SmithAmundsen

SPRING | SUMMER | 2011

US LAW

www.uslaw.org

USLAW

Table of Contents

USLAW A BRIEF HISTORY

2001 - 2011 CELEBRATING OUR FIRST TEN YEARS

LOOKING AHEAD TO OUR NEXT TEN YEARS

Ten short years ago, a group of six charter member firms joined together in informal discussion about founding a network of independent law firms that was unique from all the others. As managing partners of growing firms, we were looking for a way to elevate their service to existing clients and open the doors to new ones. We knew that they could deliver greater value to these clients by helping them tap into top notch counsel in unfamiliar jurisdictions.

From these discussions, USLAW NETWORK was formed. Our first meeting was held in November 2001 in Naples, Florida. Thirty USLAW member representatives convened in a small meeting room and created the foundation for USLAW's future.

Today, USLAW NETWORK spans the entire United States, Latin America and through partnerships with both Europe and Africa. Our reach is profound and the value we deliver to clients significant.

USLAW exists to help clients of our member firms access quality counsel, streamline the procurement of legal counsel, and create their own law firm networks within ours to meet their unique geographic needs.

In 2011, USLAW NETWORK is focused on the "Next 10." While it is a year of celebration, we will not rest on our laurels. Instead, we are committed to an even better "Next 10" with an emphasis on building, maintaining, nurturing and growing relationships both within the organization and with the clients our member firms represent.

We've achieved extraordinary success in a short period of time. But our NETWORK is only as strong as the commitment of our members and loyal clients. Today, that commitment has never been stronger.

PAST USLAW CHAIRS

and a sampling of previous conference brochure covers

2000

2001 - 2003 James J. O'Hagan

2003 – 2005 Charles F. Carr

2005 – 2007 Donald L. Myles, Jr.

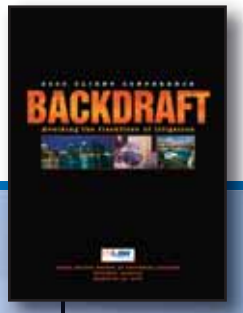
2007 – 2008 Mark A. Solheim

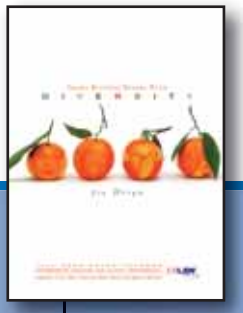
2008 – 2009 Renée F. McElhaney

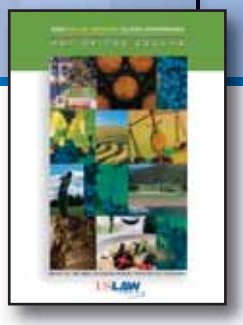
2009 – 2010 Michael R. Sistrunk

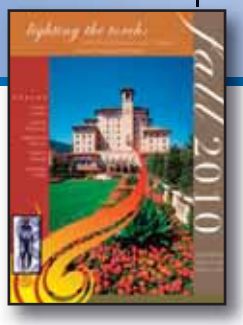
2011

THE Next 10









FROM THE Chair's Desk

2011 will prove to be a monumental year for USLAW. The year obviously is significant because of our past—this being our tenth anniversary year. We are excited about the position that the NETWORK has obtained. However, it will be an even more important year because of our future — where we are going. We are transforming the NETWORK into an even closer relationship among the law firms allowing clients to be served in the absolute best manner. We are sending a message — USLAW first — because together we are far stronger than we are as individual firms.

USLAW will not forget its past. Instead we are working diligently to maintain the quality, commitment and nature of our annual conferences. In addition we are expanding the scope of the regional meetings to get more content and opportunity for relationship-building through those events. We recognize the great role these have played in USLAW's past and we will continue to maintain this strength and integrity as part of the organization. Likewise we continue to develop improvements with USLAW.org, *USLAW Magazine*, USLAW EduNet Webinars and USLAW Radio. All of these tried-and-tested tools continue to give us a competitive edge in providing relevant information, in the timely manner necessary for our clients.

USLAW is beginning to form closer bonds in reviewing client's needs on a nationwide basis. We are utilizing the unique benefit that USLAW provides to clients to be able to get an extremely vivid jurisdictional view of their potential future risk and how to manage existing matters. Further, through combined efforts in both the development and enhancement of expertise, we offer a unique resource that is committed to working together in cooperation...not in competition. The strength of over 100 law firms and nearly 6,000 lawyers from around the world placing the client and the organization's interest first is going to be unique and unstoppable.

Individually as any one firm we are not able to provide this breadth of service or expertise. We will expand our market position by providing true global representation.

At our Spring Client Conference in Phoenix we will be concentrating on developing a strategic vision that will not only unify our firms but provide a clear pathway of how to go forward in developing USLAW as the premier legal network. Please join us.

Sincerely,

John E. Hall, Jr.
Chair, USLAW NETWORK, Inc.
Hall Booth Smith & Slover, P.C.
Atlanta, GA

www.uslaw.org USLAW

Editor/Publisher **Roger M. Yaffe**

Art Director **Jeff Freibert** • Compass Creative

USLAW NETWORK, INC
NATIONAL COUNSEL RIGHT NEXT DOOR

Roger M. Yaffe *Executive Director*
roger@uslaw.org
(800) 231-9110 Ext 1

Richard P. Magrath
Global Director, Strategic Partnerships
rpmagrath@uslaw.org
(404) 409-6789

5905 NW 54th Circle • Coral Springs, FL 33067
Phone/Fax (800) 231-9110

SmithAmundsen

ONLINE
salawus.com

CHICAGO, IL
312.894.3200

MILWAUKEE, WI
414.282.7103

ST. LOUIS, MO
314.275.1800

ST. CHARLES, IL
630.587.7910

ROCKFORD, IL
815.987.0441

WOODSTOCK, IL
815.337.4900

PRACTICE GROUPS

Litigation
- Aerospace & Commercial Transportation Litigation
- Appellate
- Bankruptcy & Creditors' Rights
- Class Action
- Commercial Litigation
- Commercial & Banking Litigation
- Construction Litigation
- Educational Law
- Employee Benefits Litigation
- Entertainment Litigation
- Environmental Litigation
- Family Law
- Health Care Litigation
- Insurance Litigation
- Intellectual Property Litigation
- Labor & Employment Litigation
- Product Liability
- Professional Liability
- Retail Litigation
- Public Entity & Governmental Liability
- Sports Litigation
- Toxic Tort
- Workers' Compensation

Corporate/Business Services
- Banking Operations
- Chinese-American Business Services
- Construction
- Corporate Business Services
- Employee Benefits
- Entertainment
- Estate & Business Planning
- Finance & Corporate Lending
- Immigration Services
- Intellectual Property
- Labor & Employment
- Media & Privacy
- Prevailing Wage Matters
- Sports
- Transportation

Industries
- Aerospace Industry
- Banking Industry
- Commercial Trucking Industry
- Construction Industry
- Entertainment Industry
- Government Entities
- Health Care Industry
- Insurance Industry
- Manufacturers Services
- Medical Devices & Pharmaceutical
- Property Management
- Retail & Restaurant
- Sports Law

SmithAmundsen

Our attorneys represent clients in a variety of matters and industries including Commercial Litigation, Financial Services Group, Labor & Employment, Life Sciences, Construction, Professional Liability, Aerospace and Commercial Transportation, Insurance Services Group, Appellate, Entertainment, and Media & Privacy.

SmithAmundsen is a 140 lawyer firm headquartered in Chicago, Illinois with three additional offices in Illinois as well as offices in Milwaukee, WI and St. Louis, MO. Legal matters are business problems to be solved and we have developed a comprehensive understanding of the enterprises our clients operate. We pride ourselves on using this knowledge to resolve matters creatively, expediently, and pragmatically.

SmithAmundsen attorneys combine litigation experience with a practical business approach to offer client-centered services efficiently and effectively. The foundation for our success is the integrity, quality, and experience of our attorneys and staff; an understanding of the relationship between litigation risks and business objectives; and the desire to explore new and innovative ways to solve our clients' problems.

Our goal is to become our clients' primary source for legal services and business advice, the lawyers you turn to when you need to "get it done and done right." In addition to litigation, we also use non-traditional means of resolving cases. We understand the importance of "bottom line" analysis. The attention we pay to the financial ramifications of litigation and its effect on enterprise outcomes helps us provide our clients with the advice they need to make appropriate decisions.

At SmithAmundsen, our diversity initiative centers upon creating and nurturing a diverse, collaborative, and inclusive working environment. We believe that multiple perspectives, derived from wide-ranging cultural and life experiences, are the catalyst for inspired thought from which our firm, clients, and community benefit. The leadership of SmithAmundsen is dedicated to recruiting, mentoring, training, and advancing exceptional attorneys who will succeed professionally and will commit to the collaborative culture of SmithAmundsen. Our female attorneys comprise 30% of firm partners and 44% of associates. We also have attorneys and staff members from various racial and ethnic backgrounds. As a firm, 18% percent of our employees are minorities.

Our Diversity Task Force works with the firm's leadership to implement strategies to expand, enhance, and maintain diversity within our firm. To that end, we have engaged in several initiatives to increase our diversity and further the business success of minorities and women at SmithAmundsen. In 2007, we established a SmithAmundsen scholarship with the Illinois Institute of Technology/Chicago-Kent College of Law. The scholarship rewards excellence in legal writing and the recipient's contribution to diversity as an integral part of the law school's intensive first-year writing experience. In addition, we provide financial support as a sponsor of the law school's Thurgood Marshall trial team. We have met with leaders of minority law school organizations to seek their direct input and assistance in our recruiting of minorities.

For more information, visit us online at www.salawus.com, download our iPhone app iSAlawus, or contact us at 312.894.3200.

MUDDY WATERS

MEDICARE SET-ASIDES IN THIRD PARTY LIABILITY CASES

Larry R. Smith and Mari Ann Novy SmithAmundsen LLC

The Medicare Secondary Payer Act ("MSPA"), *42 U.S.C. 1395y(b)(2),* provides that Medicare will not pay for medical expenses covered by workers' compensation, liability insurance, or no-fault insurance.[1] Medicare's obligation to pay arises only after these primary sources of payment are exhausted. From a public policy standpoint, this makes sense. Where a liability settlement or judgment is intended to cover accident-related medical expenses, the claimant should not be allowed to "double dip," and have Medicare pay for those same accident-related expenses.

Medicare's status as a secondary payer requires all parties involved to consider two factors when settling a liability case with a Medicare beneficiary: (1) Medicare pay-

ments made prior to the date of settlement (conditional payments) and (2) payments that Medicare may be required to make in the future for injury-related medical expenses. Satisfying Medicare's claims for pre-settlement payments is common practice, and most attorneys and liability insurers understand that process. However, a more difficult question is whether litigants have the obligation to protect Medicare from future medical expenses. For that, there is no clear answer.

WHY DOES IT MATTER?

