other occupants of the workspace from the virus. This inquiry is often directly related to the employee's position. While it may be feasible to excuse an employee from receiving the COVID-19 vaccine if she can work remotely or be assigned to a position or work area that limits contact with others, these accommodations may not be feasible for all employees. In addition to allowing remote work or reassigning the employee's job duties, physical workspace, or work schedule to decrease the employee's proximity to others, employers should consider if an employee seeking an exemption could be accommodated through a leave of absence. For example, if an employee requests an exemption from the COVID-19 vaccine mandate due to a pregnancy, the employer may provide a leave of absence for the duration of the employee's pregnancy and then allow the employee to return after she has given birth and feels comfortable getting the vaccine.

If the employer determines that exempting the employee will create a direct threat of exposure to the virus that cannot be mitigated through any accommodation, it can require the vaccine as a condition of further employment, but this decision should be documented with a clear explanation as to why the vaccine is job-related and consistent with business necessity.

Employers should take proactive steps to lessen the legal risks of mandating the COVID-19 vaccine. The employer should create a clear written policy on its mandatory COVID-19 vaccine program that is available to all employees, as well as to all conditional new-hires – who should be notified that their employment is contingent on receiving the COVID-19 vaccine. The policy should refer employees to a specific staff member to handle questions and requests for exemptions. Employers should train this staff member, as well as other management and Human Resources personnel who may also field questions and requests for exemptions, to proactively open a dialogue on the need for an exemption and the possibility of accommodations. The employer must also monitor and ensure that it conducts the exemption consideration and decision process consistently for all employees.

Employers – especially those who operate in spaces where remote work is feasible and contact with the public is limited – may wish to avoid the legal risks of a strict vaccine mandate while still encouraging their workforce to be immunized against COVID-19. There are several practices that employers can take to motivate employees to receive vaccines short of job-contingent mandates. Employees are more likely to get vaccinated if it is easy and affordable to do so. Employers may want to subsidize the cost of vaccines, allow paid time off to go get vaccines, offer cash payments for each dose of the vaccine taken, or provide paid leave for any employees experiencing side effects in the days following the vaccine. Employers may educate its workforce on the benefits of the vaccine and provide information dispelling myths about the vaccine being unsafe. Management and other high-level members of the organization should lead by example and publicize when they receive their vaccines.

Employers may also encourage employees to receive the COVID-19 vaccine by providing it at their worksite, whether the employer enrolls as a vaccinator itself or partners with a third party to bring vaccines to the worksite. Employers wishing to enroll as a vaccinator itself should be cautioned that the process is trying. The employer must show that it has a medical director running the vaccine program and medical personnel available to administer the shots. The roll-out of the vaccine can be complicated by the fact that some COVID-19 vaccinations require multiple doses or need to be stored in ultra-cold freezers. The need for social distancing while efficiently vaccinating large groups also creates logistical challenges.

If employers provide mandatory vaccinations onsite, be mindful that while providing a vaccination does not qualify as a medical examination, pre-screening questions may elicit information on employees' disabilities. Therefore, under the ADA, an employer must be able to show that these pre-screening questions are "job-related and consistent with business necessity." To meet this standard, an employer would need to be able to show that it must ask these questions in order for the employee to receive the vaccine, and that the employee needs to receive a vaccine in order to prevent a direct threat to the health and safety of the workplace. An employer does not need to show that vaccine pre-screening questions meet the "job-related and consistent with business necessity" requirement if it is providing voluntary onsite vaccinations because answering those screening questions would also be deemed to be voluntary.

For the many employers who outsource their vaccination program or require employees to receive their vaccinations at a pharmacy or healthcare site outside of the workplace, employers may require employees to provide proof of vaccination. An employer may ask an employee whether they have received the vaccine without implicating the ADA's limitations on disability-related inquiries. As long as the question is streamlined to only ask whether the employee has received the vaccine, the question is not eliciting information on employees' disabilities. Employers should tread carefully if asking any subsequent questions, including why the employee has not yet received a vaccination, because these questions may elicit information about an employee's disability and are therefore subject to the ADA's requirement that the question be "job-related and consistent with business necessity."

The bottom line is that employers may mandate COVID-19 vaccines, but this decision should be guided by an assessment of the actual risk as to whether an unvaccinated employee would expose coworkers, customer, or clients to the virus. Employers who require the vaccine must consider accommodations for those who do not want it due to disability, pregnancy, or religion. Short of mandating the vaccine, there are several steps employers may take to encourage vaccination. Whether the vaccine is mandated or encouraged, employers must be careful in narrowly tailoring any information collected from employees about the vaccination so as not to unnecessarily require an employee to disclose information about a disability.

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

EMPLOYEES TELEWORKING AND THE IMPACT ON EMPLOYMENT AND TAX POLICIES

Rebekah Jalilian-Nosraty, Erin Nathan and **Kyle Wilcox** Simmons Perrine Moyer Bergman PLC

In March 2020, the COVID-19 pandemic spurred many employers to make temporary arrangements for their employees to telework. Now a year later, these arrangements have, in many cases, turned permanent. With the ability to work remotely, employees are not only teleworking but are also moving to states beyond corporate headquarters. While many employees and employers are celebrating the flexibility and benefits that teleworking brings, when an employee moves to a new state, it creates HR and tax compliance issues. This article provides a checklist to employers and their employment and tax counsel to consider when employees move out of state.

LEAVE LAWS

Family Medical Leave Act (FMLA)

Many employers forget that under the FMLA, an employee's personal residence is not a worksite for telecommuting employees.[1] Rather, the worksite of telecommuting employees will continue to be the site where the employee reports and from which assignments are made. Employees who would qualify for FMLA, if working at a traditional worksite, will continue to qualify for FMLA while telecommuting from their residence.

State, County and Municipality Leave Requirements

Employers should also review whether the state, county and municipality that the employee is working in require leave.

LOCAL FMLA AND PAID SICK LEAVE

Employees may be entitled to leave under state FMLA laws, even if the employee has only worked inside the state for a few months, and in some states, leave is required to be paid if the employee meets eligibility requirements. Currently, if eligibility requirements are met, California, Massachusetts, New Jersey, New York, Rhode Island, Washington, and the District of Columbia require paid family leave. Colorado, Connecticut, and Oregon have enacted paid family leave requirements, but as of the submission date of this article, the law had not gone into effect.

Certain states, counties and municipalities require employers to offer paid sick leave. Under many of these requirements, an employee who is based in location A and works from location B may be covered by the sick leave policies in both locations! It is extremely critical for employers to know where their employees are working and assess the leave laws for those locations, and be careful to not just examine state law, but also look to county and city codes as well. Many large counties (e.g., Cook County, Illinois) and cities (e.g., San Francisco, California) have their own specific paid sick leave requirements.

Often employers can use existing paid time off policies to satisfy these obligations. However, employers and their counsel should carefully and closely examine the company's existing policy and determine whether all eligible employees under the specific leave entitlements are covered by the company's existing policies as paid sick leave requirements are often tied to hours worked and capture employees who are often not benefit-eligible (e.g., part-time employees).

SCHOOL LEAVE

The location of employees may require employers to provide school-related leave. Employees in 10 states, and the District of Columbia, may be entitled to school-related parental leave. These policies give parents and legal guardians time off to participate in children's educational activities and attend school conferences. As of January 2021, California, D.C., Colorado, Illinois, Louisiana, Massachusetts, Minnesota, Nevada, North Carolina, Rhode Island, and Vermont all require eligible employees to receive unpaid school-related leave. Again, check local. County and city codes address school leave as well.

WAGE PAYMENT LAWS

Fair Labor Standards Act (FLSA) / Minimum Wage and Overtime

A non-exempt workforce telecommuting can raise questions on compensable time, overtime, and minimum wage compliance. When is a non-exempt employee working and when are they not?

On December 31, 2020, the Department of Labor (DOL) considered whether travel between a remote employee's home office and a company's worksites is compensable time. The DOL's opinion letter explores several scenarios where an employee starts work at one location, travels to another work location, with differing personal errands interspersed. Ultimately, the DOL determined that travel from a home office to a worksite is normal commuting time and as such is not compensable, even if the employee performs work before and after the commute.[2]

Employers are required to exercise reasonable diligence in tracking employee's compensable time, which can be challenging for a remote workforce. Employers must pay employees for all work performed, even if the employer did not request the work be completed, and even if they have a rule against doing the work. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.[3] Employers should take care to consider how their employees are tracking time and create a procedure so that employees can report unscheduled hours.

Employers and their counsel should strongly consider creating telecommuting agreements that specifically address an employee's responsibility in tracking time and how an employee can report unscheduled hours.

Unused, Accrued Paid Time Off as Wages

Some states consider accrued vacation and paid time off as a wage and others do not. Many states require employers to follow their written policies, however, other states ignore an employer's written policy and mandate payment of unused, accrued paid time off at the end of employment. It is critical that employers and their counsel review state laws in which the company's employees are working and determine whether employees are entitled to payment of unused, accrued paid time off at the end of employment.

REVIEWING EMPLOYMENT POLICIES FOR COMPLIANCE

After determining where employees are working from, and what laws (city, county and state) apply, employers and their counsel are left to determine how to implement any necessary changes. Generally, there are two approaches. An employer can raise compliance standards for the entire company, meaning, the company provides the greatest amount of benefits provided to all employees. So, for example, an Iowa company may have a small number of employees who work and qualify for Colorado's paid sick leave requirements, but the Iowa company decides to comply with Colorado's paid sick leave requirements and provide those entitlements to all its employees, including those not working in Colorado. This might be achieved by the company following its already established policies (if those policies are in compliance) or by providing additional benefits. Alternatively, the employer may choose to issue stand-alone policies directly only to the impacted employees. In this example, only the Colorado-based employees would receive the Colorado sick leave policy and the Iowa employees would not.

STATE INCOME TAX

Employers with employees who work remotely will need to report income earned to the state where the employee performed the work, even if the employee is not a resident of the state where the work was performed. California requires income tax withholding for employees who are residents, whose base of operation is inside the state, or where the employee performs work inside the state. If the employee is working remotely temporarily due to Covid-19, Massachusetts and New Jersey will not require withholding by employers. Conversely, states such as Iowa have specifically required withholding by employers with telecommuters located in the state. New York issued guidance that requires withholding for employees whose non-pandemic worksites are within the state, regardless of the employees telecommuting location. These competing income withholding requirements highlight the need for employers to track the hours and location of remote workers.

STATE TAX OBLIGATIONS FOR EMPLOYERS

Most states require employers to pay state unemployment tax for employees working inside the state. Some locations require employers to withhold additional taxes from employees (such as Alaska, New Jersey, and Pennsylvania). Employers with a remote workforce will need to determine where the work is localized, with localization priority given to the state in which the service or work performance is located, and may need to comply with multiple state laws where employees reside, have worksites, or work remotely from more than one state.

Telecommuting employees may give rise to tax filing obligations for their employers. Employers may be burdened with franchise, income, or other business tax due to the "nexus" created by employees working remotely. Massachusetts, Rhode Island, South Carolina, and New Jersey responded to COVID-19 remote workforce by excluding pandemic-related remote employees from their corporate income and franchise tax "nexus". These exclusions are unlikely to extend through the 2021 tax year. Similarly, state sales tax laws may require retail employers to withhold sales tax due to the presence of a telecommuting employee inside the state.

WHAT TO DO WITH YOUR REMOTE WORKFORCE:

- Implement Telecommuting Agreements that:
  - Require employees to record and report the city and state from where they telecommute.
  - Address how employees will record time and report unscheduled time.
- Review city, county and state laws in the locations in which employees work to determine compliance with employment laws.
- Review current policies and procedures for compliance.
- Determine whether overall changes are necessary or stand-alone changes should be implemented for the employees in highly regulated states.

Rebekah Jalilian-Nosraty has a general practice with an emphasis on providing counsel to businesses in all aspects of corporate transactions. She joined Simmons Perrine Moyer Bergman PLC after earning her JD and MAc in 2020. Rebekah can be reached at rebekahjn@spmblaw.com.

Erin Nathan is a partner in Simmons Perrine Moyer Bergman PLC's employment law practice group. She provides counseling, workplace training and represents businesses and individuals before state and federal courts and agencies involving all aspects of employment law. Erin can be reached at enathan@spmblaw.com.

Kyle Wilcox counsels individuals with matters relating to estate planning, wills, probate, and tax law. He helps families plan the disposition of their assets and understands tax consequences associated with business transactions and estate planning as he prepares personal and fiduciary income tax returns. Kyle can be reached at kwilcox@spmblaw.com.

1 29 CFR § 825.111(a)(2)

2 DOL Opinion Letter (Dec. 31, 2020) FLSA 2020-19 https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_12_31_19_FLSA.pdf.

3 DOL Field Assistance Bulletin (Aug. 24, 2020) No. 2020-5 https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-5

IT WAS BILLED, BUT IS IT REASONABLE?

Defense Strategies to Challenge the Reasonableness of Incurred Medical Bills in Arizona

Erica Spurlock and **Matthew Baltierra** Jones, Skelton & Hochuli, P.L.C.

One of the most important words in personal injury litigation is "reasonable." From the Reasonable Person standard to reasonable compensation, personal injury litigation is a battle to convince a jury what is "reasonable." However, the plaintiffs' bar is making concerted efforts nationwide to convince courts that the "reasonable" in "reasonable expenses of necessary medical care" is not actually up for debate, and that any bill, if incurred, is automatically reasonable.

Defense attorneys, and the adjusters and clients whose interests we work hard to protect, are all too familiar with the collateral source rule. This rule is strictly interpreted in Arizona such that in theory, plaintiffs can ask the jury for every penny billed to them regardless of what was actually paid. Indeed, some plaintiff attorneys take the position that defense counsel should not even be notified of liens, write-offs, or adjustments to those bills. This position circumvents the requirement in Arizona that a plaintiff may recover only those medical expenses that are "reasonable." *Lopez v. Safeway Stores, Inc.,* 212 Ariz. 198, 129 P.3d 487 (App. 2006).

While the cost of the past medical bills is not often the primary focus of a defense, far too many defense attorneys have simply accepted that because the plaintiff can recover the full amount billed, it is not worthwhile to argue over whether that amount is reasonable. It can be tempting to avoid this battle, as it can require additional experts and discovery, but it is a battle that must be fought consistently and on all fronts. Otherwise, a potentially significant means of reducing exposure simply falls by the wayside. Although the force of Arizona's collateral source rule is often difficult for courts to overcome, each time the defense takes up this battle, we educate the judges as to the wild billing practices of litigation-friendly treating providers. Even losses, therefore, are helpful in the long run.

The good news is that proactive defense attorneys are making headway. One of the most successful arguments defendants can make is based on foundation – or lack thereof. In *Larsen v. Decker*, 196. Ariz. 239 (App. 2000), the Arizona Court of Appeals upheld a superior court's exclusion of multiple medical records and bills that did not have proper foundation. In that case, the plaintiff relied exclusively on the depositions of her treating providers and argued that the medical bills were admissible as business records. The court examined each record and bill, along with the corresponding deposition, to determine if each record or treater laid an adequate foundation to establish that each bill was "caused by and [was] reasonable and necessary results of the auto accident." The *Larsen* court relied on the Washington Court of Appeals' decision, 929 P.2d 11125, 1130 (Wash.App. 1997), for the following proposition: "[a] negligence plaintiff cannot rely only on medical records and bills to show medical expenses were necessary and reasonable; *other evidence must establish the latter.*" *Id.* (emphasis added).

This foundation-based objection was sustained by Judge Kerstin LeMaire in *Irakliev v. Wildfire Elementary School,* CV2015-003913, a case tried by Jones, Skelton & Hochuli, P.L.C. (JSH) attorneys Michele Molinario and Erica Spurlock. In that case, plaintiffs relied solely on the trial deposition of one treating surgeon to provide foundation not only for the reasonableness of his own bills but also for ambulance, ER, physical therapy, and surgicenter bills. The Court agreed that absent specific disclosure of the surgeon's expertise in those areas, those bills lacked foundation and were not admissible.

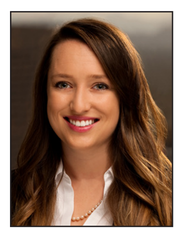
In early 2019, Judge Janet Bostwick in Pima County also agreed with this foundational objection. In *Cotton v. Sally Beauty Supply, LLC*, C2017-0748, a case handled by JSH attorney Matthew Baltierra, Judge Bostwick specifically ruled that medical bills, by themselves, "do not establish that medical care was necessary or that the cost was reasonable," and therefore before the plaintiff can introduce her medical bills into evidence, the plaintiff must provide testimony from "a witness qualified by personal knowledge or expertise . . . . [to] attest that plaintiff's bills reflect . . . [a] reasonable cost for [her medical] care." The case settled shortly after this ruling for an amount very favorable to the defense.

The other avenue for challenging the "reasonableness" of a plaintiff's medical bills is to introduce evidence of write-offs or adjustments to the bills, or evidence that the medical provider accepted a lesser amount as payment in full. The primary authority supporting this position is Canyon *Ambulatory Surgery Ctr. v. SCF Arizona,* 225 Ariz. 414, 239 P.3d 733 (App. 2010), in which the Arizona Court of Appeals held that amounts accepted as payment-in-full for medical services are relevant for determining whether medical bills are "reasonable." The dispute in *Canyon Ambulatory Surgery Ctr.* involved a group of treating physicians who sought payment of the full amount billed for workers who had medical coverage pursuant to a workers' compensation policy. Similarly, in 2011 the Arizona Court of Appeals ruled that Medicaid agency's lien on settlement proceeds should be based on the amount paid for the victim's care, not on the full amount of medical services billed, when the medical providers had accepted discounted payments. *Southwest Fiduciary, Inc. v. AHCCCS*, 226 Ariz. 404, 409-410, 249 P.3d 1104, 1109-1110 (App. 2011).