Although the MSPA was passed in 1980, Medicare's status as a secondary payer has recently been the subject of renewed attention with the passage of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"). In the past, Medicare's ability to obtain information regarding private insurance settlements in order to enforce the secondary payer provisions was limited. However, with the passage of MMSEA, specifically, "Section 111," Congress has provided CMS with new tools to track payments as well as imposing substantial penalties on all those involved in the settlement process. Now, defendants and/or their insurers and arguably their TPA's are responsible for reporting settlements, awards, or judgments involving Medicare beneficiaries to the Centers for Medicare and Medicaid Services ("CMS").[2] *See 42 U.S.C. § 1395y(b)(7) and (8)); 42 C.F.R. 411.22–411.25.*

Failing to comply with the MSPA and the MMSEA can result in steep penalties. If legal action is required by the government to recover its "secondary" payments, Medicare may recover twice the amount of the payment. *42 C.F.R. 411.24(c)(ii)(2).* Further, Medicare may seek reimbursement from any entity, including a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer that has received a primary payment. *42 C.F.R. 411.24(g).* There is also a private cause of action under the statute. *42 U.S.C. 1395y(b)(3)(A).* For Responsible Reporting Entities (RREs), the penalty for non-compliance is $1,000 per day, per reportable claim. *42 U.S.C. 1395y(b)(8)(E)(i).*

MEDICARE SET-ASIDES—WHERE THE WATER GETS MUDDY

The MMSEA has generated much debate as to whether Medicare Set Aside accounts ('MSAs") are required in the context of liability settlements. In general, an MSA is a separate, interest bearing bank account established for the exclusive purpose of paying for future accident-related medical expenses that Medicare would otherwise be called upon to pay. Although not required by the MSPA or federal regulations, the practice of establishing MSAs has its roots in the workers' compensation context, where federal regulations provide that if a workers' compensation settlement allocates an amount for future medicals, Medicare will not pay a Medicare beneficiary's future medical bills until the MSA has been exhausted. *See 42 CFR 411.46.* Additionally, CMS has issued a series of policy memoranda, beginning with the "Patel Memo," which set forth CMS's policy regarding when and how to protect Medicare's interests relating to future medical expenses in worker's compensations settlements.[3]

On the liability side, however, the water is a bit murky. Neither the MSPA nor the MMSEA explicitly require that MSAs be established in order to protect Medicare's future interests in the context of a third party liability settlement. Moreover, there are no federal regulations that require MSAs in this context. Despite this, however, it is CMS's position that the settling parties are expected to protect Medicare's interest with respect to future medical expenses of a Medicare beneficiary. At a Town Hall Teleconference on 1/28/10, a CMS representative said the following:

> *"We have continued to say with respect to set-asides [f]or liability situations that set-asides are not required in terms of CMS being involved in any type of determination of how much the set-aside should be. We have also said that our regional offices have the ability to evaluate proposed set-aside amounts for liability if their workload permits them to do so. This is not the same thing as a blanket statement that liability set-asides are simply not required or not appropriate. Regardless of the mechanism, Medicare's interests need to be protected. The statute says that we don't make payment where payment has already been made. Whether or not this is protected through setting up a formal set-aside, setting up a formal trust, simply keeping the money and ensuring that it's being – that it's paying prior – in a priority manner to Medicare until the appropriate funds are exhausted; those are all choices, but we need to make it clear that's not the same thing as saying – and that we are not in fact saying that liability set-asides aren't appropriate. So that's our general response on that."* [4]

At a subsequent teleconference, a CMS representative said the following:

> *"As we've said on many calls, CMS has formalized process to review proposals for workers' compensation, Medicare set aside amounts. It does not have the same formalized process for liability Medicare set aside arrangements. The process for worker's compensation is voluntary. We have a process for an informal process on the liability side that if a plaintiff's attorney or insurer, et cetera, wishes to approach the appropriate CMS regional office and the regional office has the ability to do so workload or otherwise, that they can choose to review a proposed set aside amount if they believe there is significant dollars at issue. Again, it's not the same extensive process that we have for worker's compensation. But regardless of whether CMS has a formalized process, or regardless of whether or not you're participating in the formalized process for worker's compensation Medicare set aside, the statute has the same language in either situation. It's not parallel language. It's not similar language. It's literally the same physical sentence that we're not to make payment where payment has already been made."* [5]

In summary, it appears to be CMS's position that those involved in liability settlements must protect Medicare's interest with respect to future medical expenses, but CMS has not stated that MSAs must be established in liability cases, nor is CMS reviewing or approving them as a means of protecting Medicare's interest.

WHAT TO DO

1. Consider whether your case is a candidate for an MSA.

If you are involved in the settlement of a case with a Medicare beneficiary where future medicals are an issue, the first step is to consider is whether your case is a candidate for establishing an MSA. This will typically depend on the amount of the settlement and the risks involved. Is Medicare likely going to be required to respond to significant future medical claims arising out of this incident? What do the medical providers say about the nature, extent, and duration of future medical expenses? Is there additional coverage, other than Medicare, that is available for future medical expenses? For example, if workers' compensation insurance has agreed to pay future medical, this may be a factor weighing against an MSA.

In cases where the claimant is not likely to require substantial future medical care, an MSA is probably not necessary. However, in that case, it is recommended that your settlement documentation indicate that the

available medical evidence suggests that there is not a strong likelihood of significant future medical expenses related to the incident involved in the settlement.

On the other hand, in cases where there is a strong likelihood that Medicare could be required to pay significant amounts for future medical care related to the claim, it may be wise to allocate some reasonable amount for future medical expenses, rather than risk that Medicare will, in the future, request reimbursement.

2. What if the claimant refuses to agree to an MSA?

In the authors' experience, the plaintiff's bar has taken the position that MSAs are not required in the context of a liability settlement and are refusing to agree to MSAs during settlement negotiations. On the defense side, there are a couple of responses. First, while it is true that MSAs are "not required" with regard to liability settlements, keep in mind that MSAs are also "not required" for workers' compensations cases, but they are used regularly in that context in order to protect Medicare's interests. Second, by failing to establish an MSA, the claimant risks having his or her Medicare benefits suspended until the amount spent on future medicals equals the settlement amount. If that happens, the first person the claimant will look to is the claimant's counsel. Third, under the MSPA, the government can, and will, seek reimbursement from any entity that has "received a primary payment," including the claimant's counsel. *See U.S. v. James Stricker, et al., Docket No. 1:09-cv-02423 (Dec. 1, 2009); U.S. v. Paul J. Harris; 2009 U.S. Dist. Lexis 23956 (N.D. W. Va 2009).*

If that is not enough to convince the claimant and his or her counsel to establish an MSA in a case that perhaps warrants one, the only other leverage that the defendant or its insurer has is to refuse to settle in the absence of an MSA. Clearly, there are risks involved in taking that position, and those risks must be weighed against the risks of proceeding without an MSA.

...in cases where there is a strong likelihood that Medicare could be required to pay significant amounts for future medical care related to the claim, it may be wise to allocate some reasonable amount for future medical expenses...

What does one do in the situation where future medicals are involved, the claimant refuses an MSA, but settlement is nonetheless in everyone's best interest? In that situation, language should be included within the settlement documents to reflect the efforts made by the defendant and its insurer to consider Medicare's interests. It is recommended that the settlement documents explicitly state that the claimant understands that the settlement may impact, limit, or preclude the claimant's right or ability to receive future Medicare benefits arising out of the injuries, and nevertheless has knowingly chosen to proceed with the settlement without establishing an MSA.

Additionally, the settlement documentation should contain a waiver of the claimant's private cause of action under the MSPA, *42 U.S.C. § 1395y(b)(3)(A)*. Although the private cause of action under the MSPA is not a *qui tam*[6] action, a Medicare beneficiary can bring a claim if he or she has suffered an individual and particular injury as the result of a primary payer's failure to comply with the MSPA (e.g., if the beneficiary's benefits are denied because Medicare has not been reimbursed). *See Woods v. Empire Health Choice, Inc., 574 F.3d 92; 2009 U.S. App. LEXIS 16676 (2nd Cir. 2009).* Thus, at minimum, the settlement documents should require a waiver of that private cause of action.

3. If the parties agree that an MSA is appropriate, how do you proceed?

The settling parties must consider how much money should be set aside, and include careful documentation as to how that amount was determined in order to demonstrate that the settling parties attempted to protect Medicare's interests. Document the available medical evidence with regard to the amount of anticipated future medicals. In complicated cases, consultation with a life care planner may be necessary. Also consider how the MSA will be funded (e.g., cash, annuity), and who will administer it (e.g., claimant, administrator). The parties are also well advised to at least attempt to have CMS review the proposed MSA. There is no requirement that CMS approve the MSA, nor is there any guarantee that CMS will review it. If CMS's approval is not sought, or not obtained, the settlement documents should, at minimum, set forth the basis for the amount and any supporting documentation.

CONCLUSION

Are MSAs required in liability cases? The best answer we can give at this time is "Probably not, but in some cases, you should do one anyway." Without further guidance from CMS, the best we can do is make the decision on a case-by-case basis and document all efforts made to protect Medicare's interests.

---

1 Medicare applies to individuals who reach age 65 and individuals who are younger than age 65 that have been receiving SSDI payments for 24 months. In addition, individuals younger than age 65 with end-stage renal disease (ESRD) or Lou Gehrig's disease are eligible for Medicare benefits as soon as they begin receiving SSDI payments, without having to wait 24 months.

2 Typically, the insurer is the RRE. However, if an insured entity engages in a business, trade, or profession and is self insured or acts without recourse to its insurance, it is responsible for Section 111 reporting. Third party administrators (TPAs) as defined by CMS are not RREs for purposes of 42 U.S.C. 1395y(b)(8) based solely upon their status as TPA. However, while entities which meet CMS's definition of a TPA generally only act as agents for purposes of liability insurance (including self-insurance), no-fault insurance, or workers compensation reporting, they may, under specified circumstances, also be an RRE. Note that for purposes of 42 U.S.C. 1395y (b)(7) reporting for group health plan arrangements, this type of TPA is automatically an RRE. *See MMSEA Section 111 Medicare Secondary Payer Mandatory Reporting, Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation User Guide, Version 3.1, July 12, 2010.*

3 http://www.cms.gov/WorkersCompAgencyServices/

4 Barbara Wright, Acting Director of Medicare Debt Management, *Transcript of Town Hall Teleconference, Town Hall Teleconference Section 111 of The Medicare, Medicaid & Schip Extension Act of 2007 42 U.S.C. 1395y(b) (8), DATE OF CALL: January 28, 2010.*

5 Barbara Wright, Acting Director of Medicare Debt Management, *Transcript of Town Hall Teleconference, Town Hall Teleconference Section 111 of The Medicare, Medicaid & Schip Extension Act of 2007 42 U.S.C. 1395y(b) (8), Date of Call: March 16, 2010.*

6 A "qui tam" action is an action brought by a private citizen on behalf of the government.

SmithAmundsen

Larry Smith is a founding partner of Chicago-based law firm SmithAmundsen LLC where his practive covers many areas including product liability, transportation, aviation, employment and commercial law. Larry may be contacted at lsmith@salawus.com.

Mari Ann Novy is currently Of Counsel at SmithAmundsen where she assists in risk management matters for the firm and its clients. She may be contacted at mnovy@salawus.com.

DEVELOPING LABOR LAW:

The NLRB's Agenda Directed at the Non-Union Workforce

Jeffrey A. Risch SmithAmundsen LLC Chair, Labor & Employment Practice Group

"The NLRA is a living statute that should evolve with a changing workplace…the time is right for meaningful Labor Reform to address the decline in Representation Petitions…"

—Wilma Liebman, NLRB Chairman, *December 2009*

Under the direction of Chairman Wilma Liebman, the National Labor Relations Board ("NLRB" or "Board") has taken unprecedented steps to regulate the private non-union workforce. While the Board traditionally administers and enforces labor law through administrative decision making subject to judicial review, and has mostly confined its activity to union-management relations, it has recently taken several regulatory actions that indicate a shift in policy and politics at the agency. The Board is seeking to broaden its scope, and to wield a larger influence over the way that employers manage their non-union workforce.