While the difference in roles of the plaintiff and defendant in *Canyon Ambulatory Surgery Ctr.* provide the plaintiffs in personal injury actions with a basis to distinguish this ruling and argue against this position, some Arizona judges have nonetheless been receptive to this argument. For example, in 2014 Maricopa County Judge Randall Warner ruled that defendants could "challenge the inference that billed charges are reasonable with evidence of the charges actually paid."

In February 2019, in *Garrett v. Specialized Services Transportation, Inc.,* 17-cv-08085 a case also handled by JSH attorney Baltierra, then-District Court Magistrate Bridget Bade ruled that a plaintiff can recover as medical special damages only the amount the plaintiff's medical providers accepted as payment-in-full.

The judges making these defense-favorable rulings no doubt understood the precept that limits plaintiffs to recovering only those amounts of medical expenses the plaintiff proves are reasonable. Unfortunately, the Judicial Committee that compiles and prepares Arizona's Jury Instructions has suggested eliminating the "reasonableness" requirement entirely, allowing plaintiffs to recover the full amount of medical expenses billed regardless of how artificially inflated that bill is. While there is no timetable yet for when this change could be made, defense attorneys must remain organized, zealous, and consistent in waging the battle against inflated medical billing.



Erica Spurlock of Jones, Skelton & Hochuli, P.L.C. focuses her practice in the areas of automobile and commercial trucking defense, employment defense, and other personal injury, wrongful death and general liability defense.

Matthew Baltierra of Jones, Skelton & Hochuli, P.L.C. defends clients against claims involving civil and tort litigation, including construction defect, premises liability, product liability, wrongful death and personal injury, commercial and contract disputes, as well as professional liability.

The Biden-Harris Administration Boosts States' Abilities to Achieve Their Ambitious Climate Change Goals

Yvonne Hennessey, Danielle Mettler-LaFeir and **Emma Marshall** Barclay Damon LLP

Over the last four years, states have been at the forefront of climate change policies. As of 2020, 15 states and U.S. territories have taken action to move toward 100 percent clean energy. During the Trump-Pence Administration, states received little support from the federal government in their quest to meet these goals, as the administration's focus was on reducing or eliminating federal climate change and greenhouse gas (GHG) emission reduction requirements. President Biden, on the other hand, has called climate change one of the four "historic crises" currently facing the United States. Although President Biden has only been in office for a short time, major efforts have already been made signaling the Biden-Harris Administration's plan to implement aggressive policies to significantly pursue renewable energy and reduce GHGs on a national level. These initiatives will have the effect of helping states meet their climate and GHG goals.

Under President Trump, the United States withdrew from the Paris Agreement, an international agreement between 197 countries focused on reducing GHG emissions. Former President Trump also used executive orders (EOs) that required federal agencies to roll back then-existing guidance in an effort to facilitate the development of fossil fuels and limit requirements to reduce GHG emissions. Key examples that sought to abandon President Obama's GHG emission reduction road map included the 2017 EO Promoting Energy Independence and Economic Growth, which required agencies to repeal and replace GHG and climate regulations, including the Clean Power Plan, a key Obama-era regulatory action to reduce GHG emissions from power plants and methane regulations; reversed a moratorium on new coal mining leases on federal lands; removed consideration of climate change in environmental reviews; and eliminated federal agencies' use of the Social Cost of Carbon (SCC) guidance.

In contrast, President Biden has outlined aggressive goals to eliminate carbon emissions from the electric sector by 2035 and achieve a zero GHG emission economy by 2050. President Biden's climate plan calls for a massive investment in clean energy, weatherization, and efforts to green the transportation sector.

EXECUTIVE ORDERS

On his very first day in office, President Biden signaled his Administration's focus on reducing GHGs and fighting climate change by moving to reinstate the United States to the Paris Agreement, and signing the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO 13990). This EO is a major shift in federal policy and strongly signals the new administration's stance on climate change. Among other things, it rescinded the Keystone XL pipeline's permit and directed all agencies to immediately review all federal regulations, orders, guidance documents, policies, and agency actions taken during the Trump-Pence Administration, and consider rescinding, revising, or replacing those that are inconsistent with the Biden-Harris Administration's climate goals that include generally, protecting the environment, reducing GHG emissions, putting an end to fossil fuels, and expanding renewables in the energy sector.

EO 13990 requires specific action by agencies to suspend, revise, or rescind the following Trump-era rules: oil and gas sector methane emission standards (85 Fed. Reg. 57398); fuel economy standards (84 Fed. Reg. 51310 and 85 Fed. Reg. 24174); appliance and building efficiency standards (85 Fed. Reg. 8626, 84 Fed. Reg. 67435, and 83 Fed. Reg. 8463); and coal and oil-fired power plant hazardous air pollutant standards (85 Fed. Reg. 31286). It also revoked multiple EOs issued under the Trump-Pence Administration, including the 2017 EO Promoting Energy Independence and Economic Growth, which sought to promote fossil-fuel projects and reduce requirements to reduce GHG emissions.

Importantly, EO 13990 further reinstituted the use of the SCC by federal agencies and the SCC Working Group. The SCC was first instituted under the Obama-Biden Administration in 2010 and is a set of estimates of the monetized damages to society associated with incremental increases or decreases in GHG emissions, including carbon, methane, and nitrous oxide. The SCC is a policy tool for agencies to use in determining the social benefits of reducing GHG emissions when considering climate impacts of potential agency actions.

Less than a week after taking office and signing EO 13990, President Biden signed his second major climate change initiative, Executive Order on Tackling the Climate Crisis at Home and Abroad (EO 14008). The central goal of EO 14008 is to lay out the Administration's strategy for carbon neutrality and includes determining new national GHG emission reduction goals consistent with the Paris Agreement, increasing renewables on public lands and off-shore waters, creating a National Climate Task Force to shape domestic response across agencies, and efforts to make the electricity sector carbon free by 2035. Other provisions of EO 14008 include environmental justice initiatives, worker training and community revitalization efforts, ending fossil fuel subsidies, ensuring climate considerations are an essential element of U.S. foreign policy and national security, and pausing all new oil and gas leases on public lands.

To coordinate and implement the administration's zero carbon agenda, EO 14008 also formally established the White House Office of Domestic Climate Policy, headed by the National Climate Advisor, and a National Climate Task Force consisting of various Executive Branch agency heads. Gina McCarthy, the former Environmental Protection Agency (EPA) administrator, has been appointed the national climate advisor and is to lead the climate efforts across federal agencies. Every federal agency must submit a draft action plan to the task force that details the agency's efforts to increase resilience of their facilities and operations in an environmentally responsible manner. The EO also requires coordination with state and local governments, tribal authorities, private developers, and any other interested party.

The actions directed in these EOs create national polices that will hold every federal entity to the same climate goals, which may push private markets to shift to lower GHG practices and products. As such, the Biden-Harris Administration has signaled that states with their own climate agendas will have a partner in the federal government to help combat climate change and aggressively pursue renewable energy. And, with the support of a Democratically controlled Congress, the new administration is likely to turn to legislative initiatives to solidify its climate change priorities and make its policies more permanent.

EPA

Due to the breadth of the EPA's regulatory authority, it will play a lead role in implementing the Biden-Harris Administration's climate goals, as well as supporting states' plans. Given EO 13990's requirement to review all Trump-era agency actions, the EPA is expected to immediately initiate rule-making activities to not only get rid of the Trump-Pence Administration's rollbacks, but to accelerate the pace of rulemakings to support the new Administration's plan. The EPA is likely to start by focusing on the major GHG emitting sectors, including transportation, electricity, and oil and gas. This may include rule-making activities, and also reconsideration and replacement of Trump-era rules. The Clean Air Act Affordable Clean Energy Rule, Trump's replacement rule for Obama's Clean Power Plan, was recently struck down by the District of Columbia Circuit on the former president's last day in office, paving the way for the EPA to promulgate a new rule that is in line with the Biden-Harris Administration's ambitious GHG reduction goals.

FERC

The Federal Energy Regulatory Commission (FERC) may also be a major player in realizing both the Biden-Harris Administration's and the states' energy goals. FERC has jurisdiction over interstate transmission of electricity, natural gas, crude oil, and refined pipelines, as well as over the rates, terms, and conditions of services. In the past four years, under a Republican majority, FERC has been accused of making decisions that harm state efforts to move away from fossil fuels and toward renewable resources. For example, the New York Independent System Operator, Inc. (NYISO), the electric grid operator in New York, proposed a buyer-side mitigation (BSM) exemption to entice renewable sources to enter the NYISO market. When a new source enters the New York energy market, BSM rules require that revenue from an outside source, such as state renewable energy credits, be subtracted from that source. The result is renewables having more cost hurdles than fossil fuels, and therefore fewer renewables added to the market. NYISO had sought to exempt renewables from this BSM requirement, which FERC rejected, effectively benefitting fossil fuel generators.

President Biden has appointed Richard Glick, a Democrat on the FERC Commission, chairman. Glick had made comments prior to appointment that signal his priorities as he steps into this new role, including his intent to approve state proposals to except renewable and energy storage resources from BSM rules. Despite the appointment, Republicans still maintain a 3-2 majority on the commission. To permanently advance renewables and a zero carbon future, Democrats who now control Congress could pass a clean-energy standard, which FERC would then be required to implement regardless of what political party is in control. Regardless, with the current support of FERC, the states may promote renewables in their markets as a cheaper alternative to fossil fuels.

Yvonne Hennessey is the chair of Barclay Damon LLP's Environmental and Lobbying & Election Law Compliance Practice Areas as well as co-team leader of the Oil and Gas, Linear Infrastructure, and Energy Markets Teams. Her practice concentrates on project siting and high-profile environmental and regulatory litigation in administrative and judicial forums.

Danielle Mettler-LaFeir is a partner at Barclay Damon LLP. Danielle's practice concentrates 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. She also counsels businesses on project development and operations as well as applicable environmental laws.

Emma Marshall is a law clerk at Barclay Damon LLP. She assists the firm's Environmental Practice Area attorneys and clients on a wide range of matters. She has experience assisting with research, advising on compliance with state and federal regulations, and drafting briefs for multiple renewable energy projects.

SHERIFFS IN THE C-SUITE?

How to Conduct an Effective and Legal Corporate Investigation in Germany

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

INTRODUCTION

There are several practical reasons for taking a closer look at internal investigations as a large number of corruption and embezzlement cases, such as the recent Wirecard scandal (a German e-payment giant that went bankrupt after fooling its investors), have shown. And yet the legal framework for internal investigations in Germany is vague at best. This, however, is about to change with the upcoming Corporate Liability Act that will have a significant impact on the importance of internal investigations. This article will provide an overview of the status quo and will examine the changes by the upcoming legislation. Our checklist at the end will help companies to successfully navigate through an internal investigation in Germany.

WHY CONDUCT A WORKPLACE INVESTIGATION IN GERMANY?

The practical needs to conduct internal investigations are often illegal actions, embezzlement, and fraud, which can lead to high financial losses for a company and threaten its very existence by fines, sanctions, liabilities, and massive damage to the company's image. Workplace investigations can uncover these wrong-doings and avoid or reduce the financial risk.

Also, if there is suspicion of illegal activities in a company, the management is obligated by law to investigate the possible misconduct. An effective internal investigation can even result in reduced legal liability. For example, violations of the European General Data Protection Regulation (GDPR) can result in fines of up to €10,000,000 or up to 2% of a company's total annual global sales. In this regard, an effective workplace investigation can be worth millions – literally.

ARE EMPLOYEES OBLIGED TO COOPERATE?

Interviewing employees is the most important source of information in an investigation. It provides a valuable insight into the company's daily practice that usually cannot be obtained from mere paperwork. Thus, it is important to clarify the extent to which an employee has to cooperate during the investigation. They are obligated to appear in person to their interview and answer the management's questions truthfully. Additionally, the employee has a contractual duty to inform her/his employer of any misconduct and/or legal violations that are known to her or him.

Whether the interviewee has the right to be accompanied by a lawyer or a works council member in the meeting has to be determined on a case-by-case basis. If the interview is merely a means to investigate the situation at hand, the employee cannot claim legal counsel being present in the meeting. However, this may be different, if allegations are more substantiated to the extent that the interview can be seen as a hearing to prepare a termination of the employment for misconduct based on that strong suspicion. In this case, the employee has the right to involve a lawyer.

IS THE COMING CORPORATE LIABILITY ACT (VERBANDSANKTIONENGESETZ) A GAME CHANGER?

The new German Corporate Liability Act is expected to be enacted into law in 2021 and will certainly be a game changer. For the first time under German law, not only will individuals be held liable but the entire corporation can be held liable for company-related criminal activities committed by its senior employees. Furthermore, fines for corporate misconduct are going to increase substantially to up to 10 percent of the average annual global sales for big corporations.

An effective compliance management system and corresponding internal investigations will be considered a mitigating factor in the sanctioning process. Although this might sound familiar to similar sentencing guidelines in the U.S., the German

Corporate Liability Act will unfortunately not be nearly as transparent or extensive. Nonetheless, for those companies that want to avoid increased sanctions, conducting an effective internal investigation in cases of misconduct is a must.

The new law will contain provisions on how to conduct the internal investigation:

- the employee will have the right to bring a lawyer or a works council member of her or his choice to the interviews;
- an obligation to inform the employee that the obtained facts from the interview may be forwarded to the authorities and/or used in a court of law; and
- the employee will have the right to refrain from giving an answer that would incriminate herself/himself.

DATA PRIVACY FRAMEWORK FOR WORKPLACE INVESTIGATIONS

Even in the most effective internal investigation, e.g., by screening the employees' emails or by using other technical surveillance, the EU and German data protection framework is crucial. Employees' data may be processed based on section 26 para. 1 Federal Data Protection Act:

- if there is a documented reason to believe the data subject (this often means the employee) has committed a crime, *or*
- if there is a suspicion of a serious breach of duty (by the employee), which does not amount to a criminal offense.

In both cases, processing the data must be "necessary." Therefore, the measures taken in the course of the investigation cannot be disproportionate to the infringement of the suspect's right to privacy. This was the problem in a case years ago, when the German state-owned Railway Company checked more than a hundred thousand private account transactions of their employees while investigating allegations of corruption.

In the course of an investigation, it can also be helpful to involve the company's data protection officer since she/he has extensive expertise in the relevant data protection law. This is a best practice: to seek the data protection officer's attention on all measures affecting the employees' data while preparing the internal investigation.

Data protection is also extended to whistleblowers, who often initiate an internal investigation by reporting misconduct.

CROSS-ATLANTIC TRANSFER OF DATA GATHERED FROM A WORKPLACE INVESTIGATION

Closely related to this is the transfer of the collected personal data abroad; in particular to the USA. Due to the invalidity of the EU-US Privacy Shield as of July 2020, it can no longer provide legal grounds for the transfer of personal data to the U.S. Now a permissible data transfer requires:

- appropriate safeguards pursuant to Art. 46 GDPR, such as the Standard Contractual Clauses;
- binding corporate rules according to Art. 47 GDPR; or
- derogations according to Art. 49 GDPR, e.g., if the employee explicitly consented to the transfer.

In many cases, the transfer of personal data to the U.S. is no longer legally possible. A solution is anonymizing the personal data before the transfer. By doing so, the data transfer would no longer fall under the scope of the GDPR.

From a practical point of view, however, this might not be necessary: For example, U.S.-lawyers can conduct interviews with employees face-to-face and evaluate the data in Germany, rather than sending the interview transcript to the U.S. But if interviews are conducted using video conference e.g., Zoom or Microsoft Teams, this brings back the data processing issue.

CO-DETERMINATION FRAMEWORK FOR WORKPLACE INVESTIGATIONS

It is also important to look to the works councils' co-determination rights. If the management decides to conduct employee interviews, the works council has a right to be informed. Furthermore, the works council has a right of co-determination as soon as the employer decides to resort to technical surveillance as part of the investigation, e.g., video surveillance at the workplace or screening the employees' emails with software.

NOW WHAT? – CHECKLIST FOR SUCCESS

How should internal investigations be carried out to be effective on the one hand and legal, in particular concerning data protection regulations, on the other hand? The following checklist may help. This list points out and illustrates the basic requirements that companies can use as a guide when carrying out internal investigations in Germany:

- Internal investigations should be well structured, with a clearly defined object of investigation, to ensure a swift process without delay. This should not compromise a thorough investigation of the facts. All incriminating and exculpatory circumstances should be investigated.
- Employee interviews should be well prepared and entail notification of the consequences arising from the interview. Although this might not be a requirement under the current legal framework, it is recommended to look at the changes the upcoming Corporate Liability Act will bring.
- Complete documentation is essential, both concerning the subsequent cooperation with the authorities and the data protection compliant procedure. This should include suspects and the facts supporting the allegations, the damage that has already occurred or is imminent, the evaluation of the interviews, and all incriminating and exculpatory circumstances.
- While conducting the investigation, it is essential to keep the whole process strictly confidential. Allegations against one or more employees should not become public knowledge in the company. This could compromise the employee(s) and result in a substantial fine for data protection violations.
- The company's data protection officer should be involved while preparing the internal investigation in order to get advice on measures affecting the employees' data.
- The works council should be involved at an early stage to ensure compliance with co-determination rights.

CONCLUSION

With the new Corporate Liability Act, the importance of internal investigations will increase substantially. They are an essential mechanism for companies to avoid or reduce drastic legal and financial liabilities. Being prepared is key. Now is the time to allocate and adjust resources to be able to conduct an effective and legal workplace investigation in Germany.

.

Dr. Jan Tibor Lelley, LL.M. is a partner at Buse in Germany and works in the firm's Essen and Frankfurt am Main offices. Jan works exclusively on labor and employment law cases. He can be reached via lelley@buse.de and @JanTiborLelley

Diana Ruth Bruch is a trainee lawyer at Buse in Germany and works in the firm's Essen office.

PELOTON, NORDIC TRACK, ECHELON, OH MY!

Discovery Strategies to obtain Virtual Fitness Data that could send Plaintiff's case riding off into the sunset.