THE NLRB'S TRADITIONAL ROLE

The NLRB is the executive agency assigned with the task of "developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990). The NLRB is made up of two distinct sections – the Board and the General Counsel. The Board itself consists of five members who are each appointed by the President to five-year terms. The Board is traditionally divided 3-2 on party lines, with the President's party controlling the majority. For roughly the past year-and-a-half, then, the Board has been controlled by the Democratic Party, through members appointed by President Obama. The Board is tasked with administering and enforcing the National Labor Relations Act ("NLRA" or "Act") 29 U.S.C. §151 et seq.; primarily overseeing union organizing petitions, and deciding charges brought by unions and employers alleging unfair labor practices. The General Counsel, who is also appointed by the President, is the prosecutor of the Act. The General Counsel's office investigates allegations of labor violations and brings the charges before the Board for adjudication. The General Counsel's office affects Board policy by issuing Advisory Opinions about specific labor law issues, and by determining what charges warrant adjudication by the Board.

Throughout its history, the Board's primary role under the NLRA has been done through the "quasi-judicial" process of deciding unfair labor practice allegations to

ensure compliance with the law. These decisions have created a body of law when interpreting the NLRA, and are given deference by the federal courts that review the Board's decisions. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Furthermore, while the NLRA generally protects employees' rights to collective action, the Board has generally focused on the relationship between employers and unions, or employees who wish to unionize.

In the past year, however, the Board has taken several steps away from its traditional role. Through administrative rulemaking and changes in how it decides unfair labor charges, as well as shifts in the focus of the General Counsel's office, the NLRB is making clear that it intends to play a much more active role in regulating labor law in the non-union setting.

THE NLRA AND THE NON-UNION EMPLOYEE

Labor relations between workers and private employers in the United States are broadly governed by the NLRA. While the central tenet of the NLRA is the worker's right to unionize, the Act's protection of an employee's ability to engage in collective action goes beyond union organizing and collective bargaining negotiations, and may include any protected "concerted activity," regardless of whether a union is involved. *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F2d 983 (7th Cir 1948), cert. denied, 335 US 845 (1948). "Concerted activity" includes any action by individual employees pursuing a common goal (i.e. attempting to improve working conditions, such as wages and benefits). *Meyers Industries*, 281 NLRB 882 (1986). While an individual employee can engage in concerted activity, the action is only "concerted" when it is performed with or authorized by other employees. *Id.* Employee actions that are strictly personal or undertaken by one individual employee are not generally deemed "concerted" under the NLRA. *Id.*

The NLRA expressly prohibits an employer from retaliating against an employee for engaging in protected concerted activities. 29 U.S.C. §157. Generally, non-union employees have received protection under the NLRA where they were retaliated against for internally criticizing a term or condition of their employment to their coworkers or a member of management. See, e.g., *Westmont Plaza*, 298 NLRB 401 (1990) (composing a letter protesting change in compensation was concerted activity); *Dearborn Big Boy No. 3*, 328 NLRB No. 92 (1999) (discussing belief that failure to hire applicant was racial discrimination with coworker was protected concerted activity).

THE NLRB'S RECENT EXPANSION OF SECTION 7 RIGHTS

In October, 2010, the Board announced (via press release) that it had filed a complaint against a Connecticut corporation for allegedly retaliating against an employee engaged in concerted action under the NLRA. The employee's supposed protected activity was far from an internal communication, however: she was terminated for posting disparaging comments about a supervisor on *Facebook*. See Complaint and Notice of Hearing, *American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (NLRB Region 34, October 27, 2010).

Following a customer complaint about her performance, the employee was asked to participate in an investigative review, submit a response, and requested representation from her union in the process. *Id.* After her request was denied, she posted a negative remark about her supervisor on *Facebook*, which drew additional comments on her "wall" from some of her coworkers. *Id.* While the complaint included allegations regarding the denial of union representation, the NLRB's focus was on the company's employee handbook, which contained a "Blogging and Internet Policy" that read, in part:

> *Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.*

Id. The NLRB alleged in its complaint that the employee "engaged in concerted activities with other employees by criticizing [her] supervisor...on her *Facebook* page." *Id.* The Board also proclaimed that the employer's blogging and internet policy was retaliatory on its face. *Id.*

While the *American Medical Response ("AMR")* matter settled before a hearing was conducted, the case shows that the NLRB is making employers' social media and internet policies a priority – one that will apply to companies regardless of whether their workforce is unionized. Indeed, this complaint marks a complete reversal of the interpretation of a nearly-identical social media policy by the previous General Counsel only a year prior. See Advice Memorandum in *Sears Holdings*, Case No. 18-CA-19081, <http://www.nlrb. gov/cases-decisions/advice-memos> (December 4, 2009). While the previous General Counsel saw no detriment to a social media policy restricting disparaging remarks, the *AMR* settlement required an agreement from the employer to scrap its blogging and internet policy, and an acknowledgement that the policy interfered with employee's rights to discuss wages and other conditions of employment.

NEW WORKPLACE POSTING REQUIREMENT EMPHASIZING NLRA RIGHTS

On December 21, 2010, the NLRB announced a proposed rule that would require all employers under its jurisdiction – union and non-union – to publish a poster notifying employees of their rights under the NLRA. The proposed poster would inform employees of the following:

- Collectively negotiate wages, hours, and other terms and conditions of employment;
- Form, join, or assist a union;
- Discuss terms and conditions of employment with other employees;
- Take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints and seeking help from a union; and
- Strike and picket.

The Board's notice further advises that it is illegal for an employer to retaliate against employees for engaging in union activities, to prohibit employees from soliciting for a union during non-work time and in non-work areas, and to prohibit employers from questioning employees about union activities in a manner that discourages such activity.

The poster would also contain the Board's web address and a toll-free number for workers to call if they believe their labor rights were being violated. Under the rule, an employer's failure to post the notice would be considered an unfair labor practice. Additionally, a failure to properly display the posting could be used by the NLRB as evidence of unlawful anti-union animus in NLRB unfair labor practice proceedings in which employer motive is at issue

The announcement of the proposed rule was not only surprising because of its scope (creating a requirement for nearly all U.S. employers), but because the Board was proposing a rule at all. While the Board has the authority to promulgate regulatory rules, it has done so only once before in its 75-year history. The previous rule, created in 1988, governed a very specific issue – unit determination in acute healthcare facilities – and the rulemaking process involved four hearings in strategic cross-national locations, resulting in over 1,000 pages of testimony on the issue. See 53 Fed. Reg. 33,900 (Sept. 1, 1988). This time, no one outside of the NLRB knew about the specifics of the proposed rule until it was announced. Public comments were accepted for the statutorily-required period, but no public hearing was held.

MANDATORY ARBITRATION CLAUSES CANNOT JEOPARDIZE SECTION 7 RIGHTS

On June 16, 2010, the NLRB's General Counsel's Office issued a memorandum that is intended to review and clarify the NLRB's position on mandatory arbitration clauses. See MEMORANDUM GC 10-06. While in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), the Supreme Court determined that an employer can require an employee to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution, the General Counsel's memorandum sought to protect the non-union employee's right to engage in protected concerted activities pursuant to Section 7 of the NLRA. 29 U.S.C. § 157.

Specifically, the General Counsel proclaimed that in order to be compliant with federal labor law, mandatory arbitration agreements in the non-union setting must be guided by the following uncompromising principles:

1. The concerted filing of a class action lawsuit….seeking to enforce employment statutes is protected by Section 7 of the Act, and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates Section 8(a)(l) of the NLRA.
2. Any mandatory arbitration agreement established by an employer may not be drafted using language so broad that a reasonable employee could read the agreement and/or related employer documents as conditioning employment on a waiver of Section 7 rights, such as joining with other employees to file a class action lawsuit to improve working conditions.
3. Nonetheless, an employer's conditioning employment on an employee's agreeing that the employee's individual non-NLRA statutory employment claims will be resolved in an arbitral forum is permissible under the Supreme Court's holding in *Gilmer*... The validity of such individual employee forum waivers is normally determined under non-NLRA law, such as the Federal Arbitration Act and the employment statutes at issue.
4. So long as the wording of these individual forum waiver agreements makes clear to employees that their Section 7 rights are not waived and that they will not be retaliated against for concertedly challenging the validity of those agreements through class or collective actions seeking to enforce their employment rights, an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration. Similarly, an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.

See MEMORANDUM GC 10-06

PAREXEL INTERNATIONAL LLC 356 NLRB NO. 82 (JANUARY 28, 2011)

In *Parexel Int'l LLC*, the Board majority agreed that the company did not terminate the employment of Theresa Neuschafer for protected concerted activities under Section 7 of the NLRA. See 356 NLRB No. 82 (January 28, 2011). Neuschafer was found to have discussed alleged pay raises and purported preferential treatment towards South Africans by management (Neuschafer was not South African). However, the Board concluded that the company wanted to prevent her from engaging in such discussions with her coworkers in the future. *Id.* Such action, according to the Board's majority, served as an unlawful preemptive strike against protected concerted activity. *Id.*

The Board reasoned that because an employer violates the NLRA by threatening to terminate an employee in order to prevent her from exercising Section 7 rights it follows that an employer similarly violates the law by terminating the employee in order to be certain that she does not exercise her rights in the future. *Id.* In so finding, the Board majority expanded the theories on which the agency may hold employers liable, stating that an employer violates the NLRA when it fires an employee "to be certain that she does not exercise her Section 7 rights." *Id.*

The Board's decision in *Parexel* is noteworthy on two fronts. First, it sets forth what is arguably a new theory of liability under the NLRA. Under the preemptive strike theory of liability, virtually any adverse employment action in the non-union setting could be the subject of a Section 7 violation. Second, the preemptive strike theory of liability was not advanced by the NLRB's General Counsel at the underlying administrative hearing, but nonetheless prevailed.

NLRB FILES COMPLAINT AGAINST BOEING FOR ESTABLISHING NON-UNION OPERATIONS

On April 20, 2011, the Board's Acting General Counsel Lafe Solomon issued a complaint against the Boeing Company alleging that it violated federal labor law by deciding to transfer a second production line to a non-union facility in South Carolina.

According the Board's own press release, "Boeing announced in 2007 that it planned to assemble seven 787 Dreamliner airplanes per month in the Puget Sound area of Washington state, where its employees have long been represented by the International Association of Machinists and Aerospace Workers. The company later said that it would create a second production line to assemble an additional three planes a month to address a growing backlog of orders. In October 2009, Boeing announced that it would locate that second line at the non-union facility." The Board's purported reasoning for issuing the complaint was based on its belief that Boeing participated in alleged unfair labor practices by threatening to open new, non-union facilities elsewhere when workers went on strike at the company's Washington state production facility in 2008.

Scheduled for hearing sometime in June 2011, the fight appears far from over. In a joint response letter addressed to Acting General Counsel Solomon, Attorneys General from nine states including South Carolina warned "[t]he only justification for the NLRB's unprecedented retaliatory action is to aid union survival. Your action seriously undermines our citizens' right to work as well as their ability to compete globally. Therefore, … we will protect our citizens from union bullying and federal coercion. We thus call upon you to cease this attack on our right to work, our states' economies, and our jobs."