E. Holland "Holly" Howanitz and **Tara S. Floyd** Wicker Smith

INTRODUCTION

In recent years, virtual fitness tracking applications and wearable devices have taken the fitness world by storm. Between virtual fitness trackers linked to at-home fitness equipment and wearable devices, people are now tracking and documenting their fitness activities by the mile and minute. While these virtual fitness tracking applications and wearable devices can provide motivation and helpful information for fitness enthusiasts and health-conscious individuals alike, this information can become problematic for a plaintiff in personal injury litigation that is not being honest about his or her limitations following an accident. As at-home fitness equipment and applications take off, these platforms continue to collect even more useful data than wearable devices in many circumstances. This article will explore the data collected from virtual fitness trackers and wearable devices and its discoverability, as well as obstacles to admissibility and authentication of this critical data.

DATA COLLECTED

With shutdowns of gyms and health clubs, at-home fitness equipment has increased in popularity, in part, from a belief that gyms and health clubs may present increased health risks during the pandemic. At-home fitness equipment like that manufactured by Peloton, Nordic Track, Echelon, Tonal, and Mirror, among others, provide at-home fitness classes virtually and track progress of users through virtual fitness tracking applications. These applications provide separate profiles for each user and track the number of total workouts completed, distance traveled, and when those workouts were completed, as well as cadence, resistance, and overall output (watts), making the data collected more reliable and consistent than that of wearable devices. In addition to data collected on these fitness applications, many applications have social media communities where users openly post and discuss their respective fitness journeys.

A comprehensive picture of an individual's general daily activity can be ascertained from data collected from wearable devices such as those manufactured by Apple, Fitbit, and Google, among others. Unlike virtual fitness trackers linked to specific fitness equipment or fitness applications, wearable devices collect data from the time the device is put on to the time it is taken off. Wearable devices collect information such as the wearer's location, route taken for outdoor exercise, activity levels, steps taken daily, heart rate, sleep patterns, active minutes, and time standing daily.

Data acquired from both virtual fitness tracking applications and wearable devices can offer evidence that could be used by the plaintiff to prove damages or by the defense to establish lack of damages. For example, if the data shows the plaintiff's activity levels diminished following the accident, the plaintiff could use it to support he or she is less active than prior to the accident. Conversely, the data could be used by the defense to establish a plaintiff is being untruthful regarding the extent of his or her damages if the plaintiff's activity levels do not match that attested to by the plaintiff. Moreover, discovery relating to activity levels prior to the subject accident can be used to disprove the plaintiff's claims of being very active prior to the accident and inactive after the accident.

DISCOVERABILITY

It can be challenging for the defense to obtain data from virtual fitness tracking applications and/or wearable devices because it will either need to come from the plaintiff directly or company itself. Manufacturers of virtual fitness tracking applications and wearable devices provide their users direct access to the data, as such, discovery requests should be served directly to the plaintiff. However, as the user can generally delete the data at any time, a litigation hold should be served on the plaintiff as soon as possible. Information regarding ownership of at-home fitness equipment and/or a wearable device, as well as participation in at-home fitness classes and social media groups may be obtained during the plaintiff's deposition through questions tailored to claimed activity levels before and after the accident, after which targeted discovery requests can be served to obtain production of the data. Targeted discovery requests should be tailored to the relevant time frame to limit objections by the plaintiff. These requests should include inquiries as to whether the plaintiff owns at-home fitness equipment and/or takes at-home fitness classes that virtually track the progress of the user through virtual fitness tracking applications, and/or whether the plaintiff owns a wearable device, along with a request for production of a download of the data. Additionally, many social media groups exist where users of home fitness equipment like Peloton, Nordic Track, Tonal, Echelon, and Mirror chronical their fitness journeys, which may be obtained through discovery to the plaintiff.

When a subpoena is sent directly to the company of the virtual fitness tracking application and/or wearable device, the subpoena will need to be domesticated in the jurisdiction where the company is based. The process for domesticating subpoenas varies state by state and jurisdiction by jurisdiction. Even after the subpoena is domesticated, there is no guarantee the company will provide data for its users as many of these companies purport to support user privacy. As such, if possible, this information should be obtained directly from the plaintiff. In many cases, the user's smartphone maintains and displays data from the virtual fitness tracker linked to at-home exercise equipment, and in certain jurisdictions it is possible to obtain a Court Order allowing a forensic expert to download the data directly from the plaintiff's phone. Therefore, the plaintiff's smart phone should be included in any litigation hold letter served at the outset of litigation.

ADMISSIBILITY

It is important to remember when seeking to introduce data collected by virtual fitness trackers and/or wearable devices that it should be treated like any other evidence, and should be admitted if it is relevant, authentic, and reliable.

Relevancy

The data collected from virtual fitness tracking applications and/or wearable devices would likely be deemed relevant to prove or disprove damages in personal injury cases where a plaintiff is alleging decreased ability to exercise to the extent he or she could prior to the accident. For example, the data could be used to establish a decrease or increase in the plaintiff's use of the at-home equipment linked to virtual fitness tracking application when a comparison is made of the data from before and after the accident. Therefore, data of this type is relevant in personal injury cases because it relates to plaintiff's activity levels and tends to prove or disprove the plaintiff's claimed damages.

Authenticity

The data can be authenticated through witness testimony that it is what the proponent claims it to be by identification of data unique to the user or through a computer forensic expert. Most virtual fitness tracking applications have profiles for each user that can be authenticated through testimony of the plaintiff. For example, the plaintiff could be questioned regarding the type, amount, and time of classes taken as reflected on the virtual fitness tracking application to establish the data is authentic and/or regarding specific fitness goals contained in data from a wearable device, as well as GPS coordinates associated with the home of the plaintiff to establish authenticity. If the testimony cannot be obtained through the plaintiff, defense counsel could hire a computer forensic expert to authenticate the data from either virtual fitness trackers or wearable devices.

Reliability

Even if data from virtual fitness trackers and/or wearable devices is properly authenticated, it is still necessary to establish it is reliable. Evidence is only considered reliable if it can accurately prove an issue in dispute without prejudicing or misleading the jury. Data from virtual fitness trackers linked to at-home exercise equipment is generally reliable regarding the number of classes taken and total time of exercise, as well as cadence, resistance, and overall output (watts) as this data is less subject to manipulation and each user is assigned a unique profile.

However, data from wearable devices is more susceptible to manipulation and is only reliable if the device is used properly. Additionally, the data could be misinterpreted by the reader, and there is no standardization among the wearable device manufacturers so there is the possibility for inaccurate information to be recorded. For example, heartrate monitors from several wearable device brands have been deemed unreliable when submerged in water, when used with skin perforations or tattoos, and/or irregular movements, among others. Moreover, some wearable devices incorrectly calculate step counts from erratic arm movements or fidgeting while the wearer is stilling down. Even still, these trackers could be deemed reliable for basic functionality such as time, frequency, and number of workouts performed.

CONCLUSION

As technology rapidly advances in the fitness industry, the digital footprint for active individuals is increasing. While data from virtual fitness trackers and wearable devices have fitness enthusiasts and health-conscious individuals tracking their activities by the mile and minute, the discoverability, admissibility, and authentication of this data is not without its challenges. However, an aggressive discovery strategy with this data in mind can provide insight into whether the plaintiff is being truthful regarding his or her alleged damages.

E. Holland "Holly" Howanitz is a shareholder in Wicker Smith's Jacksonville (FL) and Brunswick (GA) offices. She focuses her practice on defending claims, including general negligence, personal injury, products liability, automobile negligence, construction defect, and professional malpractice. She is a member of ABOTA and was recently elected to the executive committee of ABOTA's Jacksonville chapter.

Tara S. Floyd is an associate in Wicker Smith's Jacksonville, Florida, office. She focuses her practice on defending claims including general negligence, personal injury, automobile negligence, professional malpractice, and healthcare.

MEDICARE IS A SECONDARY PAYER

Lessons Learned with Medicare Set-Aside Accounts in Workers' Compensation and How They Might Apply to Liability Settlements

Paul H. Sighinolfi Ametros

It is the summer of 2001 and the workers' compensation world is reasonably quiet. In most jurisdictions, the 1980s and 1990s were hotbeds of legislative change. The workers' compensation community struggled to adapt to the significant changes many legislatures made to benefit structures following the work of the National Commission on State Workmens' Compensation Laws. There was much discussion, heated debate, and proposed fixes designed to bring stability to a troubled insurance market. State systems seemed to be adjusting to doing what they were designed to do, providing oversight on benefits to those injured at work. Employers were being offered an opportunity to secure coverage at reasonable market rates and many elected to become self-insured.

While cases settled, few in the workers' compensation community were mindful of their obligation to protect Medicare's interests consistent with the Medicare Secondary Payors Act (MSPA) 42USC Sec 1395y(b) and 42USC sec1862(b) (2)(A)(ii). This legislation was enacted to ensure Medicare only paid bills that were their responsibility, not those of a "primary payer." In 2001 and even today, some would ask, "who is a primary payer?" The simple answer, in workers' compensation, is the insurance carriers, including self-insureds. The answer in a liability context is the liability carrier. One might have thought the bar had the MSPA front and center on their radar. They did not.

In July of 2001, a deputy in the Centers for Medicare and Medicaid Services (CMS), Parashar Patel, prepared a memo for CMS administrators addressing "workers' compensation situations" and their impact on Medicare as a secondary payer. The situations concerning Patel were settlements that did not protect Medicare from making inappropriate payments. In simple terms, cases were being settled by Medicare beneficiaries, or those soon to be, where future medical payments were an element of the settlement and Medicare's interests were not a concern. Patel provided examples of his observations.

Patel's memo changed the analysis cautious attorneys make when considering settling a claim for a client with actual or potential Medicare exposure. Medicare Set Aside Accounts (MSAs) are now a fixture when settlement is considered in workers' compensation. Although the MSPA is federal law, its impact on state workers' compensation systems is universal.

WORKERS' COMPENSATION SETTLEMENTS AND THE MSPA

The settlement process in workers' compensation varies widely from state to state. For example, some parties use an MSA vendor to calculate future medical exposure consistent with evolving CMS guidance documents. Some have the resources to do future projections in-house. Some submit proposals to CMS for review if the client fits within the work volume thresholds. Some rely on projections based on evidence-based medicine and believe a reasonable consideration of Medicare's interests is all that is needed. Time will tell if there is a superior approach.

Commentators observe workers' compensation as a pure creature of statute. The benefits claimants are entitled to are limited and found in the state statutory scheme. The same is true for claim procedures. These observations woefully understate how nuanced some jurisdictions' systems are. There are however a few universal principles applicable to all workers' compensation systems; one of which makes working with the MSPA straightforward. Compensable claims are entitled to have all reasonable and necessary medical bills paid.

This benefit structure allows for an uncomplicated calculation for future medical as an element in a settlement evaluation. Causally connected, reasonable and necessary bills with no policy limit make valuing this element doable for the seasoned practitioner. Added to this is the only other universal claim element, indemnity benefits. Again, valuing indemnity is not an exceedingly complex task for someone knowledgeable about the applicable statute, the worker's actuarial life expectancy, or any statutory limits and when appropriate, and reducing a future payment to present value. Protecting Medicare's interest in future medical treatment is another important consideration. This is accomplished by having a skilled professional or team assess medical expenses associated with the claim and prognosticating about future medical needs. Settling parties must decide whether to submit the product of this calculation to CMS or not. Going through the settlement evaluation analysis is time consuming, a bit complex, but doable. Getting a client's understanding and authority is also fundamental.

Workers' compensation's rigid structure lends itself to a cookbook settlement evaluation process. One need only consider two damage elements, indemnity and medical. In workers' compensation there are no policy limits.

LIABILITY SETTLEMENTS AND THE MSPA

A liability settlement, however, considers the same two elements and depending on the nature of the claim, other damages. One must be sensitive to the fact that the exposure may exceed policy limits if insurance is all that is available to cover the loss. The complexity of a liability settlement complicates the analysis and the corresponding obligation to protect Medicare.

Having walked through the settlement process in workers' compensation, let us look at the analysis process in a typical liability case, an automobile liability claim. The plaintiff operated his vehicle with due care. He was struck by the defendant who was negligent. Negligence and liability, therefore, are a given and not important to this discussion.

The plaintiff's vehicle is a total loss. The plaintiff, a 65-year-old married business executive, sustained severe injuries requiring surgery, extended hospitalization, months of rehabilitation, and costly pharmaceuticals. His doctors believe he will need more surgery in the future. The accident significantly disrupted his family life.

A negligence suit has been filed. Discovery is complete and a trial date is set. The defendant has no tangible assets. He has had accidents in the past and as a result he is insured above his state's minimum requirements. He has $300,000 in bodily injury and property damage coverage.

The plaintiff's damages include, but are not limited to, lost wages, medical expenses to date, the vehicle, pain and suffering, loss of consortium, projected future lost wages, and future medical related to the accident. He had medical insurance up until recently, when, due to business necessity, he was terminated. There is a lien being negotiated for incurred medical expenses.

One need not have a great deal of experience nor economic insight to quickly understand the plaintiff's damages exceed the defendant's policy limits. The facts also inform that the plaintiff is Medicare eligible due to his age. The defendant's liability insurance is a primary payer. Medicare is secondary.

Given the example, how can the parties involved in the settlement "protect" Medicare's interests? Unlike workers' compensation, liability has no guidance documents from CMS. Additionally, CMS has not established a system for submitting proposed future liability medical for review. The CMS position seems to be, "we expect you to protect our interests, but we will not guide you on how to meet our expectations."

How can attorneys comply with this expectation while protecting their client when the funds available will not begin to cover the value of incurred damages? There is no black and white answer. In smaller cases, often language in the release may suffice or a rather arbitrary amount can be allocated for future medical. In larger cases, like this example, one common approach is to assess the full value of the damages, including the fair value of all future medical expenses, and determine the percentage attributable to each – a process often referred to as apportionment. The parties involved take the settlement proceeds available, the defendants' $300,000, and apply the percentages to that figure.

In this example, if the case settles for a compromise figure of $300,000, from that fees and expenses are deducted. The balance, for instance $185,000, is the funding available to satisfy the damage obligations. If future medicals represented 17% of the incurred and projected damages, then 17% of our $185,000, or $31,450, would be set aside to protect Medicare's interests. This apportionment approach finds support in *Arkansas Department of Human Services v. Ahlborn*, 547 US 268. (2006)

Where would these funds be placed? Drawing parallels from the workers' compensation guidelines, a professional administrator could assist the plaintiff in ensuring the funds are used properly. In the WCMSA Reference Guide, Medicare states that it "highly recommends" the use of professional administration. The funds would be placed into a dedicated interest-bearing checking account, and all bills associated with treatment connected to the injury would be paid out of the account. Corresponding records and annual reporting would be maintained. Professional administration would further demonstrate an effort by all parties to protect Medicare's interests.

Would CMS accept the methodology described above to protect Medicare's interests? What we know is the methodology demonstrates a logical effort to ensure Medicare is fairly represented at the settlement table and its interests are protected post-settlement. Without guidance from CMS, one cannot be certain, but an approach like this shows good faith efforts to satisfy their protection expectations.

As this article is being written, the industry is awaiting updated settlement guidance from CMS. In 2020, announcements were made by CMS suggesting they were working on guidance for the liability community on MSAs (LMSAs). In 2020, COVID-19 turned our world upside down. The pandemic impacted governmental agencies, disrupting work plans. Most recently, CMS reported an announcement to be coming in March 2021. Just what to expect is unclear. It may be guidance solely limited to LMSAs or it may have a broader impact on Medicare Set Aside accounts in both liability and workers' compensation settlements.

The obligation to protect Medicare's interests has been with us since 1980. During most of that time, the obligation was ignored more than honored. Times are changing; CMS is continually refining its guidelines for workers' compensation with updates to its reference guide every few months. And CMS continues to advise of upcoming regulations for liability cases. Although this area of the law is not a model of clarity, it appears that might change. When settling a case, it's important to be up to date on CMS's directives and the methodologies practitioners are using to address them. Consulting with those in our legal community who actively work with CMS can help make sure a prudent approach is taken.

Paul Sighinolfi is senior managing director at Ametros where he provides thought leadership and leads regulatory and policy initiatives. He is a fellow of the ABA, college of workers' compensation lawyers, and he served on the Board of the International Association of Industrial Accident Boards and Commissions. He has a M.A. from Trinity College and J.D. from Catholic University of America.

[1] There are a number of MSA vendors available. Ametros is not one. Ametros is a post-settlement professional administration company that manages settled medical funds, including Medicare Set Asides from both workers' compensation and liability cases.

DIVERSITY, EQUITY AND INCLUSION IN THE BOARD ROOM

Nasdaq Proposes New Board Diversity Requirements

Kaitlin M. Humble Hinckley Allen

Building on the momentum surrounding diversity and inclusion initiatives which has been evident throughout 2020, in December, Nasdaq submitted a proposal (the "Proposal") to the Securities and Exchange Commission ("SEC") that would require most listed companies to meet certain board diversity metrics in accordance with specific timelines. The SEC responded by issuing a Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, summarizing the Proposal and outlining next steps (the "Notice," available here).

According to Nasdaq, while some companies have already taken significant steps to voluntarily diversify their boardrooms, the national market system and the public interest would best be served by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional board diversification. Nasdaq also submits that, in its current form, reporting of board diversity data does not happen in a consistent manner or on a sufficiently widespread basis, thereby limiting the ability of investors to meaningfully evaluate such information. In support of the Proposal, Nasdaq refers to a growing body of academic research, presented in further detail in the Notice, suggesting a positive correlation between board diversity and shareholder value, investor protection, and decision making.

The Proposal requires most Nasdaq-listed company boards to have, at a minimum, one director who self-identifies as female and one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or two or more races or ethnicities, or as LGBTQ+. If listed companies do not meet these minimum requirements, they would be required to explain why these metrics have not been met. Similar, though slightly less stringent, requirements would apply to smaller reporting companies and foreign issuers.

The Proposal also requires listed companies to provide, in a proposed uniform format, certain statistical information on the company's board of directors related to a director's self-identification with respect to gender, race, and LGBTQ+ status on a going-forward basis (the "Statistical Information").

Recognizing that the Proposal does place additional burdens on companies, the Proposal contemplates a phase-in period over several years. After the first year, com-

panies must disclose their board composition, consistent with the required format of the Statistical Information. After the second year, companies must have, or explain why they do not have, at least one diverse director, and after four years (five years for Nasdaq Capital Market companies), companies must have, or explain why they do not have, at least two diverse directors.

While it is the first of its kind on a national scale, the Proposal is reminiscent of similar requirements that have gone into effect in recent years in California and, to a lesser extent, Illinois. Specifically, each publicly traded company incorporated in California must have on its board at least one female director and one director from an underrepresented community. Illinois requires public companies incorporated in Illinois to make annual disclosures with respect to board composition and diversity, although, Illinois currently stops short of requiring particular board composition.

Currently, fewer than 25% of Nasdaq companies satisfy the diversity requirements of the Proposal. Corporate diversity advocates point to similarly low statistics in California prior to the adoption of board diversity requirements in that state and note that the percentage of California boards with diverse members has increased significantly following the implementation of those requirements. Nasdaq is hopeful that the Proposal, if adopted, would yield similar results on a national scale.

The SEC held a period of public comment on the Proposal that concluded on March 11, 2021. All comments are available to view on the SEC's website (see here). Following the conclusion of this comment period, the SEC will approve or disapprove of the Proposal, or institute additional proceedings to determine how to move forward.

Kaitlin M. Humble is an associate in Hinckley Allen's Corporate & Business practice group. Kaitlin advises a range of business clients on matters related to corporate finance and taxation, corporate governance, mergers and acquisitions, securities regulation, bankruptcy and corporate restructuring, and commercial real estate transactions.

THE WRONG LAWSUIT AT THE WRONG TIME

The Limits of Wrongful Death Actions in California

Todd G. Lezon Murchison & Cumming, LLP

INTRODUCTION

No one ever wants to be a party to a lawsuit. When a lawsuit is filed, it means something went terribly wrong. But lawsuits are even more agonizing when they involve the death of a loved one.

When people die because of the wrongful act of another, the result is often a lawsuit for wrongful death. Whether a person dies suddenly in a car accident or from breathing in asbestos particles for decades, the relatives left behind can ask the judicial system to compensate them for their loss.

In many ways, these lawsuits are similar to any other civil action that did not involve a death. But in other ways they are strikingly different.

Wrongful death actions can involve several plaintiffs. These plaintiffs will invariably claim that the loss of their loved one was tragic and has left them in a state of bottomless grief. The emotional testimony of plaintiff after plaintiff describing the loss of a mother, father, son, or daughter will deeply affect a jury. For these reasons, wrongful death actions can be costly for defendants and their liability insurance carriers.

This article briefly explains two legal doctrines that can significantly limit a person's right to sue for the death of a relative.

THE NATURE OF A WRONGFUL DEATH LAWSUIT

The logical starting point is to define what a wrongful death lawsuit actually is. When someone dies because of the neg-

ligence or intentional misconduct of another, specified heirs may sue the alleged wrongdoer for the loss they have sustained because of the victim's death. Such lawsuits are known as actions for wrongful death.

Not everyone who had a relationship with the victim is entitled to sue the alleged wrongdoer. Those who may sue are limited to the victim's spouse, domestic partner, children, stepchildren, parents, and the victim's minor dependents in certain circumstances.

A wrongful death action seeks to compensate the plaintiff for the gravity of his or her lost relationship with the victim. A plaintiff's recoverable damages include loss of support that the plaintiff would have received from the victim; loss of advice or training the plaintiff reasonably expected from the victim; loss of love, companionship, affection, and moral support from the victim; and funeral and burial expenses. Thus, the value of the plaintiff's wrongful death claim depends on the nature and extent of the plaintiff's relationship with the victim. A plaintiff who had a strong bond with the victim can expect to recover more in damages than a plaintiff who only met the victim once.

In sum, a plaintiff in a wrongful death action may sue the alleged wrongdoer for negligently or intentionally killing the plaintiff's family member. The plaintiff's damages are intended to compensate for a lost relationship with the victim.

THE ONE ACTION RULE

In every wrongful death action, all of the victim's heirs must join as plaintiffs in a single lawsuit. Plaintiffs cannot file multiple lawsuits against the defendant. A person not already named as a plaintiff in an existing wrongful death lawsuit cannot later file a separate action against the same defendant. In California, this is known as the One Action Rule.

The easiest way to illustrate the effect of the One Action Rule is by an example. A man dies in a car accident. The man's wife and daughter file a wrongful death lawsuit against the defendant driver involved in the accident. But these plaintiffs never inform the man's son that they have filed the lawsuit. The lawsuit then settles and is dismissed under the terms of the settlement. Then, the son learns that his mother and sister filed and later settled a lawsuit. The son then files his own wrongful death lawsuit against the defendant. Because of the One Action Rule, the son's lawsuit will be barred, and the defendant could successfully move to dismiss it on that ground. In this hypothetical situation, the son's only remedy is to sue his mother and sister for omitting him as a named plaintiff in the wrongful death action. But he cannot sue the defendant.

From the defendant's perspective, not having the son in the lawsuit was highly advantageous. Otherwise, the defendant would have had to pay more to settle the case. Importantly, the defendant never had any duty to investigate whether any additional plaintiffs should have been joined to the lawsuit.

THE RELATION BACK DOCTRINE

The second important limitation on a plaintiff's right to bring a wrongful death action is timing. Statutes of limitation impose strict deadlines on a plaintiff's right to file a lawsuit after a plaintiff suffers compensable harm. Subject to narrow exceptions, no plaintiff is permitted to file a lawsuit after the statute of limitations on his or her claim expires.

In California, the statute of limitations for a lawsuit arising out of an injury or death is two years from the date of injury or death. So, if a motorist is injured in an auto accident on February 1, 2021, he has until February 1, 2023, to file a lawsuit for any injuries caused by the accident. If the lawsuit is filed even one day late, the defendant will ask the court to summarily dismiss the action or have a judgment taken in his favor.

But there are recognized exceptions to the rigid deadlines imposed by the statutes of limitation. One notable exception is the "Relation Back Doctrine." Simply stated, the Relation Back Doctrine treats an act done at a later time as though it occurred at an earlier time. This means that if the plaintiff timely files a lawsuit, new parties may be added to the lawsuit even after the statute of limitations expires.

For example, Plaintiff Jones is involved in a motor vehicle accident with Defendant Smith on November 1, 2015. On October 31, 2017, Plaintiff Jones timely files a lawsuit against Defendant Smith for personal injuries. During the course of gathering evidence in discovery, Plaintiff Jones learns that, at the time of the accident, Defendant Smith was operating his vehicle within the course and scope of his employment with a corporation.

Subsequently, on January 10, 2018, Plaintiff Jones files an amended complaint that names the corporation as a defendant, under the theory that it is vicariously liable for Defendant Smith's negligence. In this situation, Plaintiff Jones' amended complaint "relates back" to the date of filing of the original complaint. Since Plaintiff Jones has sued the corporation for the same auto accident the original complaint was based upon, the corporation is legally considered to have been named as a defendant when Plaintiff Jones filed his original complaint on October 31, 2017.

But the Relation Back Doctrine does not apply to a wrongful death action. New plaintiffs cannot join an existing wrongful death lawsuit more than two years after the victim's death. This can be disastrous for wrongful death plaintiffs who are seeking to maximize the value of their claims by adding as many plaintiffs to the lawsuit as possible.

I have personally seen just how Draconian and unforgiving this rule can be. A few years ago, I defended a wrongful death case where the victim fell off a ladder and died on August 31, 2015. The three plaintiffs—the victim's wife and two daughters—filed a wrongful death lawsuit on August 31, 2017, the last possible day to do so. The plaintiffs' attorney later discovered that the victim had 11 other children living in Guatemala. In November 2018, the plaintiffs' attorney filed a motion to allow the plaintiffs to add the victim's 11 additional children as plaintiffs. I opposed that motion by arguing that the statute of limitations expired on August 31, 2017, and the Relation Back Doctrine could not be used to salvage the prospective plaintiffs' claims. The judge agreed. Shortly thereafter, the case settled. Had the plaintiffs' attorney been able to add 11 new plaintiffs to the lawsuit, it would have inflated the case settlement value by several orders of magnitude.

CONCLUSION

Like any civil action, the number of plaintiffs suing the defendant in a wrongful death lawsuit matters. More plaintiffs means more relationships lost because of the victim's death. But unlike other lawsuits, wrongful death actions are subject to unique procedural rules that can limit the defendant's exposure to a large damages award. Defendants, their attorneys, and their insurance carriers must understand how to maximize the advantages presented by these rules.

Todd G. Lezon is an associate in the Los Angeles office of Murchison & Cumming, LLP. His practice focuses primarily on transportation and general liability. Prior to law school, Todd served two tours of duty with the U.S. Army in Operation Iraqi Freedom

CANADA'S CRACK DOWN ON DATA PRIVACY AND WHAT THIS COULD MEAN FOR INTERNATIONAL BUSINESS

Erin Schachter Therrien Couture Joli-Cœur LLP

With many individuals working from home, cyberattacks of all kinds are on the rise. Ransomware, data leaks, identity theft, fraud, and the unauthorized collection and resale of personal information, are all buzzwords that quickly gain enormous media attention during the chaos of 2020. Individuals are beginning to speak out against the use of their information by corporations and many countries are beginning to listen. Significant policy changes are occurring on a global level and Canada is neither the first nor the last to strengthen its domestic policy.

Incorporeal goods, such as data, are notoriously difficult to keep within the bounds of one nation. Consequently, changes to the privacy practices of one country can have tremendous influence on an international scale.

In Canada, the federal and provincial governments have begun to take concrete efforts to strengthen their legislation governing how businesses handle personal data. Many have noted that Canada is following the stricter enforcement trend initiated by the European Union and found in the *General Data Protection Regulation* ("GDPR")[1].

The GDPR was adopted on April 14, 2016, and became applicable starting on May 25, 2018. The Regulation was very innovative at the time and, after its adoption, it became a model for many national laws outside the European Union. It appears that Canada and some of its provinces are now following in the footsteps of the GDPR with the new legislation it adopted at the end of 2020.

Canada has two federal privacy laws that are enforced by the Office of the Privacy Commissioner of Canada. The *Privacy Act*[2] regulates how the federal government handles personal information, whereas the *Personal Information Protection and Electronic Documents Act*[3] (PIPEDA) controls how businesses handle personal information.

PIPEDA applies across Canada but is pre-empted by privacy legislation enacted by a province if that legislation is substantially similar[4]. Of Canada's 10 provinces and three territories, only three provinces have opted to enact or maintain their own privacy legislation (Alberta, British Columbia, and Quebec). Federally regulated businesses that conduct business in Canada are always subject to PIPEDA regardless of their location in Canada. Furthermore, information that crosses provincial or national borders in Canada is subject to PIPEDA regardless of where the business is located.

For this reason, changes to privacy legislation at the federal level have an enormous impact on business across Canada. Currently, both the federal government and the provincial government in the province of Quebec are implementing new rules.

In Canada, in November 2020, Parliament approved Bill C-11, *An Act to Enact the Consumer Privacy Act and the Personal Information Protection and Data Protection Tribunal Act and to make consequential and related amendments to other Acts* ("Bill C-11").

In Quebec, in June 2020 the National Assembly approved Bill 64, *An Act to Modernize Legislative Provisions Respecting the Protection of Personal Information* ("Bill 64")[5].

If passed, these Bills will strengthen the protection of personal information collected by private institutions. Even if these Bills are not passed "as is," we can expect a number of these measures to be enacted in the coming years.

These Bills include the following measures:

- Stricter restrictions on consent to the use of an individual's personal information, and a guarantee that the information will only be used for the intended purpose.
- Stricter requirements regarding the wording of the request for consent, which must be written in a manner that is easy to understand.
- Special rules regarding consent when dealing with "sensitive" information. Information is designated as "sensitive" if, because of its nature or the context of its use or dissemination, it involves a high level of reasonable expectation of privacy.
- The requirement to appoint an individual within the organization who will be responsible for compliance with applicable legislation.
- Enhanced rights are given to individuals to determine how their information is handled and whether they want their information destroyed or no longer disseminated. These rights differ according to the proposed legislation.

Another important element is the new restriction on data transfers between jurisdictions. The provincial legislation requires additional measures when seeking to transfer data out of the province. An assessment of the protection afforded must be made to determine whether the exported data will benefit from a similar level of protection as the domestic data. If it is determined that the destination of the potential transfer does not provide an equivalent level of protection, the transfer of the data will be prohibited. Where transfers are allowed following the assessment, they must be accompanied by a written agreement between the parties.

This requirement is much stricter than under federal legislation, which provides for a general obligation to use agreements or other methods to ensure comparable levels of protection for information transferred to third parties, without necessarily conducting a preliminary assessment.

In both cases, if foreign jurisdictions do not have adequate safeguards in place, it will be necessary to put in place rigorous contracts to ensure the protection of information. Otherwise, the company that transferred the information could be held liable in the event of an incident or a breach. Key point: if you want to do business in Canada or with Canadians, you may be required to conform to Canadian privacy standards.

Overall, these Bills provide for more stringent legislation on the handling of personal information, greater responsibility on the part of businesses, greater control mechanisms on the part of regulatory authorities in the event of an incident, as well as stricter penalties for businesses that do not comply with the law.

The sanctions proposed in the Bills far exceed those that existed before. If the Bills are adopted, companies could be fined between $10 million and $25 million or a percentage of their revenues. These sanctions are similar to the GDPR, which sets a maximum fine of €20 million or 4% of annual worldwide turnover for infringement. These percentages and the way they are calculated differ. In the proposed provincial legislation, the amount is between 2% and 4% of the company's annual revenues, while in the proposed federal legislation, the amount is between 3% and 5%.

By comparison, in the United States, various levels of regulators may issue penalties, but there is no unified legislation or authority throughout the United States thus penalties can vary widely.

As many countries, including Canada, are adapting their legislation to keep pace with trends in the GDPR, one of the lingering questions is whether this will have an impact on the United States.

Businesses today are highly dependent on technology, and even more so since the global pandemic. Personal information is ubiquitous, and few businesses can operate without it. Authorities in Canada are committed to restricting the use and handling of personal information. The consequences of not complying with these new restrictions once they take effect could be devastating for businesses.

Erin Schachter of Therrien Couture Joli-Cœur LLP is an attorney operating in the field of intellectual property law, technology law, data privacy as well as other commercial litigation matters. Erin is a member of the litigation team, and acts on behalf of clients on a national and international level before the provincial and federal courts in Quebec.

1 *Regulation (EU) 2016/679.*
2 *Privacy Act* R.S.C., 1985, c. P-21
3 *Personal Information Protection and Electronic Documents Act* S.C. 2000, c. 5
4 Organizations in the Province of Quebec Exemption Order (SOR/2003-374)
5 Bill C-11 and Bill 64 are collectively referred to as the Bills

BUSINESS INTERRUPTION MEASUREMENT CONSIDERATIONS IN A POST-COVID-19 WORLD

Jeff Williams, CPA, CGMA, MAFF MDD Forensic Accountants

The 2020 hurricane season saw us exhaust the modern English alphabet in terms of named hurricanes. In the same year, we also saw an even higher number of wildfires, explosions, and tropical storms.

While each event was certainly different in terms of impact, 2020 – and now 2021 – can claim one common element: COVID-19. As forensic accountants, one of our roles is to ensure we've accurately considered all scenarios and the impact they may or may not have had on the loss in question.

With this in mind, below are three key issues that need to be considered when assessing a business interruption claim in the wake of the Coronavirus.

REVENUE/TURNOVER[1]

Many aspects of the world's economy are still on hold as various governments continue with stay-in-place orders to help slow the virus' spread. As we work with our clients to help quantify claims, we continue to see a wide variety of issues across all industries, some of which are noted on the next page's graphic.[2]

CONSIDERATIONS FOR SAVED & INCREASED COSTS

Individual expenses are frequently evaluated to determine the degree to which certain expenses continue, diminish, or cease during a given period of indemnity. Because of COVID-19, it's crucial to understand that certain expenses may not behave as anticipated.

For example, if a loss occurred sometime after March 2020, labor could be less than in years prior with no relation to a given loss because the insured may have issued layoffs and/or furloughs. Conversely, other expenses may have increased such as freight and materials costs as a result of the impact on the global supply chain. Thus, it is imperative that we understand the nature of all expenses and how they may or may not affect the loss.

Pharmaceutical

- Supply shortages as generic and branded drug companies rely on sourcing materials from India and China
- Clinical trials affected as approximately 20% of studies are performed in China
- Focus shifted to production of masks, ventilators, sanitizer, etc.

Food & Beverage

- Reduced consumption and issues with supply chains
- Scarcity in stores and stockpiling due to panic
- Supply of ingredients and raw materials affected
- French trade group ANIA, reported that F&B companies have experienced a 22% loss in turnover worldwide

Paint & Coating

- Facing a recession
- Major manufacturers were closed and certain projects were suspended
- Shutdown of supporting sectors
- Industry shortages in alcohol, photoinitiators, dyes and pigments
- Customer closings which have affected demand

Personal Care & Cosmetics

- Suffering from decreased sales due to the closing of stores globally
- Labor shortages and decreased demand have caused shutdowns in production
- Supply chain impacted due to halted factory work from China

Global Air Travel

- International airports closed to foreign air traffic
- Cancelled flights/airplanes retired
- Reduced capacity on commercial flights

PERIOD OF INDEMNITY

Traditionally, understanding the revenue trends before, during, and after the loss helps ensure that the measurement accurately encompasses the true nature of the damage while still accounting for changing market conditions.