CONCLUSION

Through its very public words and actions, the Board is using new methods to regulate federal labor law, and shows a newfound interest in capturing the spotlight for its efforts. The Board has indicated that, going forward, it will play a larger role in non-union employment issues. Major shifts in Board practice and policy will have a serious impact on U.S. employers in any industry, in any geographic location, and regardless of any union affiliation.

SmithAmundsen

Jeffrey A. Risch is a Partner at the Chicago-based law firm of SmithAmundsen LLC where he concentrates his practice on the representation of management in all areas of traditional labor law. Jeff may be contacted at jrisch@salawus.com.

THE TORT REFORM AGENDA

AFTER THE 2010 MIDTERM ELECTIONS

Robert L. Shannon and Kevin D. Abernethy
Hall Booth Smith & Slover, P.C.

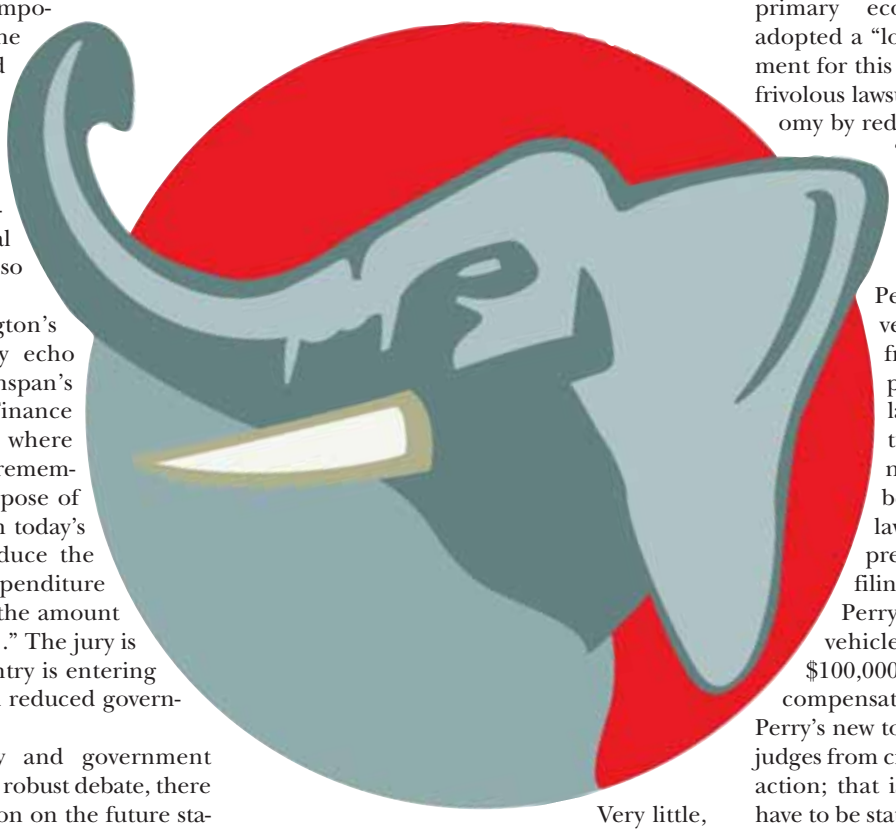
In the November 2010 elections Republicans picked up 16 governorships, gained 680 seats in state legislative elections, and won control of the U.S. House of Representatives with a net pickup of 63 seats. The aftermath of this election so far has resulted in the temporary extension of the Bush-era tax rates and an extension of unemployment benefits. Reduced estate tax rates and provisions permitting the expensing of corporate capital expenditures are also now law.

For now, Washington's new fiscal policy may echo economist Alan Greenspan's 1978 Senate Finance Committee testimony where he remarked, "Let us remember that the basic purpose of any tax cut program in today's environment is to reduce the momentum of expenditure growth by restraining the amount of revenue available… ." The jury is still out on if the country is entering an era of austerity and reduced government.

While tax policy and government growth have generated robust debate, there has been little discussion on the future status of tort reform. This article discusses potential developments in tort reform for 2011 and 2012 and how those changes can be positively utilized.

POTENTIAL STATE TORT REFORM LEGISLATION

Tort reform is likely to center on the state and local levels over the next two years because President Obama and Speaker Boehner are at complete odds on the issue.



Very little, if anything, regarding tort reform will occur at the federal level. However, look for newly elected state Republicans to push the tort reform agenda.

LOSER PAYS ALL BRITISH SCHEME

Republican governors may very well spend some political capital and advocate a British-style "loser pays" rule which would require plaintiffs to pay legal costs should they lose their lawsuit. Most of America's primary economic competitors have adopted a "loser pays" scheme. The argument for this policy is such a system deters frivolous lawsuits and will benefit the economy by reducing legal expenses. A pure "loser pays" law requires the losing party, plaintiff or defendant, to pay for the winner's attorney's fees.

Texas Governor Rick Perry has already proposed a version of the "loser pays" framework. Mr. Perry has proposed a system where the lawyers and law firms would actually pay the winner's attorney's fees. The reasoning behind this idea is to force lawyers to extensively evaluate, pre-suit, whether or not they are filing a frivolous claim. Governor Perry would also create new legal vehicles to handle claims below $100,000 which, in theory, could help compensate victims more quickly. Mr. Perry's new tort reform law would prohibit judges from creating common law causes of action; that is, all causes of action would have to be statutory.[1] It is worth monitoring whether or not your state is considering adoption of a "loser pays" scheme because it could save, or cost, you money in legal expenses.

FEDERAL EXPERT WITNESSES STANDARDS ADOPTED AT THE STATE LEVEL

Republicans are also likely to continue adopting the federal *Daubert* expert witness rules at the state level. *Daubert* refers to the U.S. Supreme Court decision *Daubert v. Merrill Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This decision confers broad authority to a federal court trial judge on deciding whether or not to permit an expert witness to testify before a jury. Via tort reform, many states have already adopted this federal evidentiary law at the state level. Utilizing the *Daubert* scheme can be a powerful tool to save money and efficiently resolve litigation.

A BLUEPRINT FOR FILING EFFECTIVE *DAUBERT* MOTIONS

If your state has adopted the *Daubert* scheme, or a version of it, then filing a motion under that framework is worth considering. Preparing successful Daubert motions takes considerable time. The case law on this topic can be technical and esoteric. However, the blueprint below provides a specific analytical framework, supported by case law, for generating a *Daubert* attack.

First, note the fundamental analytical requirements set forth in *Daubert v. Merrill Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), where the United States Supreme Court held it is the trial judge's responsibility to ensure any scientific testimony or evidence admitted is both (1) relevant and (2) reliable. One constant in cases applying *Daubert* is the theme that the trial court is the gatekeeper of expert testimony.

Second, when filing a *Daubert* motion, keep in mind the non-moving party has the burden of establishing by a preponderance of proof that a proper foundation exists for the admissibility of that party's proffered expert testimony. The role of the Court is to keep unreliable and irrelevant information from the jury. One of the factors the Court must consider in deciding whether or not to admit proposed expert testimony is whether the testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591.

Third, systematically apply the four *Daubert* factors which must be considered in determining the reliability of expert testimony:

1) whether or not the expert methodology has been tested or is capable of being tested;
2) whether or not the technique has been subject to peer review and publication;
3) the name and potential error rate of the methodology; and
4) whether or not the technique has been generally accepted in the proper scientific community.

509 U.S. at 591-94.

The fourth and final component is to move, if possible, for summary judgment in tandem with filing *Daubert* motions. This provides the proverbial one-two punch that may knock out a case. We recently defended a corporation in a products liability case. Not surprisingly, we filed *Daubert* motions and contemporaneously moved for summary judgment. The trial judge excluded all of the plaintiffs' expert testimony except the proof of inadequate warning for the alleged hazard.

However, when adjudicating summary judgment, the trial judge found there was no evidence of defective design and the alleged dangers/hazards connected to the product were open and obvious. The Court found, as a matter of law, there was no duty to warn of the open and obvious dangers and, even if there had been a duty to warn, the warnings provided by defendant corporation were appropriate. Thus, the only claim plaintiffs had expert testimony on was removed by summary judgment, and plaintiffs' case was terminated.

It is only fair to note the downside to this strategy. If the *Daubert* and summary judgment motions expose gaps in the plaintiff's case, then the plaintiff's attorney may voluntarily dismiss and re-file the action. This may aggravate the client, depending on their goals.

FACTORS TO CONSIDER WHEN FILING *DAUBERT* MOTIONS

First, are there grounds to file a *Daubert* motion? One method for answering this question is taking the expert's deposition. For example, we successfully struck an expert under *Daubert* because the expert assumed a cylinder's center of gravity without knowing volume or weight (The volume of a cylinder = $(\prod)(r^2)(l)$ where r = radius and l = length and $\prod$ = 3.14. Weight = (volume) • (density)). The expert's assumptions were discovered on deposition.

Second, preparing and filing pre-trial *Daubert* motions may save the client money in trial defense costs and, if this is a goal, foster settlement. Successfully excluding an expert could very well gut the opposition's case. Third, filing a *Daubert* motion allows the judge to consider the expert testimony in a cool, collected manner detached from the heat of trial. In our experience, judges are extremely reluctant to strike an expert at trial. Generally judges will only strike an expert at trial if there is overwhelming evidence the expert testimony is defective. Why wait and take the chance the judge will allow a bad expert to testify?

Fourth, many trial lawyers boast they want to shred apart an expert on cross at trial – regardless of whether or not the judge ultimately strikes the testimony for failing to conform to *Daubert*. In theory, this sounds logical. But, what if the jury misses the nuance? What if the testimony is so technical or scientific the jury simply becomes bored and does not listen? Or, what if the injuries are catastrophic, the jury becomes angry, and simply stops focusing on the trial evidence? These are all factors to consider when deciding whether or not to file *Daubert* motions.

We have seen a number of incompetent experts effectively connect with the jury. Sometimes the jury will be drawn to an expert because of demeanor, credentials, or appearance. These experts may have faulty methodologies, conclusions, and inaccurate testimony, but because the jury likes the expert, they are effective and can harm your case. Unfortunately, it is not always the brightest or most logical expert that has the greatest impact on the jury. Therefore, when supported by the record, file the pre-trial *Daubert* motion.

Daubert and its progeny are powerful pre-trial tools that can shape litigation and evidence in favor of your client. Watch to see if your state legislature is debating tort reform. Whether it is *Daubert* evidentiary rules, a "loser pays" framework, or another proposal, these laws will most likely impact your business and legal strategy.

Robert Shannon is a senior partner at Hall Booth Smith & Slover. His practice concentrates on large, complex litigation and international transactions; he has tried over forty cases to a jury. Mr. Shannon is a Brigadier General who serves in the Georgia Air National Guard.

Kevin Abernethy is an attorney at Hall Booth Smith & Slover. He is a general litigator who has successfully handled a variety of cases from trial through appeal. Mr. Abernethy has extensive trial experience throughout the southeast. His practice concentrates on high-exposure cases.

[1] *Loser Pays, Everyone Wins,* The Wall Street Journal, *December 15, 2010, at A 20.*

DODD-FRANK GIVES POWER TO THE PEOPLE

David M. Majchrzak Klinedinst PC

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), mammoth legislation that spans 848 pages and is generally cited for the efforts it takes to reign in the finance industry. Hence, it is easy to overlook that this enactment addressed a much broader group of corporate entities through a few important provisions that have received relatively less fanfare. These empower shareholders to vote on compensation being paid to top executives and also to take more control in corporate governance, both through increased disclosure requirements and greater access to the nomination of directors.