In some cases, particularly with policies that afford coverage for an extended period of indemnity, revenues will return to pre-loss, "normal" levels subsequent to reinstatement. In a way, we might expect the revenue trends to follow the repair schedules.

However, these scenarios may not be the case with COVID-19. Regardless of the repair completion date, revenues may still appear off-trend when compared to pre-loss levels.

While certain industries have undoubtedly benefitted from the effects of COVID-19 (e.g. internet retailers, virtual conferencing companies, paper mills, and delivery services to name a few), the typical experience we have noticed at MDD is an overall lack of comparability between pre-COVID-19 revenue experience and the experience of an entity during this pandemic.

To combat this, forensic accountants must take great care to understand a business' opportunities and challenges when evaluating expected earnings but for an insured loss during these unique times.

Since the World Health Organization's declared COVID-19 as a global pandemic on March 11, 2020,[3] MDD has been retained to assist in quantifying thousands of losses. The insight we have gained from these events has been invaluable. We will continue to use this knowledge to ensure everyone understands the nuanced nature of the current market and help the insured get back to business as usual.

Jeff Williams, CPA, CGMA, MAFF is a partner at MDD Forensic Accountants and is based out of the firm's Miami/Fort Lauderdale office. An expert in economic damage quantification analysis, Jeff's professional practice focuses on lost profits, business disputes, builders' risk & soft costs, business interruption, physical damages, stock & contents matters, personal injury & wrongful death.

[1] Source for Bullet #2 in Global Air Travel - https://www.businessinsider.com/coronavirus-havoc-forces-airlines-to-retire-iconic-planes-sooner-2020-3

[2] Source for Bullet #4 in Food & Beverage Industry - https://manufacturingtomorrow.com/article/2020/06/im2 pact-of-covid-19-on-the-process-manufacturing-industry-2020/15487

[3] https://www.cdc.gov/nchs/data/icd/Announcement-New-ICD-code-for-coronavirus-3-18-2020.pdf

WHAT CAUSES NUCLEAR VERDICTS?

Nick Polavin, Ph.D. and **Merrie Jo Pitera, Ph.D.** Litigation Insights

Recent years have seen an unsettling increase in the number of "nuclear" trial verdicts – i.e., a plaintiff verdict with a damages award disproportionately larger than the harm caused – typically over $10 million. This includes the largest award of the last two years: an eye-popping $8 billion in a product liability case. For defendants, the trend has generated even more uncertainty and anxiety about taking a case to trial.

So, what is causing this uptick in massive verdicts? And who is most vulnerable to such outcomes?

THE "REPTILE STRATEGY"

Some people point to the increasing popularity of the plaintiffs' "Reptile Strategy," which seeks to maximize damage awards by instilling fear and anger among jurors, prompting a verdict based on instinct (i.e., fight or flight) rather than logic.

The strategy exploits the human response to threats by utilizing three key components: First, plaintiff's counsel will focus on a universal "safety rule" that is impossible not to acknowledge, such as, "Safety should always be a top priority." They will then claim the defendant violated this safety rule, and in doing so put everybody's safety at risk, not just the plaintiff's. Finally, they convince jurors that the jury alone has the power to reduce or eliminate the danger posed by the defendant – by finding in favor of the plaintiff and awarding a large amount of monetary damages. The strategy suggests to jurors that awarding high damages will punish the defendant and deter it, and others, from similar behavior.

By focusing the case on the community rather than the specific plaintiff, and on the worst possible outcome rather than the plaintiff's outcome, plaintiff attorneys make it easier for jurors to see themselves as the victim. In essence, the strategy serves as a crafty circumvention of the "Golden Rule" (that you cannot ask jurors to put themselves in the plaintiff's shoes).

RECENT TRENDS THAT STRENGTHEN THE REPTILE STRATEGY

Increased Awareness of Corporate Misconduct

At one point, some of the biggest American companies were viewed as the backbone of the U.S. economy. For many, such views have shifted. Litigation Insights' national survey from April 2020, for instance, showed only 41.6% of respondents have a positive view of corporations, and 81.5% believe large corporations often manipulate government agencies.

With increased exposure to news stories via social media, news apps, and televisions in every room, there has been a great deal of publicity on corporate scandals, including Volkswagen emissions, Wells Fargo accounts, the opioid crisis, and price hikes on treatments like the EpiPen. Because of the increased awareness of corporate wrongdoings, many jurors come in with the idea that Big = Bad; coupled with the amount of money corporations have (or are perceived to have), these attitudes can make the Reptile Strategy more resonant.

People Feel Victimized

A 2019 Edelman poll found that only one fifth of the sample thought "the system" (i.e., society) is working for them, while over half said it is working against them. Part of this sentiment is likely due to the growing wealth gap that has received increased attention in recent years, especially given that 80% of people believe the wealthy have "too much power."

When people feel like a victim of society, they tend to sympathize with the plaintiff's perspective more easily and see the lawsuit as a way to assert power. If jurors already feel victimized, a defendant's conduct can seem more threatening and invite a stronger punishment.

Jurors Want to Make a Difference

People want to make a difference and sitting as a juror provides that opportunity. Many people, and millennials in particular, see jury service as a way to enact social change – lawsuits can right social wrongs, redistribute wealth, and challenge the status quo. Unfortunately for defendants, a verdict for the plaintiff is seen as a way to fulfill these goals.

The Reptile Strategy preys on this desire, because when jurors buy into the plaintiff arguments, they believe a plaintiff verdict and large damage award can make a lasting difference that will keep others safe. Plaintiff attorneys even try to empower jurors by telling them they are "guardians of the community."

Recent social movements like Black Lives Matter and #MeToo have also highlighted this trend. As issues involving victimization and social injustice are salient to almost everyone, the desire to be a "guardian of the community" can be particularly strong.

Plaintiffs' "Bad Company" Story

To boost the potency of their Reptile Strategy, plaintiff attorneys have become adept at crafting the "bad company" story, fraught with witness soundbites that either appear to admit the bad conduct or are easily extrapolated to imply it. And when the bad company story is peppered with bad documents, such as poorly worded emails (often taken out of context), plaintiff attorneys develop motive behind the behavior – that those involved were hiding the conduct to protect themselves or the company's reputation.

Focusing only on rebutting the plaintiff's claims can appear overly defensive and allows the plaintiff to control the narrative. A defendant must instead counter with a "good company" story: Who is the defendant, and how does it help people? How does it go "above and beyond?"

Perception of Corporate Representative

Whether jurors buy into a good or bad company story is often driven by their perception of the corporate representative. If the representative is perceived as arrogant, uncaring, cagey, etc., jurors tend to attribute that behavior to the defendant as a whole.

PSYCHOLOGICAL FACTORS THAT INCREASE DAMAGES AWARDS

Anchoring

The amount jurors award in damages, after finding for a plaintiff, is almost always influenced by the amount of the demand. In psychological terms, we call that "anchoring."

Anchoring is a psychological heuristic, or shortcut, that influences how people assess numerical estimates. People will start with a suggested reference point (an "anchor") and then adjust based on additional information or assumptions. Academic research shows that these adjustments are usually insufficient, giving the initial anchor a great deal of influence over the final number.

The most interesting part of this heuristic is that jurors can explicitly say the plaintiff asked for too much money and react negatively to the request, and yet still be affected implicitly by the anchor. For example, if a plaintiff requests $50 million, jurors may think it is ridiculous and believe they are being tough on the plaintiff by awarding $20 million. Of course, that is still a nuclear verdict in most cases. Had the plaintiff's attorney only requested $20 million, jurors would have made similar adjustments and settled on a lower figure. Most plaintiff lawyers realize this effect and "shoot for the moon."

Psychology of Large Numbers

Simply put, humans are terrible at fully comprehending the difference between large numbers, such as millions versus billions. This psychological principle is known as "scalar variability" – i.e., our ability to comprehend numbers decreases as the number increases. Unfortunately, people often lack the capacity to understand exactly how much money they are awarding when they reach a nuclear verdict.

Availability Heuristic

If you think about the verdicts you have heard about in the news, nuclear verdicts are probably what come to mind. Plaintiff verdicts with large damage awards tend to make headlines more than defense verdicts, so these numbers are top of mind in deliberations. This psychological phenomenon is known as the "availability heuristic" – a mental shortcut whereby people rely on what comes to mind when evaluating a topic.

Our mock jurors often cite lawsuits they have heard about when discussing damages. For example, we often hear them reference the McDonald's hot coffee verdict, saying, "We know what spilling hot coffee on yourself is worth, so this plaintiff's injury is worth at least that amount." More recently, we have seen jurors mention current verdicts, too: "Well that lady got $80 million from J&J for her cancer," or "What's the going rate of lawsuits these days? $50 million?" Essentially, these headlines become additional anchors.

CONCLUSION

Unfortunately for defendants, a variety of factors lead to nuclear verdicts – and many of them can work hand in hand. Defendants must therefore fight on multiple fronts to minimize the risk of a nuclear verdict. Such strategies include objecting to plaintiff Reptile tactics, crafting a "good company" story and themes to set your own trial narrative, carefully selecting and preparing your corporate representative, and performing an effective voir dire to identify jurors with a victim mentality and other characteristics that predispose them to a plaintiff verdict. Although the possibility of a high damage award can never be eliminated, it can be minimized through methodical preparation and research-backed strategies.

Dr. Nick Polavin has eight 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.

With 31 years of trial consulting experience, Dr. Merrie Jo Pitera, CEO of Litigation Insights, is a psychology and communication expert who assists clients in all litigation genres to better connect with jurors and arbitrators by developing persuasive case narratives via mock trials and focus groups. She also specializes in improving witness communication skills.

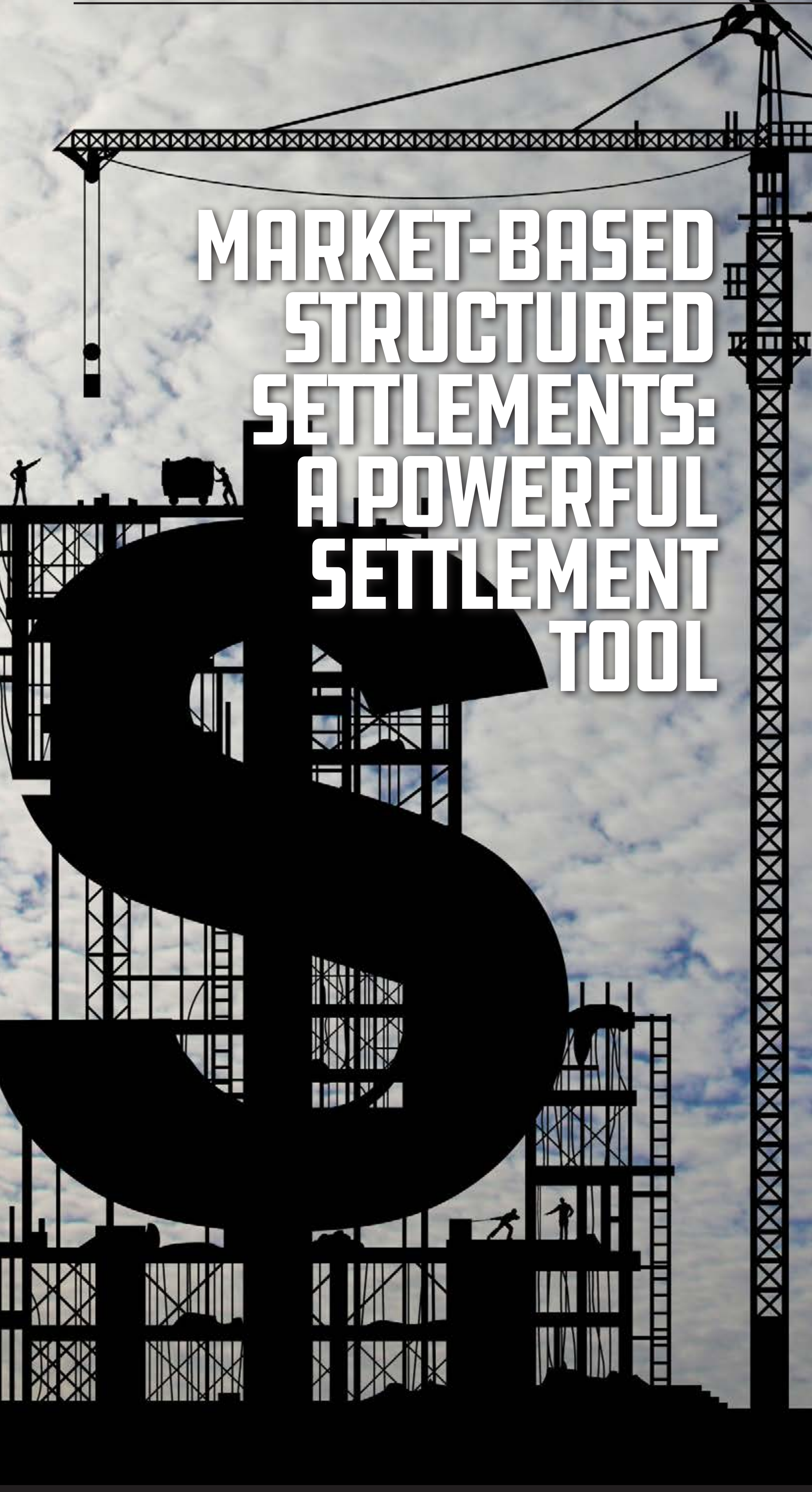
1 Edelman (2019). 2019 Edelman Trust Barometer. January 20, 2019. https://www.edelman.com/sites/g/files/aatuss191/files/2019-02/2019_Edelman_Trust_Barometer_Global_Report.pdf

2 Igielnik, R. (2019). 70% of Americans say U.S. Economic System Unfairly Favors the Powerful. *Pew Research Center.* https://www.pewresearch.org/fact-tank/2020/01/09/70-of-americans-say-u-s-economic-system-unfairly-favors-the-powerful/

3 Baer, J. & Wilinski, J. (2011, April 28). Millennial Jurors: Who Are They and How Do We Best Communicate with Them. *Insights.* https://www.litigationinsights.com/millennial-jurors-who-are-they-and-how-do-we-best-communicate-with-them/

4 Bell, C. (2014, February 7). How Big Numbers Short-Circuit Your Brain and Your Finances. *Life Hacker.* https://lifehacker.com/how-big-numbers-short-circuit-your-brain-and-your-finan-1518166831

5 Tversky, Amos; Kahneman, Daniel (1973). Availability: A heuristic for judging frequency and probability. *Cognitive Psychology*, 5(2): 207–232.



MARKET-BASED STRUCTURED SETTLEMENTS: A POWERFUL SETTLEMENT TOOL

Brian Annandono Arcadia Settlements Group
Dennis Drexler Assura Trust

STRUCTURED SETTLEMENTS ARE EVOLVING

Settlements that are "structured" through a combination of cash and future periodic payments continue to be a reliable method for resolving personal physical injury and workers' compensation cases. In fact, over the last 15 years, structured settlements have become the primary settlement method for the resolution of workers' compensation cases that involve post-settlement Medicare obligations. And in the liability area, structured settlements are an important tool in the settlement of a wide array of matters, including those involving catastrophic injuries and injuries to minors.

The foundation of a traditional structured settlement plan is typically a single-premium annuity issued by a highly rated life insurance company. These settlement annuities provide secure compensation for future medical and long-term financial needs. Other tools can be useful in structuring settlements for people whose needs can extend well into the future, including future medical management accounts, trusts and now, periodic payments with market-based returns.

INNOVATION AND TRANSFORMATION

The parties involved in the settlement process – on both sides of the negotiation table – are always looking for ways to resolve matters creatively, while still providing protection for their respective clients. Claims professionals and attorneys are turning to settlement professionals to provide creative and effective tools to evaluate and meet the future needs of plaintiffs at the time of settlement. As a result, the settlement consulting practice is evolving to provide new financial tools to assist their respective clients.

For many years, casualty insurance companies – large and small – had internal structured settlement programs that were managed in coordination with affiliated life insurance companies. Following settlement, the affiliated life insurance companies issued the annuities that provided the periodic payments included in the terms of settlement. These programs, while successful, often created a cookie-cutter approach to settlement plans that did not foster creativity or imagination. As these programs have become less prevalent, the settlement consulting practice is experiencing a shift in priorities and direction, with a renewed focus on innovation.

THE RESULT: THE SETTLEMENT CONSULTING INDUSTRY IS MATURING

Settlement professionals are no longer simply "structured settlement brokers" providing a one-dimensional product to comply with the corporate mandates of casualty insurance companies. Settlement professionals are becoming innovative and responsive, and their services are expanding and becoming more diverse. They have become advisors, consultants and planners. They bring expertise to both sides of the settlement table.

Companies that operate in this segment are also evolving. As noted above, the primary financial instrument to provide future periodic payments has been a single premium immediate annuity. When structured properly, these annuities provide payments to claimants on a tax-free basis based on provisions found in sections 104 and 130 of the Internal Revenue Code. The life insurance companies that provide traditional settlement annuities have also innovated recently, within the boundaries of IRS rules.

Other companies are emerging and developing new methods to meet the demand for innovation and creativity. One new product that we will review in this article is the Growth Structured Settlement from Assura Trust.

THE GROWTH STRUCTURED SETTLEMENT: A MARKET-BASED SOLUTION

As the need for a broader, more holistic settlement approach has emerged, Assura Trust partnered with the Vanguard investment management company to introduce the market-based Growth Structured Settlement. The Growth Structured Settlement relies on Vanguard's LifeStrategy Growth Fund (VASGX) to deliver tax-free payments in coordination with tax-free settlement annuity payments. The Growth Structured Settlement can be particularly useful for cases involving people whose needs extend beyond 20 years, where growth and inflation protection are important. The payments are timed to meet life needs, occurring monthly, annually, etc., like a traditional structured settlement.

How does it work?

Just like a tax-free structured settlement funded by an annuity, the Growth Structured Settlement is set up to pay for a specific time frame, with payments made on specific dates, monthly, annually, etc.

Key Benefits of the Growth Structured Settlement:

- Tax-free income
- Market-based growth for the claimant/plaintiff
- Full and final release for the defendant
- Low risk to the claimant/plaintiff
- Structured payments allowing for preservation of funds

When should it be used?

There are many situations where the Growth Structured Settlement might be helpful to resolving cases. Below are two examples.

Birth Injury Case: A young child who has experienced a birth injury will have financial needs that will last throughout his lifetime. He will need his settlement funds for steady growth to keep up with inflation and the increasing cost of living. The Growth Structured Settlement would allow a family in this circumstance to create a settlement plan that will deliver market-based growth and tax-free payments.

Workers' Compensation Settlement: The Growth Structured Settlement was recently utilized in the negotiation and settlement of a workers' compensation matter. The insurance carrier decided to settle the indemnity portion of the claim and leave the medical portion open. The injured worker, a 39-year-old male, was receiving $4,700 per month in indemnity benefits. The parties decided to use $1,700,000 as the present-day settlement amount, allocating the funds equally between the traditional settlement annuity and the Vanguard fund:

- The settlement annuity would pay **$2,615** per month for life with a 40-year guarantee. The guaranteed return is $1,188,000.
- With the Vanguard fund, we targeted a payout of **$4,200** per month for 40 years. Using 5.5% hypothetical growth, the total payout would be $1,990,141.
- Combined, this injured worker could receive **$6,815** per month, with a potential payout of $3,178,141 over 40 years.
- As of the date of this writing, the average annual return for the Vanguard LifeStrategy Growth Fund was *8.60%* since its inception on September 30, 1994.

A settlement option that combines lifetime income from a highly rated life company with income derived from a Vanguard fund offers a holistic solution that delivers security and market-based growth.

LOOKING AHEAD

The settlement consulting profession will continue to evolve to meet the needs of the various stakeholders that participate in the settlement process – from evaluation through funding. Whatever role you play in the process, encourage your settlement professional to be creative and explore the numerous settlement products and programs that are emerging during this transformational time.

Brian Annandono is a settlement consultant with Arcadia Settlements Group in Cleveland, Ohio. Arcadia helps resolve conflicts, reduce litigation expenses, and create long-term financial security for injured people.

Dennis Drexler is a vice president and trust officer for Assura Trust. Assura Trust facilitates comprehensive settlements for the benefit of personal injury victims and their families.

FACES of USLAW

meeting the MOMENT 2001 - 2021

LEADING THE WAY

Connie Cahill from Barclay Damon LLP's Albany, New York, office has been elected managing partner of the law firm's 475-person organization. Barclay Damon is a full-service firm with a particular focus on energy, intellectual property, labor and employment, and health care. Cahill began a three-year position as deputy managing partner in 2018 to prepare for the transition to managing partner. She is the first woman to lead the organization in its 165-plus-year history.

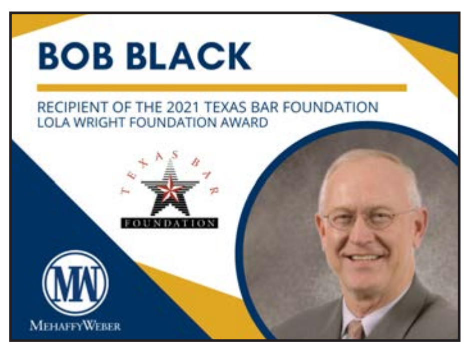
After previously being elected to serve as Hanson Bridgett LLP's next managing partner, Kristina Lawson officially took the reins on Jan. 1, 2021. Lawson becomes the first woman to lead the firm in its more than 60-year history.

Klinedinst PC announces the largest leadership change in the firm's 37-year history. Heather L. Rosing takes over as CEO and president from firm founder John D. Klinedinst, who led the West Coast law firm for nearly four decades. Klinedinst will serve as chair emeritus and continue to focus his practice on litigation, including professional liability, business litigation, and intellectual property disputes. Shareholders Arthur S. Moreau, III and Susan S. Nahama have also been elevated to chief financial officer and chief operating officer, respectively. Rosing is the firm's second-ever CEO, and the first female CEO.

EC RUBIO 50 AÑOS

USLAW's Mexico member firm is celebrating 50 years in business and has an updated name and logo: EC Rubio specializes in domestic and international transactions, mainly in the industrial sector, and in foreign investment.

MehaffyWeber Managing Shareholder Robert "Bob" Black received the Texas Bar Foundation Lola Wright Foundation Award for 2021. The award is presented in recognition of outstanding public service in advancing and enhancing legal ethics in Texas and includes a monetary donation from the Lola Wright Foundation to a charity in the recipient's honor. Black selected the Humane Society of Southeast Texas as his charity of choice, an organization dedicated to enriching the lives of pets and people through advocacy, education, and forever homes for animals and an organization that he served for several years as President of their Board.



Roetzel & Andress has been conducting wellness activity challenges nearly every six months since 2017. Wellness challenges encourage employees to incorporate healthy habits into their daily lives by completing daily tasks such as logging minutes of activity or tracking healthy foods eaten. It also allows Roetzel employees to work together towards their fitness goals and build camaraderie along the way. Coordinated through Health Enhancement Systems (HES), the challenges also include individual, team, and location challenges. The first challenge was "Get Fit on Route 66" with the firm's most recent challenge being "Walktober," which included 90 participants across all Roetzel offices and 16 fiercely competitive teams.

"We believe the challenges are important both because it is a way to build up morale between and among the offices and we believe it has and will continue to reduce the firm's overall health plan costs," said Roetzel President and Shareholder Paul Jackson. "We continue to hear positive comments from both the attorneys and staff as to their increased motivation to stick to a more active lifestyle because of the encouragement of their peers."

meeting the MOMENT 2001 - 2021

DIVERSITY AND INCLUSION INITIATIVES

The State Bar of Arizona honored Ashley Villaverde Halvorson, a partner at Jones, Skelton & Hochuli in Arizona, with the 2020 Diversity and Inclusion Leadership Award. She shares this Award with Judge David Gass of the Arizona Court of Appeals, Division One. Established in 2015, The Diversity and Inclusion Leadership Award is presented by the Board of Governors to an attorney, judge, employer, organization, or bar association that significantly advances diversity and inclusion in the Arizona legal community through creative, strategic, or innovative efforts. As a passionate supporter of diversity in the profession and the Latino community in Arizona, Halvorson serves on the firm's Diversity Committee, Recruiting Committee, and formerly chaired its Diversity Legal Writing Program. Since 2010, Halvorson has been an active member of Los Abogados, Arizona's Hispanic Bar Association.

SmithAmundsen in Illinois honored Dr. Martin Luther King Jr. and his legacy through a special firm initiative supporting educational opportunities for African American students to promote diverse, inclusive, and equitable workplaces. The firm is donating a percentage of firm revenues that were generated on Dr. Martin Luther King Day, January 18, 2021, to educational programs supporting college-bound African American high school students in the communities where SmithAmundsen offices are located.

SmithAmundsen

Moses Suarez, partner and co-chair of SmithAmundsen's Health Care group, received two important recognitions in 2020. He was selected as a recipient of the 2020 HNBA Top Lawyers Under 40 Award. The Hispanic National Bar Association (HNBA) selected Moses from a pool of highly qualified candidates from across the country based on his exceptional commitment to service and his outstanding professional achievements. Suarez was also selected as a recipient of the 2020 "Best LGBTQ+ Lawyers Under 40" Award by the National LGBT Bar Association & Foundation. Each year, the LGBT Bar recognizes 40 LGBTQ+ legal professionals under the age of 40 who have distinguished themselves in their field and have demonstrated a profound commitment to LGBTQ+ equality.

HansonBridgett

Hanson Bridgett LLP in San Francisco, California, received the 2020 Platinum Diversity Award from the Contra Costa County Bar Association (CCCBA). The award honors law firms that embrace diversity awareness and implement comprehensive, targeted actions.

meeting the MOMENT 2001 - 2021

HELPING OUR COMMUNITIES

SUPPORTING SENIORS. Mehaffy Weber in Texas participated in the 12th Annual Jefferson County Young Lawyers Association (JCYLA) Holiday Food Drive for Seniors in the Fall of 2020 to support the local Meals on Wheels Program through Nutrition and Services for Seniors. The drive is put on by the Jefferson County Young Lawyer's Board each year. Associate Kate Thorne was elected secretary to the Board and spearheaded the firm's efforts of raising monetary donations and canned goods.

MehaffyWeber
HOUSTON | BEAUMONT | SAN ANTONIO | AUSTIN

JSH JONES, SKELTON & HOCHULI, P.L.C.

FAMILIES BENEFIT FROM JONES, SKELTON & HOCHULI, P.L.C. (JSH) GENEROSITY. JSH worked with three philanthropic organizations to bring the holiday spirit to families and children in Arizona. Although they were unable to host their annual in-person Santa visits and toy drives, the firm's charity committee donated $7,500 to the Phoenix Children's Hospital, Stepping Stone Foundation, and A New Leaf.

JSH partner Michael Hensley serves on the Board of Stepping Stone Foundation. Its hallmark program LEAF (Literacy Elevates Arizona Families) nurtures success for families of limited opportunities by providing a two-generation, tuition-free and comprehensive family literacy program for children at risk of school failure. JSH's donation provided monthly at-home learning kits and supplies for 40 preschool and elementary school children.

JSH appellate partner Lori Voepel has been an active Board member with A New Leaf, an organization serving 26,000+ individuals annually through their homeless and domestic violence shelters. JSH's donation helped A New Leaf meet their $10,000 goal to install a sports court at one of their shelters, helping the families stay active and enjoy the outdoors.

JSH partner Steven Bullington supports various fundraisers for the Phoenix Children's Hospital. In 2020, PCH's Child Life was unable to receive toy donations that typically fill the closets for families and patients to shop from. JSH's donation helped PCH stock their toy closet for infants, toddlers, and teens through their new holiday engagement opportunity, Toyland at Phoenix Children's.

N95 DONATIONS. In the firm's effort to help their local community, Hanson Bridgett LLP donated all the firm's N95 masks to local hospitals, made a matching donation to the California Fire Relief, plus another matching donation to California food banks.

FOOD FROM THE BAR. Hanson Bridgett LLP participated in the San Francisco-Marin Food Bank's "Food from the Bar" – an annual fundraising event for law firms, to help feed an unprecedented number of families who are dealing with lost jobs, school closures (many kids eat two meals a day at school), food insecurity, and other circumstances. The firm coordinated an online auction to help its fundraising efforts and was able to raise more than $50,000, with help from the entire firm, contributing to San Francisco-Marin Food Bank's grand total of over $650,000, enough to provide about 1,300,000 meals during this time of need.

BRINGING JOY DURING THE COVID-19 PANDEMIC. Every year during the holiday season, Hanson Bridgett LLP in San Francisco participates in BASF's Head Start Program to sponsor hundreds of elementary school students, many who have special needs or are at risk of becoming homeless. The students write adorable letters to Santa wishing for an array of fun gifts, from Disney dolls, dinosaurs, and even pizza. Due to COVID, the firm could not receive these letters or go shopping for them in 2020; however, students received gift certificates to Safeway and Target from individual employees, and the firm matched all donations. Through the firm's collective efforts, they were able to still bring joy to the children and parents in need in their community during these unprecedented times.

HansonBridgett

firms ON THE MOVE

[Christine M. DiBiase](#) of [Adler Pollock & Sheehan, P.C.](#) in Rhode Island was appointed by the Rhode Island governor to serve a two-year term as a member of the Board of Commissioners tasked with overseeing operations of the Narragansett Bay Commission (NBC). The NBC is governed by a 19-member Board of Commissioners, appointed by the mayors and administrators of the municipalities in the service area, as well as ten gubernatorial appointments.

(L-to-R) Neil Dornbaum, Kathleen Peregoy, Abigail Walsh, and Lucia Smalikova.

Connell Foley LLP in Roseland, New Jersey, has established a new Corporate Immigration and Global Mobility Practice, as part of Connell Foley's accomplished Labor and Employment Group. The new practice is co-chaired by partners Neil Dornbaum and Kathleen Peregoy. The addition of the Corporate Immigration and Global Mobility Practice at Connell Foley significantly enhances and expands the service offerings for businesses requiring employment-based immigration counsel, including both Immigrant Visas ("green cards") and Nonimmigrant (temporary) Visas, as well as international transfers of key personnel. The practice also advises on the unique immigration issues raised by mergers, acquisitions and other forms of corporate restructuring regarding employment clearances of foreign personnel after a reorganization, as well as I-9 and other regulatory compliance concerns."

Michael Bonasso of Flaherty Sensabaugh Bonasso PLLC in West Virginia was named to the Lawyers & Leaders Class of 2020 by West Virginia Executive Magazine. Since 2017, West Virginia Executive magazine, in partnership with the West Virginia University College of Law, has been working to shine a light on lawyers who strive to do the best for their clients, communities, and fellow people with the Lawyers & Leaders Awards. Bonasso, one of Flaherty's founding members and managing member for 27 years, has defended companies in the areas of complex, mass and class action litigation, and product litigation for more than 40 years.

Kristina Lawson, Hanson Bridgett LLP's managing partner, has been selected as the president of the Medical Board of California. This state board oversees the licensing and regulation of physicians, surgeons, and certain allied healthcare professionals in California, and promotes access to quality medical care. Lawson was first appointed to the board in 2015 by Governor Jerry Brown.

Jennifer Martinez of Hanson Bridgett LLP has officially been named the first Chief Diversity, Equity, and Inclusion Officer, in the firm's history. The newly created role aligns with the firm's commitment to increase racial and ethnic diversity firmwide and fight racial inequality. Martinez will lead the firm's diversity, equity, and inclusion programming; develop diversity hiring and retention goals and policies; and coordinate the firm's efforts to promote diversity, equity, and inclusion in the legal community and those in which the firm's attorneys work and live.

Jones, Skelton & Hochuli partner Ashley Villaverde Halvorson has been appointed to the Hispanic National Bar Association's 2020-2021 Latina Commission. Halvorson also was elected to serve as the 2021 Vice President of the Los Abogados Foundation, a 501(c)(3) charitable organization that supports the mission of Los Abogados, Arizona's Hispanic Bar Association.

Clarissa Reiman of Jones, Skelton & Hochuli, PLC has been accepted into the 2021 FDCC (Federal Deposit Insurance Corporation) Ladder Down Phoenix Class. The FDCC Ladder Down Program is a one-year course created for women lawyers by women lawyers to provide leadership training, mentorship, and networking opportunities. The business development component provides in-depth training for women lawyers to achieve positions as equity partners, shareholders, and top rainmakers at their firms. Reiman has devoted her 18-year legal career to the defense of insurers, third-party administrators, and their insureds.

Brittany S. Ford of Quattlebaum, Grooms & Tull PLLC in Arkansas has been named Secretary for the Board of Directors for Pulaski and Perry Counties CASA (Court Appointed Special Advocates). CASA serves children in Pulaski and Perry counties who have experienced abuse and/or neglect by ensuring each child has a safe and permanent home, giving them a voice in court, and advocating for their safety and specific needs.

Joseph W. Price II of Quattlebaum, Grooms & Tull PLLC in Arkansas has been appointed to the Board of Directors of We Are The 22, an Arkansas non-profit focused on direct veteran suicide intervention. We Are The 22 teams are on standby 24 hours a day to respond in person to Arkansas veterans in suicidal crisis, provide peer support and get them the help and support they need. Founded in 2017, We Are The 22 has responded to more than 200 Arkansas veterans in crisis.

successful

RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

VERDICTS

Duke Evett PLLC (Boise, ID)

Keely E. Duke of Duke Evett, PLLC in Idaho recently won an appeal in front of the 9th Circuit Court of Appeals in a legal malpractice case in which Duke was representing some of the defendant attorneys. Duke was able to establish for the 9th Circuit that there was no basis for the legal malpractice claim and the 9th Circuit affirmed the dismissal of the case as to her clients.

In a commercial litigation matter, Duke and her colleague Elizabeth D. Sonnichsen have scored major pretrial victories for their client in Northern Idaho by getting the counterclaims against their client dismissed as a sanction by the Court, along with an award of significant legal fees for her client, due to their opponent's violation of the Court's preliminary injunction entered in favor of Duke's client and for multiple violations of discovery orders by the opposing side..

MehaffyWeber (Houston, TX)

E. Wade Carpenter and Barbara Barron of MehaffyWeber in Texas successfully defended a death case involving a forklift on a job site crushing an employee. No one witnessed the incident. The case was removed to federal court, and the plaintiff attorney filed a motion to remand alleging that MehaffyWeber's client had spread a rumor that the plaintiff died of a heart attack to prevent him from receiving workers' compensation, and the plaintiffs made a state court claim of discrimination under the Labor Code. The state statute in question indicates that "a person" may not discharge or in any other way discriminate against an employee…". Though there was no solid case law on what "a person" meant, they creatively opposed the remand, and the judge denied the remand and kept the case. Federal Judge Ramos of the Southern District of Texas stated: "Here the absence of any allegation that any of the Defendants were employers renders the anti-discrimination claim legally insufficient and fraudulent on its face, as set out above." Additionally, the MehaffyWeber team simultaneously filed a 12 (b)(6)/12 (c) motion on the pleadings that the cause of action should be dismissed, and the federal judge dismissed that claim. The case completed resolved favorably within weeks of that ruling.