EXECUTIVE COMPENSATION

As a number of large corporate vessels began to capsize in the economic storms of the past few years, the compensation paid to top executives trying to captain these ships fell under much criticism. Dodd-Frank attempted to address these concerns by empowering shareholders with a say on pay.

Specifically, Dodd-Frank amended the Securities Exchange Act of 1934 to establish parameters requiring shareholder advisory votes regarding executive compensation. On January 25, 2011, the Securities and Exchange Commission ("SEC") implemented these Dodd-Frank provisions. The final rules provided that issuers, at least once every three years, must provide for a separate shareholder advisory vote in proxy statements to approve compensation of named executives. At least once every six years, there must additionally be a separate resolution, subject to shareholder vote, to determine whether these votes should occur annually, bi-annually, or tri-annually. In certain circumstances, there must also be a separate shareholder advisory vote to approve golden parachute arrangements.

Further, companies must publicize their adherence to these new rules. Proxy statements now have to disclose the requirement to provide separate shareholder votes on executive compensation, the frequency of votes on shareholder compensation, and golden parachute compensation associated with merger transactions. Additionally, these materials must also disclose the general effect of these votes, including whether they are binding or non-binding.

Even if shareholders are not given any true, direct power regarding decisions on executive compensation, Dodd-Frank also provided some new mandates that at least make the process more transparent. In particular, shareholders must be apprised of the relationship between the compensation paid and the company's financial performance. This must take into account any change in share value, dividends, distributions, the median total annual compensation of all employees (outside the chief executive officer), and the chief executive officer's annual compensation. Moreover, and perhaps more significantly, the corporation must disclose

what effect, if any, the results of the most recent shareholder vote on executive compensation had in determining compensation policies and decisions.

Thus, the increased incentive to the board of directors to address executive compensation carefully becomes evident. The shareholders will have a regular opportunity to voice their opinions regarding the increasingly hot button topic of compensation. These same shareholders will then be able to determine whether their collective directions were followed and, if not, whether there was, in their opinion, a valid reason for the board making a contrary decision.

PUBLICATION OF NOMINATION OF DIRECTORS IN PROXY MATERIALS

Traditionally, the job security of directors has been somewhat protected. Therefore, even when shareholders disagreed with significant decisions—such as, for example, compensation paid to top executives—changes were unlikely to result. As such, the potential to ignore minority shareholders' concerns was significant.

Dodd-Frank sought to change this. It provided that the SEC may issue rules and regulations requiring shareholders be permitted to use corporate proxy solicitation materials for nominating individuals to membership on the board of directors. Indeed, the SEC acted quickly and, on August 25, 2010, barely more than one month after Dodd-Frank was signed, adopted new rules facilitating shareholders' nomination rights. However, such access to the nomination table is limited. Under the rules, shareholders will be eligible to have their nominees included in the proxy materials only if they own at least three percent of the company's shares continuously for at least the prior three years. This means, however, the nominees of significant, long-term shareholders must be listed in their proxy materials, alongside the nominees of management.

Those shareholders who are eligible to include nominations in the proxy materials, may do so on only a limited basis. They will be able to include no more than either one nominee or a number representing up to 25 percent of the company's board of directors, whichever is greater. The company's proxy materials will then include a disclosure of the nominating shareholder, as well as the shareholder nominee or nominees, that is similar to the disclosure currently required in a contested election. As is the case when directors nominate candidates, the nominating shareholder or group will be liable for any false or misleading statements it makes about the nomination, regardless of whether the statements are included in the company's proxy materials. Per the SEC's release, the company itself will not be responsible for information provided by the shareholder and then reproduced in the company's proxy materials.

The effects of this are that shareholders who otherwise are provided the opportunity to nominate directors at a shareholder meeting under applicable state or foreign law would be able to have their nominees included in the company proxy materials sent to all shareholders. This is a potentially significant change. Whereas many companies have permitted shareholders meeting certain criteria to nominate directors, in most instances, those nominations were meaningless. Frequently, existing directors would nominate the slate of candidates and the corporation would then send information to the shareholders through proxy materials, so those shareholders have information to vote their shares. Thus, most shareholders would have no information regarding other candidates that were "nominated from the floor" and proxy votes would have already been cast. As a result, shareholders only had real access by launching a proxy fight, wherein they would mail out their own ballots.

The SEC's new rules not only ensured the long-time, significant shareholders would have access to the same proxy materials the company issued, but also required new formalities surrounding the nomination process. These included both giving shareholders the ability to use the shareholder proposal process to establish procedures for the inclusion of shareholder director nominations in company proxy materials and a requirement the corporation inform investors the reason(s) why either a single person should serve as both chairman of the board of directors and also as the chief executive officer, or different individuals should serve in those roles.

IMPACT OF DODD-FRANK

What impact does all of this really have? Although heralded as a massive reform and having a good potential to initiate discussions at high corporate levels, this legislation will likely result in few changes absent some strong, dissenting minority shareholders. First, although all shareholders may now vote on executive compensation, it is an advisory vote, which, by definition, means it is non-binding. Although the main goal of advisory votes is to ensure directors understand shareholders' general viewpoints, shareholders are unlikely to take strong positions that they know how much senior executives should be paid.

The rationale for this seems clear. There are various market forces at work, particularly when selecting a chief executive officer. How many "real" candidates are there? What other options do each of the candidates have? Therefore, how much to compensate named executives to come aboard and then to stay is probably more art than science.

Plus, the legislative teeth of the legislation, increased access to proxy votes, have, at best, a questionable bite. Before Dodd-Frank, directors would determine how much the top executives would be paid. Therefore, they have always had some exposure when their seats began subject to a vote on this issue. The changes above mean the sitting directors may have a few more meaningful challengers, but those challenges will be limited by (1) the ability to nominate and publish within the company's proxy materials being granted only to those with a significant share percentage over a significant time, and (2) the limitations on the number of nominations each shareholder may make. To the extent many shareholders may be deferential to the sitting board or wary of a candidate nominated outside the traditional process, there probably is little risk outside a strong group of particularly frustrated shareholders.

Perhaps the real hazard Dodd-Frank poses to all directors comes in the form of increased exposure to derivative suits. Again, Dodd-Frank and the SEC rules stemming therefrom set up a situation where shareholders are given an opportunity to voice their preference for the direction the company takes on a particular issue—executive compensation—and then receive a response both as to whether that advice was followed and the reasoning for the board's decision. Although the board's decision will likely be protected by the business judgment rule, the board should exercise considerable care in how it crafts its responses to ensure both (1) its decisions, whatever they may be, are, in fact, protected, and (2) reasonable explanations are given to mitigate shareholder discontent.

David M. Majchrzak is a seasoned civil litigator with Klinedinst PC in San Diego, California. He has significant experience assisting corporate entities, directors and officers, and successful individuals with complex disputes, as well as representing legal professionals in malpractice claims.

AVOID BEING AN EASY TARGET PREVENTING PATENT MARKING LAWSUITS

Shawn M. Raiter and Sarah E. Madsen
Larson • King, LLP

In 2009 and 2010, the Federal Circuit Court issued three significant decisions that dramatically changed the legal landscape of patent marking claims. Before these decisions, patent marking lawsuits that accused companies of marking products with expired or inapplicable patent numbers were relatively rare. Court rulings that capped damages at $500 *per decision* pertaining to falsely marked products failed to motivate many plaintiffs to bring false patent marking lawsuits.

However, the Federal Circuit then interpreted the $500 penalty as applying *per falsely marked article*, and further opined that the standing requirement may be satisfied by any person, regardless of whether the person alleged a competitive injury resulting from the alleged false patent. Perceiving these developments as an opportunity for large damage awards, the plaintiffs' bar began filing a torrent of false patent marking lawsuits on behalf of non-competitive plaintiffs.

In response to these mass filings, Senate Judiciary Chairman Patrick Leahy (D-VT) proposed the Patent Reform Act of 2011. If the Patent Reform Act of 2011 is passed as adopted by the Senate Judiciary Committee, only plaintiffs who allege a competitive injury will have standing to bring a false patent marking lawsuit. As we await the fate of the Patent Reform Act of 2011, it is incumbent upon in-house counsel of product manufacturing companies and outside counsel defending these companies to understand how to prevent these claims.

TRENDS IN PATENT MARKING CASES

United States law, 35 U.S.C § 292, prohibits sellers of goods from marking products or packaging with expired patent numbers or patent numbers that do not cover the product upon which they appear. Any seller who falsely marks a product is subject to a penalty of $500 for each offense. The statute allows any person to sue to recover the penalty on behalf of the United States; if the person is successful, they share the recovery equally with the government.

Courts historically interpreted the $500 recovery permitted under Section 292 as applying per decision. However, in *Forest Group, Inc. v. Bon Tool Company*, 590 F.3d 1295 (Fed. Cir. 2009), the U.S. Court of Appeals for the Federal Circuit clarified the penalty as applying *per article*, not per decision. The Federal Circuit acknowledged that a per article penalty may encourage "'a new cottage industry' of false marking litigation by plaintiffs who have not suffered any harm." *Id.* at 1303. However, the court further opined that a penalty of "*not more than $500*" would guard against "disproportionately large penalties for small, inexpensive items produced in large quantities." *Id.* at 1304. This, unfortunately, has not proved to be true.

In *Pequignot v. Solo Cup Company*, the Federal Circuit held that products marked with an expired patent number may constitute false marking, but a plaintiff must still prove that the false marking was done with the intent to deceive the public. A rebuttable presumption of intent arises from a false marking paired with knowledge of the falsity. In *Pequignot*, Solo successfully rebutted the presumption by providing credible evidence that it did not leave the expired patent numbers on its products to

deceive the public, but did so in good faith reliance on the advice of counsel and to reduce costs and business disruption as it phased out the products that referenced the expired patents.

In *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321 (Fed. Cir. 2010), the Federal Circuit considered whether an individual plaintiff had standing to bring a false patent marking lawsuit. The court reaffirmed that Section 292, which provides that "[a]ny person may sue for the [$500 per article] penalty, in which one-half shall go to the person suing and the other to the use of the United States," is a *qui tam* statute. "[A] *qui tam* provision operates as a statutory assignment of the United States' rights, and 'the assignee of a claim has standing to assert the injury in fact suffered by the assignor.'" *Brooks Bros.*, 619 F.3d 1321, 1325. In other words, a *qui tam* plaintiff can establish standing merely by alleging that the United States has suffered an injury in fact that is causally connected to the defendant's conduct.

As a result of the Federal Circuit's decisions in *Bon Tool*, *Pequignot* and *Brooks Brothers*, false patent marking lawsuits have become financially enticing for opportunistic plaintiffs and their counsel, and the obstacle of establishing standing has been more easily overcome. This, in turn, has caused the number of patent marking claims to multiply exponentially.

OVERVIEW OF THE FALSE MARKING PROVISION IN THE PENDING PATENT REFORM ACT OF 2011

To guard against the continued flood of patent marking lawsuits, Congress proposed the Patent Reform Act of 2010. The 2010 bill was the first piece of legislation to propose an amendment requiring *qui tam* plaintiffs to allege a competitive injury resulting from the alleged false patent marking. Additionally, the proposed reform provides for the application of the bill to all cases pending at the date of enactment. This provision would eliminate standing in already-filed cases in which plaintiffs failed to allege a competitive injury.

Although the 2010 bill failed to pass, Senate Judiciary Chairman Patrick Leahy remained an undeterred proponent of patent reform. Leahy recently introduced the Patent Reform Act of 2011, which proposes the same key provisions as the 2010 bill: Section 292 plaintiffs would be required to allege a competitive injury, and, if enacted, the bill would apply to all cases pending as of the date of the bill's enactment. Proponents of patent reform were recently encouraged when the Senate Judiciary Committee passed the Patent Reform Act of 2011 and sent it to the Senate floor for consideration.

PREVENTING PATENT MARKING CLAIMS

Until Congress passes a patent reform bill that requires Section 292 plaintiffs to allege competitive injury, virtually anyone can bring a false patent marking lawsuit against a product manufacturer. To avoid becoming a target of such a claim, product manufacturers and their counsel can take the following preventative measures:

- **Consult with Counsel Regarding Patent Marking Policies**

Companies that mark their products with patent numbers should consult with counsel regarding their patent marking policies. This is particularly important for manufacturers of mass-produced consumer goods, as those products seem to be the target of opportunistic plaintiffs attempting to reap a financial benefit from filing false patent marking lawsuits.

- **Maintain a Patent Inventory**

Product manufacturers should maintain a list of patents that are applicable to each product they manufacture and send to market. Maintaining a current list of the patents and their respective expiration dates allows a manufacturer to effectively monitor the status of patents, and will facilitate efforts to remove expired patents from products.

- **Remove Expired Patents from Products**

Expired patents should be promptly removed from products. To the extent that the removal of expired patents is delayed or completed in phases, companies should document the good faith or business-related reasons for the delay. As in *Pequignot*, such documentation will help the company rebut the presumption that the expired patents remained on the products in an attempt to deceive the public.

- **Avoid Marking a Product with Multiple Patents that May or May Not Cover the Product**

A product should only bear applicable patents. If a company is unsure whether a patent applies to a particular product, the company should seek the opinion of counsel. A false marking plaintiff may attempt to show that the inapplicable patent is demonstrative of the manufacturer's intent to deceive. The manufacturer will be better able to defend against the plaintiff's claim if it possesses a formal opinion concerning the applicability of the patent to the product at issue.

- **Ensure Patents on Redesigned or Modified Products are Still Applicable**

If a manufacturer redesigns or modifies a product, it should also evaluate whether the patents that were marked upon the original product still apply to the redesigned/modified product and its packaging. Any inapplicable patents should be removed.

- **Remove Unowned or Disclaimed Patents from Products**

If the manufacturer sells or disclaims a patent, the patent should be promptly removed from the products on which the patent appears. Additionally, the manufacturer should document the sale or disclaimer of a patent in the company's patent inventory.

CONCLUSION

With its decisions in *Bon Tool*, *Pequignot* and *Brooks Brothers*, the Federal Circuit has unfortunately opened the floodgates for patent marking claims. While the political climate may be ripe for patent reform efforts, the passage of patent reform legislation will take time and is not guaranteed. Product manufacturers should therefore take preventative measures to ensure that each product they sell bears current and appropriate patents. Paired with the manufacturer's reliance upon counsel who is knowledgeable in this area of law, such efforts could ultimately spare your company or client from a large exposure.

Shawn M. Raiter is a partner at Larson • King, LLP in St. Paul, Minnesota. He focuses his practice on class action, mass tort and business litigation. He is recognized in The Best Lawyers in America *and has been named a "Super Lawyer" by his peers in* Minnesota Law & Politics *every year since 2004. Shawn has tried cases to verdict in state, federal and administrative courts and has argued cases before numerous appellate courts.*

Sarah E. Madsen is an associate at Larson • King, LLP in St. Paul, Minnesota. She focuses her practice in the areas of complex commercial, products liability, and financial services litigation. She has represented clients in a wide variety of complex civil litigation disputes, and has appeared in matters venued in state and federal courts throughout the United States.

PROACTIVE, LONG-TERM CORPORATE CRISIS MANAGEMENT

THE HUNTER, THE OSTRICH, AND THE SPIN MASTER

Neil A. Goldberg and Colleen M. Murphy
Goldberg Segalla LLP

PROLOGUE

With a "hunter, an ostrich, and a spin master" in the title, you may think that an Aesop's Fable awaits. This story has all of the elements of those timeless fables: unforgettable characters, a good scare, and an important lesson. Unlike Aesop's Fables, this tale takes place in the present-day world of a corporate manufacturer striving to combat crisis events which have gathered media and social media attention. Administrative agency inquiries, scientific papers, or a catastrophic accident can all become catalysts for crisis events.

OUR STORY'S SETTING: A TREACHEROUS LITIGATION ENVIRONMENT

We find our main characters, the ostrich, hunter and spin master set in a treacherous litigation environment, which favors plaintiffs. The plaintiffs' bar is now armed with unprecedented access to corporate information as a result of concerted, organized efforts to foil protective orders and confidentiality agreements. Manufacturers can no longer reasonably expect that their corporate documents will only be disclosed within the context of a single case, protected under confidentiality orders. Document packages are now published and sold by plaintiffs' counsel and other so-called "public-access" corporations, foundations, or organizations funded by the plaintiffs' bar.

A surplus of plaintiffs' lawyers has made a negative impact on the corporate environment. Judges in the new legal environment face heavy dockets, and may not engage in the sophisticated analysis called for by the complex legal issues raised by product liability cases.

OUR SUPPORTING PLAYERS: DISAFFECTED JURORS PLAY A KEY ROLE IN THE NEW TREACHEROUS LEGAL ENVIRONMENT

In today's treacherous legal environment, there is one standout – the disaffected juror. This "new class" of potential jurors has been displaced by economic chaos. Unemployed and bitter jurors contribute significantly to the volatility of jury verdicts. With time on their hands, they frequently access social media channels such as Facebook, LinkedIn, Twitter, YouTube, blogs and websites. Through these sites, they learn about and react to allegedly improper corporate conduct, large legal verdicts, punitive damages and settlements. They form negative opinions based on blurbs and sound bites without considering the corporation's side, and are ready to "stick it to" the corporation.

OUR CAST OF CHARACTERS: THE HUNTER – THE PLAINTIFFS' BAR

In the wild, the hunter often prevails by stalking, distracting, confusing, or exhausting its prey. As the hunter of prehistoric times learned that hunting in a group often was more successful, so too have today's plaintiffs' lawyers joined groups to prosecute their clients' interests.

Today's legal hunters engage in sophisticated and stealth techniques to bag their prey. Plaintiffs' attorneys now establish and jointly finance pro-plaintiff research. They may also lobby to place sympathetic representatives on quasi-public product-standards committees and sponsor quasi-scientific product studies. The hunters' tactics mold public opinion, including through the use of social media, against a corporate defendant long before the trial.

THE OSTRICH – THE CORPORATION

Corporate America has traditionally defended itself only in the courtroom, not in the media. Corporations confronted by the media and social media do not fare well when they employ the ostrich-like response of burying their heads in the sand. This approach is often viewed by potential jurors as a silent admission.

Timely, adept and strategic use of the media and social media can prove extremely helpful to Corporate America. Rather than playing the ostrich, corporations may instead take swift proactive measures and reap the potential benefits of making their position known in the public forum.

THE SPIN MASTER – MEDIA LIAISON

The spin master is the person who works with corporate counsel to navigate the corporate manufacturer through the treacherous areas of media and social media attention and product liability litigation. The spin master must be aware of, but detached from, the corporate self-perception and denial that often limits the objectivity of the typical corporate officer. He or she must also be fully informed of all aspects of product development and manufacture, have a talent for formulating long-term goals, and be extremely media and social media savvy and a manufacturer should hire someone highly experienced in dealing with the media and social media in crisis situations.

BLUEPRINT FOR DISASTER

A manufacturer faced with a product liability claim which reacts hastily and without a long-range strategy, is drafting a blueprint for disaster. For example, a corporate representative may issue a knee-jerk statement, post, or blog, that proves later to be misleading or untrue. Like the ostrich, the representative may instead refuse to comment when a comment is appropriate and necessary. The media and/or users of social media will seize upon the opportunity to spread unfavorable publicity and will not let go until the damage is done.

DEVELOPING A POSITIVE GAME PLAN ASSISTED BY COUNSEL AND THE SPIN MASTER

The fundamental goal of a manufacturer faced with managing a crisis and/or defending a product liability action ought to be developing a strategy that projects the corporate image in a positive way and that has the effect of influencing the very people that will sit in judgment of it.

A Corporation Must be Prepared for a Crisis.

1. Well before the crisis hits, a corporation should have a formal crisis-management plan.
2. A crisis-management plan should address a corporation's long-term interests.
3. A crisis-management plan should rapidly produce the technical information necessary to understand the problem with a manufacturer's product, and to distill that information to simple components. A well-structured document retention and retrieval program is esential.
4. A crisis-management plan should identify a core crisis management team.
5. A crisis-management plan should identify key crisis scenarios and the responses.
6. The corporation should engage in a mock crisis response.
7. The corporation must engage in online monitoring of the corporation's image and brand, and use media and social media to create a favorable image.

Executing the Crisis-Management Plan.

1. The corporation should seek to control the crisis.
2. The corporation should collect and analyze facts and proactively communicate its findings as warranted through media and social media channels both internally and externally.
3. The corporation should express concern as deemed appropriate by counsel and the crisis management team.

After Resolving the Crisis.

1. The corporation will learn from its mistakes.
2. The corporation will make changes as warranted and communicate those changes to the public through media and social media.
3. The corporation will revise the crisis-management plan.

APPLYING THE GAME PLAN

The preceding discussion sets forth general guidelines for drawing up a game plan for corporations facing potential crises. What follows are the steps that corporations should consider in implementing the guidelines using a hypothetical scenario.

Suppose the following situation. A disgruntled employee of a regional manufacturer of a popular beverage has been linked to the deaths of three consumers who drank a bottle of the beverage that was intentionally tainted. The cause of the deaths and the name of the employee have been identified, and a major media and social media onslaught is underway. The crisis-management team, guided by counsel and fronted by the spin master, is prepared to proceed with a well-planned and finely tuned course. Here is what the team will do:

- Counter all negative media reports, social media attacks and potential legal claims aggressively while preserving the established, trusted reputation of the company.
- Utilize social media proactively including appropriate posts to the company's website, blogs, YouTube, and its Twitter followers, LinkedIn and Facebook.
- Present the company as fully responsive, forthright, and communicative.
- Demonstrate genuine concern and compassion for those impacted.
- Emphasize that the event arose out of unanticipated criminal behavior.
- Specify the immediate steps that the company has taken to ensure absolute safety to consumers of the product.
- Address issues in a straightforward manner.
- Prepare public statements and social media responses carefully that not only pass legal muster but that demonstrate warmth, involvement, and concern.
- Anticipate future developments and prepare additional public statements.
- Schedule one or two well-planned, public appearances by the company's president or chief executive officer to issue a statement in the place of the spin master or other spokesperson, to demonstrate concern and involvement at the highest levels. Post this appearance through all appropriate social media channels.
- Cultivate existing media and social media relations and forums and develop new contacts.
- Limit responsibility for answering questions from the press or in the social media to the spin master or designated spokesperson.
- Answer questions frankly to the extent appropriate: an answer of "I don't know" is preferable to an inaccurate, off-the-cuff response.
- Reinforce the company's pride in the product and its confidence in recommending the product to the public upon the prompt resolution of the crisis.
- Educate employees fully with respect to the relevant facts so that they are accurately informed in the event that they are presented with questions from the outside.
- Educate the employees regarding what they may and may not say in social media channels.
- Step back and reexamine the progress of the crisis management at established intervals to ensure that long-range goals are being met.
- Document all stages of the crisis management fully and designate a particular officer or employee as custodian of relevant records, and social media posts.
- Learn from the crisis so that even more effective crisis control policies and procedures are in place for the future.
- Make appropriate changes as a result of the crisis, and if warranted make the changes known through the media and social media.