TRANSACTIONS

Hanson Bridgett LLP (San Francisco, CA)

Project Cannabis, a Hanson Bridgett LLP client, has been acquired by Columbia Care, one of the world's largest cultivators, manufacturers, and providers of medical and adult-use cannabis products and related services. Hanson Bridgett Partner and Cannabis Practice Group Leader, Jonathan Storper, led the team representing Project Cannabis in the $69 million deal. The total transaction consideration includes approximately $52.5 million in Columbia Care stock and an additional $16.5 million of consideration anticipated to be paid to the sellers from the proceeds of a subsequent sale of Project Cannabis' real estate assets. To learn more about this transaction, click Hanson Bridgett Advises Project Cannabis on $69 Million Sale to Columbia Care.

pro bono SPOTLIGHT

Hanson Bridgett LLP

During what has been a challenging year nationwide, Hanson Bridgett LLP attorneys have met the challenge by contributing more than 5,500 pro bono hours for the 2019-2020 billable year. Pro bono work is an integral part of Hanson Bridgett's firm culture, and many of the firm's attorneys work tirelessly to better the lives of those in the communities in which they work and live.

1

The Pro Bono Committee approved several amicus matters, including one on behalf of the Tahirih Justice Center in the case of Rosa Rivera-Perez v. William Barr where a Salvadoran woman was threatened with deportation because the immigration judge and the Board of Immigration Appeals failed to consider circumstantial evidence regarding El Salvador's gruesome machismo and femicide culture.

Hanson Bridgett drafted and filed an amicus brief in support of Rivera-Perez's petition for review. Additional signatories to the brief include the Harvard Immigration and Refugee Clinical Program, the Florence Immigrant & Refugee Rights Project, and the National Immigrant Justice Center. The amicus brief led to the Government's participation in mediation, and Rivera-Perez's release from detention pending remand to the Immigration Court for consideration of circumstantial evidence.

In addition to the firm's work with the Tahirih Justice Center, The UC Hastings Appellate Project, led by Hanson Bridgett Partner Gary Watt, achieved great success before the United States Court of Appeals for the Ninth Circuit. Hilda Kajbaf and Shandyn Pierce, third-year law students at UC Hastings College of the Law, represented Sonos Maudilla Diaz-Reynoso, an undocumented immigrant who sought asylum in the U.S. to avoid domestic violence in her native Guatemala. Watt, who chairs Hanson Bridgett's Appellate Practice Group, served as general counsel to the Appellate Project.

2

Hanson Bridgett's Pro Bono Committee in collaboration with the firm's RACE Task Force recently approved a partnership with BAOBOB, which is a consortium of local Black-owned businesses. As part of this new partnership, Hanson Bridgett attorneys will volunteer their time to provide training, webinars, and learning opportunities to BAOBOB members on various topics.

3

The Pro Bono Committee also partners with the Lawyers Committee for Civil Rights, and it is through this partnership that several attorneys in the firm provided remote representation for families seeking asylum in the U.S. by preserving their claims under the Federal Tort Claims Act "FTCA") to seek reparations from the federal government for the harms they suffered as part of their forcible separation at the border. This work included filing an FTCA administrative complaint within two years of the family's U.S. entry date just prior to separation to preserve the family's claim. Many of these clients were referred to the firm just weeks before their claims were due to expire under the two-year statute of limitations. Several attorneys quickly volunteered to help—they contacted the clients, arranged for interpreters to assist with obtaining necessary information, and completed and filed the administrative complaints required to preserve the clients' claims. Liz Masson led the efforts, and participating attorneys contributing a total of 195 pro bono hours were: Samir Abdelnour, Kathryn Doi, Anthony Dutra, Rosanna Gan, Celia Guzman, Robert McFarlane, Melissa Malstrom, and Jennifer Yazdi.

Hanson Bridgett's commitment to continue advocating for and working toward human rights and equity remains a priority in all cases. They proudly contribute pro bono hours to continue those efforts.

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 nearly 100 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 an 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 IN EUROPE.

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
- Organized around client expectations
- 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.

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

2001 20 2021 USLAW NETWORK, INC®

USLAW...your HOME FIELD ADVANTAGE

2021 MEMBERSHIP ROSTER

ALABAMA | BIRMINGHAM
Carr Allison
Charles F. Carr .... (251) 626-9340
ccarr@carrallison.com

ARIZONA | PHOENIX
Jones, Skelton & Hochuli, P.L.C.
Phillip H. Stanfield .... (602) 263-1745
pstanfield@jshfirm.com

ARKANSAS | LITTLE ROCK
Quattlebaum, Grooms & Tull PLLC
John E. Tull, III .... (501) 379-1705
jtull@qgtlaw.com

CALIFORNIA | LOS ANGELES
Murchison & Cumming LLP
Dan L. Longo .... (714) 953-2244
dlongo@murchisonlaw.com

CALIFORNIA | SAN DIEGO
Klinedinst PC
John D. Klinedinst .... (619) 239-8131
jklinedinst@klinedinstlaw.com

CALIFORNIA | SAN FRANCISCO
Hanson Bridgett LLP
Mert A. Howard .... (415) 995-5033
mhoward@hansonbridgett.com

CALIFORNIA | SANTA BARBARA
Snyder Burnett Egerer, LLP
Barry Clifford Snyder .... (805) 683-7750
bsnyder@sbelaw.com

COLORADO | DENVER
Lewis Roca Rothgerber Christie LLP
Jessica L. Fuller .... (303) 628-9527
Jfuller@lrrc.com

CONNECTICUT | HARTFORD
Hinckley Allen
Noble F. Allen .... (860) 725-6237
nallen@hinckleyallen.com

DELAWARE | WILMINGTON
Cooch and Taylor P.A.
C. Scott Reese .... (302) 984-3811
sreese@coochtaylor.com

FLORIDA | CENTRAL FLORIDA
Wicker Smith O'Hara McCoy & Ford P.A.
Richards H. Ford .... (407) 843-3939
rford@wickersmith.com

FLORIDA | SOUTH FLORIDA
Wicker Smith O'Hara McCoy & Ford P.A.
Nicholas E. Christin .... (305) 448-3939
nchristin@wickersmith.com

FLORIDA | TALLAHASSEE
Carr Allison
Christopher Barkas .... (850) 222-2107
cbarkas@carrallison.com

HAWAII | HONOLULU
Goodsill Anderson Quinn & Stifel LLP
Edmund K. Saffery .... (808) 547-5736
esaffery@goodsill.com

IDAHO | BOISE
Duke Evett, PLLC
Keely E. Duke .... (208) 342-3310
ked@dukeevett.com

ILLINOIS | CHICAGO
SmithAmundsen LLC
Lew R.C. Bricker .... (312) 894-3224
lbricker@salawus.com

IOWA | CEDAR RAPIDS
Simmons Perrine Moyer Bergman PLC
Kevin J. Visser .... (319) 366-7641
kvisser@spmblaw.com

KANSAS/WESTERN MISSOURI | KANSAS CITY
Dysart Taylor Cotter & McMonigle, PC
Patrick K. McMonigle .... (816) 714-3039
pmcmonigle@dysarttaylor.com

KENTUCKY | LOUISVILLE
Middleton Reutlinger
Elisabeth S. Gray .... (502) 625-2848
EGray@MiddletonLaw.com

LOUISIANA | NEW ORLEANS
McCranie, Sistrunk, Anzelmo, Hardy McDaniel & Welch LLC
Michael R. Sistrunk .... (504) 846-8338
msistrunk@mcsalaw.com

MAINE | PORTLAND
Richardson, Whitman, Large & Badger
Elizabeth G. Stouder .... (207) 774-7474
estouder@rwlb.com

MARYLAND | BALTIMORE
Franklin & Prokopik, PC
Albert B. Randall, Jr. .... (410) 230-3622
arandall@fandpnet.com

MASSACHUSETTS | BOSTON
Rubin and Rudman LLP
John J. McGivney .... (617) 330-7000
jmcgivney@rubinrudman.com

MINNESOTA | ST. PAUL
Larson • King, LLP
Mark A. Solheim .... (651) 312-6503
msolheim@larsonking.com

MISSISSIPPI | GULFPORT
Carr Allison
Douglas Bagwell .... (228) 864-1060
dbagwell@carrallison.com

MISSISSIPPI | RIDGELAND
Copeland, Cook, Taylor & Bush, P.A.
James R. Moore, Jr. .... (601) 427-1301
jmoore@cctb.com

MISSOURI | ST. LOUIS
Lashly & Baer, P.C.
Stephen L. Beimdiek .... (314) 436-8303
sbeim@lashlybaer.com

MONTANA | GREAT FALLS
Davis, Hatley, Haffeman & Tighe, P.C.
Maxon R. Davis .... (406) 761-5243
max.davis@dhhtlaw.com

NEBRASKA | OMAHA
Baird Holm LLP
Jennifer D. Tricker .... (402) 636-8348
jtricker@bairdholm.com

NEVADA | LAS VEGAS
Thorndal Armstrong Delk Balkenbush & Eisinger
Brian K. Terry .... (702) 366-0622
bkt@thorndal.com

NEW JERSEY | ROSELAND
Connell Foley LLP
Kevin R. Gardner .... (973) 840-2415
kgardner@connellfoley.com

NEW MEXICO | ALBUQUERQUE
Modrall Sperling
Jennifer G. Anderson .... (505) 848-1809
Jennifer.Anderson@modrall.com

NEW YORK | BUFFALO
Barclay Damon LLP
Peter S. Marlette .... (716) 858-3763
pmarlette@barclaydamon.com

NEW YORK | HAWTHORNE
Traub Lieberman
Stephen D. Straus .... (914) 586-7005
sstraus@tlsslaw.com

NEW YORK | UNIONDALE
Rivkin Radler LLP
David S. Wilck .... (516) 357-3347
David.Wilck@rivkin.com

NORTH CAROLINA | RALEIGH
Poyner Spruill LLP
Deborah E. Sperati .... (252) 972-7095
dsperati@poynerspruill.com

NORTH DAKOTA | DICKINSON
Ebeltoft . Sickler . Lawyers PLLC
Randall N. Sickler .... (701) 225-5297
rsickler@ndlaw.com

OHIO | CLEVELAND
Roetzel & Andress
Bradley A. Wright .... (330) 849-6629
bwright@ralaw.com

OKLAHOMA | OKLAHOMA CITY
Pierce Couch Hendrickson Baysinger & Green, L.L.P.
Gerald P. Green .... (405) 552-5271
jgreen@piercecouch.com

OREGON | PORTLAND
Williams Kastner
Thomas A. Ped .... (503) 944-6988
tped@williamskastner.com

PENNSYLVANIA | PHILADELPHIA
Sweeney & Sheehan, P.C.
J. Michael Kunsch .... (215) 963-2481
michael.kunsch@sweeneyfirm.com

PENNSYLVANIA | PITTSBURGH
Pion, Nerone, Girman, Winslow & Smith, P.C.
John T. Pion .... (412) 281-2288
jpion@pionlaw.com

RHODE ISLAND | PROVIDENCE
Adler Pollock & Sheehan P.C.
Richard R. Beretta, Jr. .... (401) 427-6228
rberetta@apslaw.com

SOUTH CAROLINA | COLUMBIA
Sweeny, Wingate & Barrow, P.A.
Mark S. Barrow .... (803) 256-2233
msb@swblaw.com

SOUTH DAKOTA | PIERRE
Riter Rogers, LLP
Robert C. Riter .... (605) 224-5825
r.riter@riterlaw.com

TENNESSEE | MEMPHIS
Martin, Tate, Morrow & Marston, P.C.
Lee L. Piovarcy .... (901) 522-9000
lpiovarcy@martintate.com

TEXAS | DALLAS
Fee, Smith, Sharp & Vitullo, L.L.P.
Michael P. Sharp .... (972) 980-3255
msharp@feesmith.com

TEXAS | HOUSTON
MehaffyWeber
Barbara J. Barron .... (713) 655-1200
BarbaraBarron@mehaffyweber.com

UTAH | SALT LAKE CITY
Strong & Hanni, PC
Stephen J. Trayner .... (801) 323-2011
strayner@strongandhanni.com

WASHINGTON | SEATTLE
Williams Kastner
Rodney L. Umberger .... (206) 628-2421
rumberger@williamskastner.com

WEST VIRGINIA | CHARLESTON
Flaherty Sensabaugh Bonasso PLLC
Michael Bonasso .... (304) 347-4259
mbonasso@flahertylegal.com

WISCONSIN | MILWAUKEE
Laffey, Leitner & Goode LLC
Jack Laffey .... (414) 312-7105
jlaffey@llgmke.com

WYOMING | CASPER
Williams, Porter, Day and Neville PC
Scott E. Ortiz .... (307) 265-0700
sortiz@wpdn.net

USLAW INTERNATIONAL

ARGENTINA | BUENOS AIRES
Barreiro, Olivas, De Luca, Jaca & Nicastro
Nicolás Jaca Otaño .... (54 11) 4814-1746
njaca@bodlegal.com

BRAZIL | SÃO PAULO
Mundie e Advogados
Rodolpho Protasio .... (55 11) 3040-2923
rofp@mundie.com

CANADA | ALBERTA
CALGARY & EDMONTON
Parlee McLaws LLP
Connor Glynn .... (780) 423-8639
cglynn@parlee.com

CANADA | ONTARIO | OTTAWA
Kelly Santini
Lisa Langevin .... (613) 238-6321 ext 276
llangevin@kellysantini.com

CANADA | QUEBEC | BROSSARD
Therrien Couture JoliCoeur
Douglas W. Clarke .... (450) 462-8555
douglas.clarke@groupetcj.ca

CHINA | SHANGHAI
Duan&Duan
George Wang 8621 6219 1103
george@duanduan.com

MEXICO | MEXICO CITY
EC Rubio
René Mauricio Alva .... +52 55 5251 5023
ralva@ecrubio.com

TELFA

AUSTRIA
PHH Rechtsanwälte
Rainer Kaspar .... +43 1 714 24 40
kaspar@phh.at

BELGIUM
CEW & Partners
Charles Price .... (+32 2) 534 20 20
Charles.price@cew-law.be

CYPRUS
Pyrgou Vakis Law Firm
Melina Pyrgou .... +357 22466611
m.pyrgou@pyrgouvakis.com

CZECH REPUBLIC
Vyskocil, Kroslak & spol., Advocates and Patent Attorneys
Jiri Spousta .... (00 420) 224 819 133
spousta@akvk.cz

DENMARK
Lund Elmer Sandager
Jacob Roesen .... (+45 33 300 268)
jro@les.dk

ENGLAND
Wedlake Bell LLP
Richard Isham .... +44(0)20 7395 3000
risham@wedlakebell.com

ESTONIA • LATVIA • LITHUANIA
LEXTAL Tallinn|Riga|Vilnius
Lina Siksniute-Vaitiekuniene .... (+370) 5 210 27 33
lina@lextal.lt

FINLAND
Lexia Attorneys Ltd.
Markus Myhrberg .... +358 10 4244200
markus.myhrberg@lexia.fi

FRANCE
Delsol Avocats
Emmanuel Kaeppelin .... +33(0)4 72 10 20 30
ekaeppelin@delsolavocats.com

GERMANY
Buse
Jasper Hagenberg .... +49 30 327942 0
hagenberg@buse.de

GREECE
Corina Fassouli-Grafanaki & Associates Law Firm
Korina Fassouli-Grafanaki .... (+30) 210-3628512
korina.grafanaki@lawofmf.gr

HUNGARY
Bihary Balassa & Partners Attorneys at Law
Phone .... +36 1 391 44 91

IRELAND
Kane Tuohy Solicitors
Sarah Reynolds .... (+353) 1 6722233
sreynolds@kanetuohy.ie

ITALY
LEGALITAX Studio Legale e Tributario
Alessandro Polettini .... +39 049 877 58 11
alessandro.polettini@legalitax.it

LUXEMBOURG
Tabery & Wauthier
Véronique Wauthier .... (00352) 251 51 51
avocats@tabery.eu

MALTA
EMD
Dr. Italo Ellul .... +356 2123 3005
iellul@emd.com.mt

NETHERLANDS
Dirkzwager Legal & Tax
Karen A. Verkerk .... +31 26 365 55 57
Verkerk@dirkzwager.nl

NORWAY
Advokatfirmaet Sverdrup DA
Tom Eivind Haug .... +47 90653609
haug@sverdruplaw.no

POLAND
GWW
Aldona Leszczyńska-Mikulska .... +48 22 212 00 00
warszawa@gww.pl

PORTUGAL
Carvalho, Matias & Associados
Antonio Alfaia de Carvalho .... (351) 21 8855440
acarvalho@cmasa.pt

SERBIA
Vukovic & Partners
Dejan Vuković .... +381 11 2642 257
office@vp.rs

SLOVAKIA
Alianciaadvokátov
Gerta Sámelová Flassiková .... +421 2 57101313
flassikova@aliancia.sk

SPAIN
Adarve Abogados SLP
Juan José García .... +34 91 591 30 60
Juanjose.garcia@adarve.com

SWEDEN
Wesslau Söderqvist Advokatbyrå
Phone .... +46 8 407 88 00

SWITZERLAND
Meyerlustenberger Lachenal
Nadine von Büren-Maier .... +41 22 737 10 00
nadine.vonburen-maier@mll-legal.com

TURKEY
Cukur & Yilmaz
Phone .... +90 232 465 07 07

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. USLAW Client Resources provide 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 USLAW client resources products or services listed as well as ideas for the future that would benefit you and your colleagues.

VIRTUAL OFFERINGS

As a result of the COVID-19 pandemic, USLAW has successfully explored and executed new and different ways to help members virtually connect with their clients, and we anticipate doing so for the foreseeable future. From USLAW Panel Counsel Virtual Meetings to exclusive social and networking opportunities to small virtual roundtable events, industry leaders and legal decision-makers have direct access to attorneys across the NETWORK to support their various legal needs. Moving forward, we will promote a hybrid virtual approach to our future live events when we can safely return to in-person events.

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. In light of COVID-19, we continue to evaluate and look forward to events in 2021. We are re-focusing on in-person meetings where and when possible, and we are considering adding smaller, regional, driving distance practice group events to our portfolio of live events. Regardless of the live events calendar, we will continue to be creative with virtual event offerings. 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, jury consultation, courtroom technology, forensic accounting, structured settlements, future medical fund management, and investigation.

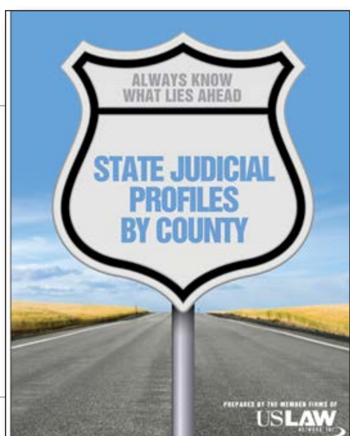
S-E-A Know. AMETROS Settle well. ARCADIA The Structured Settlements Company LITIGATION INSIGHTS MARSHALL INVESTIGATIVE GROUP MDD FORENSIC ACCOUNTANTS

LAWMOBILE

We are pleased to offer a completely customizable one-stop educational program that will deliver information on today's trending topics that are applicable and focused solely on your business. We focus on specific markets where you do business and utilize a team of attorneys to share relevant jurisdictional knowledge important to your business' success. Whether it is a one-hour lunch and learn, half-day intensive program or simply an informal meeting discussing a specific legal matter, USLAW will structure the opportunity to your requirements – all at no cost to your company. In light of COVID-19, consider hosting a virtual LawMobile event for your team.

COMPENDIA OF LAW

USLAW regularly produces new and updates existing Compendia providing multi-state resources that permit 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. We've also added several COVID-19-specific compendia that focus on civil immunity, general liability, force majeure and more. Visit the Client Resources section of uslaw.org for the complete USLAW compendium library.



STATE JUDICIAL PROFILES BY COUNTY

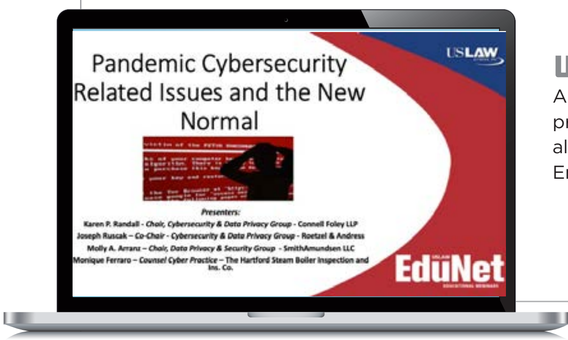
Jurisdictional awareness of the court and juries on a county-by-county basis is a key ingredient to successfully navigating legal challenges throughout the United States. Knowing the local rules, the judge, and the local business and legal environment provides a unique competitive advantage. In order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

USLAW MAGAZINE

USLAW Magazine is an in-depth publication produced and designed to address legal and business issues facing commercial and corporate clients. Recent topics have covered cybersecurity & data privacy, COVID-19 impacts, medical marijuana & employer drug policies, management liability issues in the face of a cyberattack, defending motor carriers performing oversized load & heavy haul operations, employee wellness programs, social media & the law, effects of electronic healthcare records, allocating risk by contract and much more.

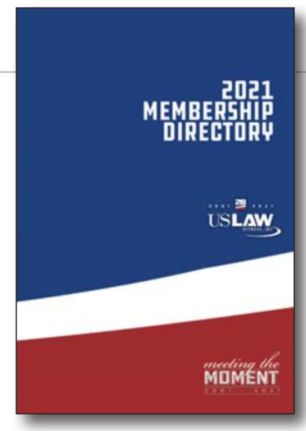
USLAW CONNECTIVITY

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



USLAW EDUNET

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



USLAW MEMBERSHIP DIRECTORY

Each year USLAW produces a comprehensive membership directory. 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. If you would like to be added to the distribution list, contact us here.

CLIENT LEADERSHIP COUNCIL AND PRACTICE GROUP CLIENT ADVISORS

Take advantage of the knowledge of your peers. USLAW NETWORK's Client Leadership Council (CLC) and Practice Group Client Advisors are hand-selected, groups of prestigious USLAW firm clients who provide expertise and advice to ensure the organization and its law firms meet the expectations of the client community. In addition to the valuable insights they provide, CLC members and Practice Group Client Advisors also serve as USLAW ambassadors, utilizing their stature within their various industries to promote the many benefits of USLAW NETWORK

PRACTICE GROUPS

USLAW prides itself on variety. Its 6,000+ attorneys excel in all areas of legal practice and participate in USLAW's nearly 20 substantive active practice groups and communities, including Banking and Financial Services, Commercial Law, Complex Tort and Product Liability, Construction Law, Data Privacy and Security, eDiscovery, Employment and Labor Law, Energy/Environmental, Healthcare Law, Insurance Law, International Business and Trade, IP and Technology, Professional Liability, Retail and Hospitality Law, Transportation and Logistics, White Collar Defense, Women's Connection, and Workers' Compensation. Don't see a specific practice area listed? Not a problem. USLAW firms cover the gamut of the legal profession and we will help you find a firm that has significant experience in your area of need.

2021 USLAW Corporate Partners

THANK YOU PARTNERS

USLAW PREMIER PARTNER

Know.

S-E-A

OFFICIAL TECHNICAL FORENSIC ENGINEERING AND LEGAL VISUALIZATION SERVICES PARTNER

www.SEAlimited.com
7001 Buffalo Parkway
Columbus, OH 43229
Phone: (800) 782-6851
Fax: (614) 885-8014

Chris Torrens
Vice President
795 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061
Phone: (800) 635-9507
Email: ctorrens@SEAlimited.com

Ami Dwyer, Esq.
General Counsel
795 Cromwell Park Drive, Suite N
Glen Burnie, MD 12061
Phone: (800) 635-9507
Email: adwyer@SEAlimited.com

Dick Basom
Manager, Regional Business Development
7001 Buffalo Parkway
Columbus, Ohio 43229
Phone: (800) 782-6851
Email: rbasom@SEAlimited.com

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

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

S-E-A's expertise in failure analysis doesn't end with investigation and research. Should animations, graphics, or medical illustrations be needed, S-E-A's Imaging Sciences/Animation Practice can prepare accurate demonstrative pieces for litigation support. The company's on-staff engineers and graphics professionals coordinate their expertise and can make a significant impact in assisting a judge, mediator or juror in understanding the complex principles and nuances of a case. S-E-A can provide technical drawings, camera-matching technology, motion capture for biomechanical analysis and accident simulation, and 3D laser scanning and fly-through technology for scene documentation and preservation. In addition, S-E-A can prepare scale models of products, buildings or scenes made by professional model builders or using 3D printing technology, depending on the application.

You only have one opportunity to present your case at trial. The work being done at S-E-A is incredibly important to us and to our clients – because a case isn't made until it is understood. Please visit www.SEAlimited.com to see our capabilities and how we can help you effectively communicate your position.

2021 USLAW Corporate Partners

AMETROS
Settle well.

Ametros

OFFICIAL FUTURE MEDICAL FUND MANAGEMENT PARTNER

www.ametros.com
P.O. Box 827
Burlington, MA 01803
Phone: (877) 275-7415

Mark Doherty, CMSP
Executive Vice President of Sales
Email: mdoherty@ametros.com

Ametros is the largest and most trusted professional administration expert in the industry, working closely with everyone involved in the settlement process to drive resolution and provide support, security and potential savings for injured individuals once they settle their case. Ametros becomes the injured individual's main resource to help guide them through their medical treatment and any necessary reporting after settlement. Ametros helps ease settlement fears and assists in settling difficult and complex claims, including workers' compensation, liability, trusts, life care plans, Medicare Set Asides, and all other future medical allocations.

ARCADIA
The Structured Settlements Company

Arcadia

OFFICIAL STRUCTURED SETTLEMENT PARTNER

www.teamarcadia.com
5613 DTC Parkway, Suite 610
Greenwood Village, CO 80111
Phone: (800) 354-4098

Rachel D. Grant, CSSC
Structured Settlement Consultant
12894 Parkridge Drive, Suite 100
Shelby Township, MI 48315
Phone: 586.932.2111
Email: rgrant@teamarcadia.com

Your USLAW structured settlements consultants are:
Brian Annandono, CSSC • Cleveland, OH
Cassie Barkett, Esq. • Tulsa, OK
Len Blonder • Los Angeles, CA
Rachel Grant, CSSC • Detroit, MI
Nicole Mayer • Chicago, IL
Richard Regna, CSSC • Denver, CO
Iliana Valtchinova • Pittsburgh, PA

Arcadia Settlements Group is honored to be USLAW's exclusive partner for structured settlement services.

Arcadia Settlements Group (Arcadia) and Structured Financial Associates (SFA) have merged to create the largest provider of structured settlement services, combining the strength of best-in-class consultants, innovative products and services, and deep industry expertise. Our consultants help resolve conflicts, reduce litigation expenses, and create long-term financial security for injured people through our settlement consulting services. Arcadia Consultants also assist in the establishment and funding of other settlement tools, including Special Needs Trusts and Medicare Set-Aside Arrangements, and are strategically partnered to provide innovative market-based, tax-efficient income solutions for injured plaintiffs.

Arcadia is recognized as the first structured settlement firm with more than 45 years in business. Our consultants have used our skill and knowledge, innovative products and unparalleled caring service to help settle more than 325,000 claims involving structured settlement funding of more than $40 billion and have positively impacted hundreds of thousands of lives by providing security and closure.

LITIGATION INSIGHTS

Litigation Insights

OFFICIAL JURY CONSULTANT AND COURTROOM TECHNOLOGY PARTNER

www.litigationinsights.com
9393 W. 110th Street, Suite #400
Overland Park, KS 66210
Phone: (913) 339-9885
Twitter:@LI_Insights

Merrie Jo Pitera, Ph.D.
Chief Executive Officer
Phone: (913) 486-4159
mjpitera@litigationinsights.com

Adam Bloomberg
Vice President – Managing Director of Visual Communications
Phone: (214) 658-9845
abloomberg@litigationinsights.com

Jill Leibold, Ph.D.
Director of Jury Research
Phone: (310) 809-8651
jleibold@litigationinsights.com

Christina Marinakis, J.D., Psy.D.
Director – Jury Research
Phone: (443) 742-6130
cmarinakis@litigationinsights.com

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

Litigation Insights is proud to be the exclusive corporate sponsor of jury research and courtroom technology services for USLAW NETWORK.

Our clients hire us when their cases are complex, difficult and/or unclear. They bring us in when issues are volatile, emotions are high, and millions of dollars are at risk. We're asked to consult on tough litigation because we've seen so many tough cases and, more importantly, we've provided valuable insights. Remember, not every case needs a mock trial. We also support your litigation efforts with smaller budget services such as theme development, witness preparation, voir dire and jury selection.

Our courtroom consultants, or "Hot Seat" operators, have no fewer than 12 years of experience in the application of industry-leading presentation software and equipment, as well as an advanced knowledge of courtroom protocol and procedure. We make a point of learning the case facts, becoming familiar with your exhibits and video depositions, and we work closely with the trial attorneys to provide continuity and peace of mind.

Litigation Insights has been certified as a Women's Business Enterprise by the Women's Business Enterprise National Council (WBENC).

For more information on how we can help with jury research and/or courtroom technology support, please contact any of our executive staff listed above.

2021 USLAW Corporate Partners

Marshall Investigative Group

OFFICIAL INVESTIGATIVE PARTNER

www.mi-pi.com
401 Devon Ave.
Park Ridge, IL 60068
Phone: (855) 350-6474 (MIPI)
Fax: (847) 993-2039

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

Adam M. Kabarec
Vice President
Email: akabarec@mi-pi.com

Matt Mills
Vice President of Business Development
Email: mmills@mi-pi.com

Thom Kramer
Director of Internet Investigations
Email: tkramer@mi-pi.com

Amie Norton
Business Development Manager
Email: anorton@mi-pi.com

Valentina Benjamin
SIU Manager
Email: vbenjamin@mi-pi.com

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

One of our recent achievements is leading the industry in Internet Presence Investigations. With the increasing popularity of communicating and publishing personal information on the internet, internet presence evidence opens doors in determining the merit of a claim. Without approved methods for collection and authentication this information may be inadmissible and useless as evidence. Our team can preserve conversations, photographs, video recordings, and blogs that include authenticating metadata, and MD5 hash values. Our goal is to exceed your expectations by providing prompt, thorough and accurate information. At Marshall Investigative Group, we value each and every customer and are confident that our extraordinary work, will make a difference in your bottom line. **Services include:**

- Activity/Background Checks
- AOE / COE
- Asset Checks
- Bankruptcies
- Contestable Death
- Criminal & Civil Records
- Decedent Check
- Health History
- Intellectual Property Investigations
- Internet Presence Investigations
- Pre-Employment
- Recorded Statements
- Skip Trace
- Surveillance

MDD Forensic Accountants

OFFICIAL FORENSIC ACCOUNTANT PARTNER

www.mdd.com
11600 Sunrise Valley Drive, Suite 450
Reston, VA 20191
Phone: (703) 796-2200
Fax: (703) 796-0729

David Elmore, CPA, CVA, MAFF
11600 Sunrise Valley Drive, Suite 450
Reston, VA 20191
Phone: (703) 796-2200
Fax: (703) 796-0729
Email: delmore@mdd.com

Kevin Flaherty, CPA, CVA
10 High Street, Suite 1000
Boston, MA 02110
Phone: (617) 426-1551
Fax: (617) 426-6023
Email: kflaherty@mdd.com

Matson, Driscoll & Damico is a leading forensic accounting firm that specializes in providing economic damage quantification assessments for our clients. Our professionals regularly deliver expert, consulting and fact witness testimony in courts, arbitrations and mediations around the world.

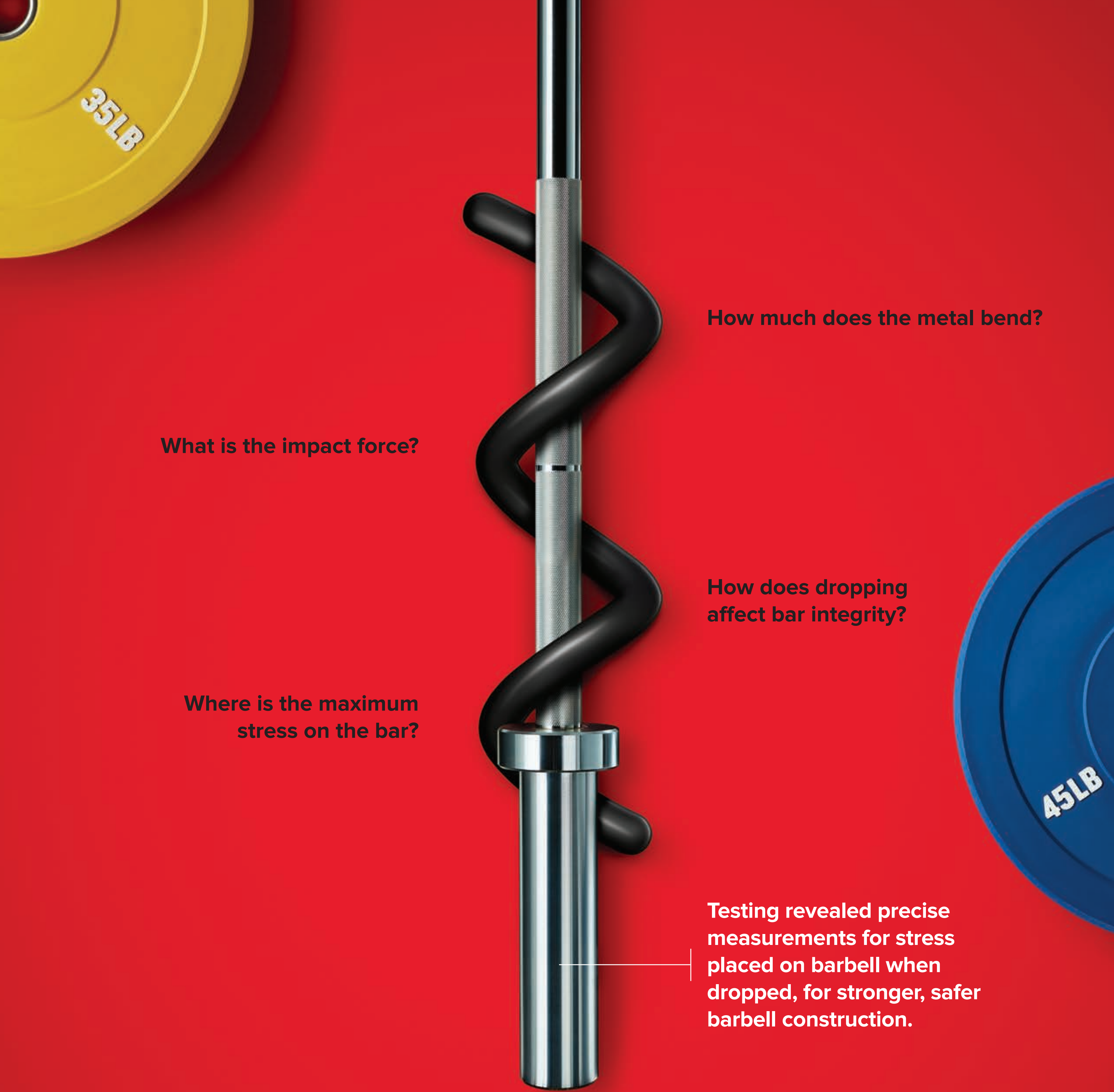
We have been honored to provide our expertise on cases of every size and scope, and we would be pleased to discuss our involvement on these files while still maintaining our commitment to client confidentiality. Briefly, some of these engagements have involved: lost profit calculations; business disputes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

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

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

Regardless of where our work may take us around the world, our exceptional dedication, singularly qualified experts and demonstrated results will always be the hallmark of our firm. To learn more about MDD and the services we provide, we invite you to visit us at www.mdd.com.

THANK YOU PARTNERS


35LB
How much does the metal bend?
What is the impact force?
How does dropping affect bar integrity?
Where is the maximum stress on the bar?
45LB
Testing revealed precise measurements for stress placed on barbell when dropped, for stronger, safer barbell construction.