These specific steps are based on fundamental guiding principles and may be adapted to any variety of product liability situations. The key is to establish an effective crisis-management team and plan *before* a crisis develops. A corporation should have its counsel study and understand the particular qualities of the product at an early stage. Counsel should anticipate a range of potential liability situations, assist in the selection and grooming of a spin master, and put into place a comprehensive crisis-management program.

It is only with such foresight that a manufacturer can be assured of a competitive place in an increasingly hostile world of media and social media attacks, product liability litigation, and runaway punitive damage awards. The hunter is here to stay and is growing hungrier and cagier. With good counseling, the corporate ostrich will become a thing of the past.

Neil A. Goldberg, is past president of the DRI and a past chair of its Product Liability Committee. He is also a past president and board chairman of the Lawyers for Civil Justice, the past chair of the New York State Bar Association's Products Liability Committee, a member of the Board of Directors of USLAW NETWORK and is on the Advisory Board of the Bureau of National Affairs' Product Safety & Liability Reporter. Mr. Goldberg is a founding partner of Goldberg Segalla LLP in Buffalo, New York.

Colleen M. Murphy, is a partner at Goldberg Segalla, LLP, in Buffalo, New York, where she confines her practice to product liability and professional liability defense.

THE DEPUTIES IN YOUR CUBICLES:

FEDERAL LAWS CREATE NEW WHISTLEBLOWER BOUNTIES AND PROTECTIONS

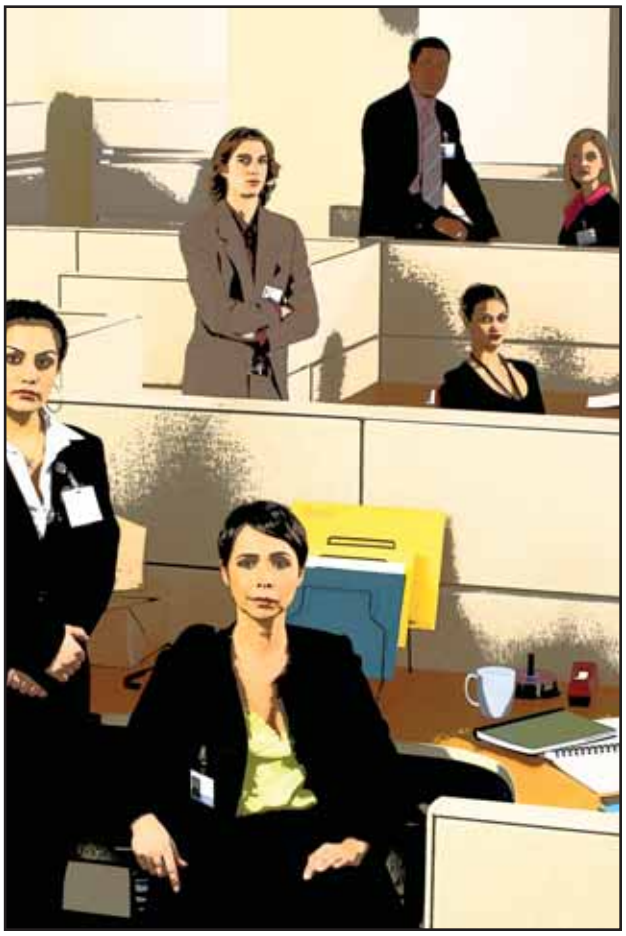
Jonathan J. Wegner and Kelli P. Lieurance Baird Holm, LLP

The federal government has been hanging "WANTED" posters across corporate America, and the face on it may be yours.

Two recently passed laws expand or create new whistleblower protections, adding to the already extensive array of whistleblower laws that impact U.S. companies large and small. The Dodd-Frank Wall Street Reform and Consumer Protection Act alone includes five separate provisions that expand or fortify existing whistleblower rules, two of which promise bounties to employees and other associated parties for turning their suspicions of noncompliance with federal law into federal lawsuits. Several of the Dodd-Frank provisions are already effective, although regulations are in the works to clarify how some of the provisions will be interpreted by federal agencies.

Similarly, the FDA Food Safety Modernization Act includes new whistleblower and anti-retaliation provisions that apply to any "entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food." The anti-retaliation provisions protect any employee of a covered entity who provides to its employer, the federal government, or a state attorney general any information that the employee reasonably believes constitutes a violation of the FSMA, or otherwise assists in an effort to bring forward acts that the employee believes violate the FSMA.

Although these new rules technically are limited to food companies, SEC-reporting companies, financial services companies and companies that receive government contracts or reimbursements, the extremely broad classes of potential whistleblowers under these provisions likely will cause most covered companies to require their vendors and contractors to undertake appropriate protective compliance measures. The trickle-down effect could be similar to that which occurred throughout corporate America after the Sarbanes-Oxley whistleblower provisions were implemented. To that end, we have been advising employers—whether expressly covered by the new rules or not—to undertake a comprehensive review of their corporate ethics program and anti-retaliation policies so that they are in line with industry best practices.



Perhaps the most surprising change among the various new whistleblower provisions is the amendment of the Securities Exchange Act to establish a bounty program that encourages whistleblowers to take complaints directly to the Securities and Exchange Commission. Under these provisions, any employee who voluntarily provides original information about a violation of the securities laws that leads to a conviction or enforcement action resulting in sanctions of more than $1,000,000 would be entitled to an award of between 10 percent and 30 percent of the monetary sanctions collected. Claims that could potentially surpass this liability threshold would include claims pertaining to insider trading, market manipulation, making misleading disclosures or payment of bribes in foreign countries. The powerful inducement to report potential claims could result in employees declining to utilize the reporting, legal, audit and other compliance functions developed by companies in accordance with SOX and general good governance practices.

The SEC released proposed rules to implement the bounty program in November, and the industry comments to the proposal illustrate how potentially damaging covered companies view the new framework. As one commenter politely put it: "We are concerned… that an unintended consequence of these new incentives will be to weaken existing internal compliance and ethics programs that have contributed to advancing these same goals." In an attempt to address this concern, the rule allows a potential whistleblower to first provide information to the employer's legal or compliance personnel and preserve whistleblower status, so long as information is then provided to the SEC within 90 days.

While this 90-day window may afford an opportunity to conduct an internal investigation, it presents numerous issues for employers. First, it is highly questionable as to whether an employee would risk losing a potentially large monetary award by adhering to corporate procedures. Moreover, if allegations involve complex facts requiring further investigation—as is common in cases involving securities laws—the 90-day window may be insufficient for companies to conduct an appropriate investigation. Even if employees utilize corporate compliance programs, the whistleblower still could disclose potential violations to the SEC if the employee does not agree with the internal investigation's conclusions.

Although the proposed rule would exclude certain compliance personnel from participating in the bounty program, such employees would become eligible to receive awards if the employer's compliance program fails to lead to an appropriate response to violations, including if the company fails to disclose the potential violation to the SEC or it acts in "bad faith." This "bad faith" standard potentially could result in compliance personnel second-guessing the results or integrity of an internal investigation, creating additional complexities for corporations seeking to develop appropriate compliance programs.

Other provisions of the Dodd-Frank Act expand or fortify existing whistleblower rules and protections as follows:

- Employees whose activities are covered by the Commodities Exchange Act may participate in a whistleblower bounty program similar to that established by the SEC and will be protected by comparable anti-retaliation provisions.
- Employees who perform "tasks related to the offering or provision of a consumer financial product or service" that is regulated by the new Bureau of Consumer Financial Protection are protected from retaliation for whistleblowing.
- Employees of private subsidiaries of public companies are eligible for whistleblower bounties and protections.
- The False Claims Act is amended to clarify that an "employee, contractor, or agent or associated others" are eligible whistleblowers for purposes of bounties awarded and protections afforded under the FCA. Exactly who might qualify as an "associated" whistleblower is unclear, but the amendment is intended to expand the potential universe of whistleblowers who might bring an FCA claim.

Finally, as noted above, the FDA Food Safety Modernization Act establishes whistleblower protections for food-industry employees. The whistleblower provisions of the FSMA became effective in January. Given its sweeping nature and broad protections, all food industry participants should consider adopting strong whistleblowing and anti-retaliation policies and consider appropriate management training with regard to both the prohibition against anti-retaliation and how to avoid the appearance of retaliation to avoid frivolous lawsuits.

In light of these significant changes, now is the time to begin a companywide review of corporate ethics and compliance policies to address allegations and concerns raised by whistleblowers and to ensure an anti-retaliation mentality is ingrained in your corporate culture. Programs should include the following:

- A core code of conduct and ethics program that is short, readable, culture-specific and incorporates not only legal requirements but also organizational expectations and procedures for reporting concerns.
- A master policy or separate policies as needed for compliance with applicable laws and regulations. The policies should:
  - Evaluate the applicability of rules and regulations and incorporate necessary items in the company's code of ethics, operating policies, committee charters, employee manuals.
  - Establish protocols, reporting channels, staffing, response teams and management/oversight responsibilities.
  - Include training standards and provide for periodic employee updates and reviews.
  - Account for geographic, cultural and linguistic differences among participants.
  - Provide for periodic reporting to the company's audit committee and full board of directors.
- A detailed plan for a companywide release of the programs and policies.
- Methods for monitoring performance and periodically surveying employees to determine effectiveness.

Implementing appropriate whistleblower and anti-retaliation policies is necessary not only to ensure compliance with laws but also to protect your company and yourself from the reputational harms that can result from whistleblower allegations. The government's increasing reliance on whistleblowers to ensure compliance coupled with the powerful new inducements for employees to become whistleblowers counsel in favor of developing proactive policies now to respond to potential problems down the line.

EXECUTIVE SUMMARY

Recently enacted federal laws establish whistleblower bounties, fortify anti-retaliation rules and expand the universe of persons eligible to qualify for whistleblower awards and protections. Employers affected include all public companies, companies that receive federal payments and reimbursements, and companies engaged in the food industry and the consumer financial services industry.

ACTION ITEMS AND BEST PRACTICES

- Establish or update your organization's core code of conduct and ethics program. This should be a short, culture-specific program that incorporates not only legal requirements but also organizational expectations and procedures for reporting concerns (i.e., whistleblowing).
- From the core ethics program, develop a master policy or separate policies as needed for compliance with applicable rules (e.g., Sarbanes Oxley, SEC and stock exchange rules, the Federal False Claims Act, federal banking regulations, Federal Sentencing Guidelines, Department of Labor standards, Equal Employment Opportunity regulations, state laws, audit standards).
- Programs should cover (i) both domestic and international operations and (ii) both financial and non-financial allegations.
- Revisit and reinforce SOX compliance programs, use of the company's whistleblower hotline and board oversight.
- Implement or update anti-retaliation policies to comply with the new rules and regulations.
- Train human resources and compliance personnel to identify potential violations covered by whistleblower provisions.
- Develop an internal investigation plan. Designate and train personnel on procedures for conducting investigations.
- Monitor current regulatory developments and update policies to respond to changes.

Jonathan J. Wegner is a member of the Banking and Financial Transactions Law Group of Baird Holm, LLP, and has worked with public companies and financial institutions to develop a variety of regulatory compliance programs.

Kelli P. Lieurance is a member of Baird Holm's Labor, Employment and Employee Benefits Law Group and regularly represents employers with respect to labor relations and employment matters, including personnel policies and preventive planning.

HOW TO USE SOCIAL MEDIA TO WIN YOUR CASE

Peter H. Christensen and Kathryn Tunacik Smith
Strong & Hanni, PC

Your adversary in litigation may be posting information online that could help you win your case. Social networking websites such as Facebook, Twitter, and MySpace have exploded in popularity in the past several years. Every month Facebook users post 30 billion pieces of content, such as comments, photos, videos, news stories, and web links. Ninety-five million short messages or "tweets" are posted every day on Twitter. For example: "I had such a great run this afternoon. 5 miles today. I'm going to go for 6 miles tomorrow." This tweet would be a key piece of evidence to an attorney defending a personal injury case where the plaintiff claims he can no longer run due to his injuries.

There is a good chance that many of your opponents are users of social media. They may be posting information that could make your case. Often a user's information is publicly available and can be accessed by anyone with an internet connection. Even though a Facebook user can limit access to a list of other approved users, courts are increasingly granting access to "private" social media accounts.

HOW IS SOCIAL NETWORKING DATA RELEVANT?

The basic information many Facebook users share includes relationship status, employment information, educational background, religious affiliation, political views, hobbies and interests, address and phone number, and web links to the user's other websites or blogs. Beyond this basic profile content, Facebook users post photos, videos, and comments on a myriad of topics ranging from where they go on vacation to the jobs they have and the status of their health. This content can be relevant, admissible evidence in many types of cases.

Personal Injury Cases

In personal injury cases the extent or existence of a plaintiff's injuries is often disputed. Dishonest plaintiffs may post photos or videos online that contradict their injury claims. Personal injury plaintiffs who claim they are unable to do the activities they once enjoyed may post photos or publish comments that reveal that their claims are exaggerated or simply untrue. A defense attorney who knows how to search Facebook might find photos of a plaintiff lifting his child high in the air or playing golf. Where the same plaintiff alleges that the disputed accident caused him to sustain permanent, severe back injuries, the photos may defeat or significantly diminish the value of his personal injury case. In these cases, mining social networking websites for information can take the place of hiring a private investigator to conduct surveillance.

In a recent Federal District Court case in California, the plaintiff claimed that after the accident at issue, his life was constantly "hell on earth."[1] Yet, in one MySpace comment he wrote that painting is "a frustrating activity when his arm hairs would get caught in paint." This post was written after the accident in the present tense, leading the court to conclude that the plaintiff actually could engage in activities he claimed the accident had precluded him from doing. Painting was on the plaintiff's list of activities that were adversely affected by the accident. The court agreed that the plaintiff incurred some general damages attributable to the accident, but found that the evidence—including his online postings about painting—belied his claim of constant pain and rendered his testimony regarding the extent of his pain not credible.

Sexual Harassment Cases

Information on a social networking website can also be useful in defending sexual harassment cases. A Federal District Court case in Indiana granted the defendants access to portions of two plaintiffs' Facebook and MySpace communications because the plaintiffs claimed they had experienced "depression and post traumatic stress" as a result of sexual harassment.[2] The court found that photos posted by the plaintiffs were discoverable because they might reveal the defendants emotional or mental status.

Social networking content can also help to defend a sexual harassment case where the party who was allegedly harassed by coarse language or distasteful behavior has posted comments using the same language or photos depicting the same type of behavior that he or she has alleged were unwelcome in the lawsuit.

In divorce cases, a party may be able to defeat a claim for alimony by proving through social media content that the spouse demanding alimony is cohabitating with another person.

Rule 26 of the Federal Rules of Civil Procedure governs the scope of discovery and its limits. The Indiana sexual harassment case articulated limits to the discoverability of social networking communications in light of claims related to emotional and mental health. The court held that social networking website content is not shielded from discovery simply because it is "locked" or "private" and that social networking site content must be produced when it is relevant to a claim or defense in the case. However, the court also held that the plaintiffs' allegations of depression, stress disorders, and like injuries did not automatically render *all* social networking communications relevant. The court articulated several guidelines tailored to the specific allegations in the case. Plaintiffs' counsel was directed to produce all content responsive to the defendants' discovery requests that fell

Other courts have been more permissive and have not limited the scope of social networking information that must be made available to defense counsel. A trial court judge in Pennsylvania ordered a personal injury plaintiff to provide his Facebook and MySpace user names and passwords to counsel for defendants and directed that counsel could have "read-only" access to the entirety of the plaintiff's accounts.[3] The court also ordered that the plaintiff not delete or alter existing information or posts from the accounts.

There are innumerable ways that social networking content can become the key evidence that wins your case, but the strategy for obtaining the information can be a tricky process.

HOW TO GET THE INFORMATION

There are strategic considerations to make when requesting the information directly from litigants. The following steps address the key considerations:

1. Determine whether any social networking information is publicly available and gather the publicly available data before making a request directly to the opponent.
2. Consider the best time to make the request.
3. Prevent existing data from being lost or deleted.
4. Get a court order compelling production of the information.

First, Get Publicly Available Content

Depending on each user's privacy settings, some information is available to any person with an account on the particular website. On Facebook, a user can customize the privacy settings to allow groups of friends to view certain content while restricting the content from other friends. The user can restrict content to a network of users, such as other users who went to their high school or college. Some users make basic profile information publicly available but restrict photos and comments.

To find publicly available information on your opponent in litigation, the best place to start is often by Googling the person's name. If the party has an uncommon name or an unusual spelling, you will frequently find links to that person's online profiles. A Google search can provide links to the person's social networking profiles, blogs the person publishes or to which he contributes, news stories about him or on which he has commented, or countless other websites that either reference that person or that are written by him.

It can also be helpful to search for the person's name in individual websites' search engines. In Facebook, the majority of users have some basic information such as a name and photo publicly available. Only registered Facebook users can conduct searches using Facebook's own search engine. When a search is conducted in Facebook, the results are prioritized by the searcher's own information. Thus, when a registered user in Salt Lake City, Utah who attended the University of Utah searches for a John Doe who also lives in Salt Lake City and attended the University of Utah, that John Doe will be at the top of the search results. Other John Does will show up lower on the list of matches. It is also possible to filter search results by various identifiers such as location, school, or workplace.

If your opponent's social networking data is publicly available, simply save the relevant information as PDF documents. Bookmark the websites and periodically check them for new information.

Strategically Time your Request

Search engines will not conclusively reveal whether a particular individual has an account on the website in question. Some people use aliases and other people have common names that make them difficult to find. If social networking data on your opponent is not publicly available, or if you cannot determine whether the individual has any social networking accounts, you will have to ask for the information from the party.

Some attorneys ask whether a party uses any social networking websites in their first set of interrogatories and request copies of the data in their requests for production of documents. The best timing for such requests depends on the nature of the case. In some cases it is better to wait until after taking the party's deposition to ask about social networking. The party being deposed will then have already detailed his claims and there is a better chance that social networking data can later be used for impeachment purposes.

Make Sure Information is Preserved

Plaintiffs and defendants have a duty to preserve evidence when they learn that the materials are relevant to an investigation or litigation. The requesting attorney should, at the least, remind his opponent of his duty to preserve evidence when he makes a request for social networking data. Consider petitioning the court for a "freeze" order compelling the party to preserve the information. You can also directly contact the websites to request that content a user deletes is preserved by the website.

Get an Order Compelling Production

If your opponent will not voluntarily provide the social networking data requested, move the court for an order compelling the party to produce the requested documents. Motions to compel discovery of social networking content have been successful in several courts.[4] These courts have found that there is no expectation of privacy in the posting of Facebook and MySpace information, even when the user limits access to selected online friends.

You may consider subpoenaing the information directly from the website in question, but you will likely run into difficulty. Facebook has interpreted the Stored Communications Act, 18 U.S.C. § 2701 et seq., as prohibiting them from disclosing the contents of a user's Facebook account to any non-governmental entity even pursuant to a valid subpoena or court order. They have had some success defending this position in court. The better approach is to get an order compelling the individual user to produce the information or give authorization for the information to be released from the website.

An order for the plaintiff to turn over his user name and password may go further than necessary. This order is akin to ordering a homeowner to turn over the keys to his house rather than simply to make the property available for inspection. Instead, courts can order parties to produce printed copies of the websites' content. Courts can also order parties to allow opposing counsel access to their social networking websites by adding the attorneys as "friends."

Recently Facebook has provided an option for users to download a compressed file of their entire history of Facebook activity. The compressed file contains PDF documents of every piece of content the user has posted. Courts can order production of Facebook content by ordering users to produce their account history files. Parties can then be required to periodically supplement the disclosure with updated files as the case goes on.

Beware of the temptation to become an opponent's fake online "friend," as this action would likely violate the rules of professional conduct prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. The New York City Bar Association's Committee on Professional Ethics issued an opinion specifically prohibiting actions such as creating a false Facebook profile for the purpose of making a friend request to an opponent.

CONCLUSION

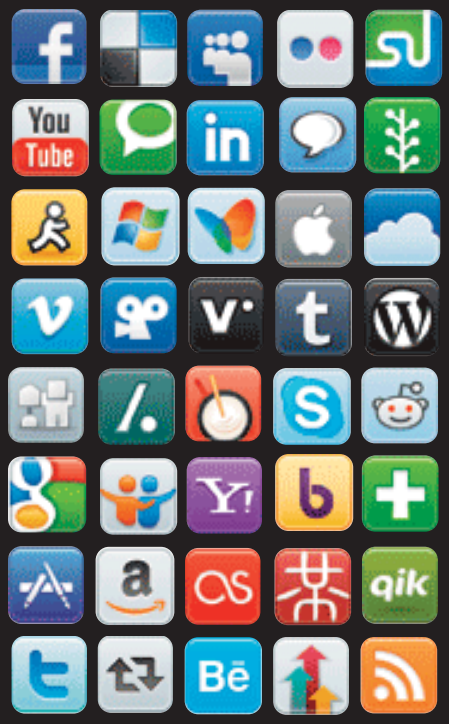
Social networking websites are growing by hundreds of thousands of users per day. Savvy attorneys recognize the value of the information opposing parties are posting online and use it to the advantage of their clients.

Peter Christensen is a partner at Strong & Hanni in Salt Lake City, Utah. His practice concentrates on transportation and construction law cases. Peter has successfully defended insurance companies and their insureds in hundreds of cases through settlement, mediation, arbitration, and jury trials.

Kathryn Tunacik Smith is an attorney at Strong & Hanni in the transportation group. She holds a J.D. from the University of Utah and a B.S. from Indiana University.

[1] Sedie v. United States Postal Serv., 2009 U.S. Dist. LEXIS 113206 (N.D. Cal. Nov. 19, 2009).
[2] EEOC v. Simply Storage Management and O.B. Management Serives, Inc., 270 F.R.D. 430 (May 11, 2010).
[3] McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).
[4] See i.e. McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty Dec LEXIS 270 (September 9, 2010) ; Bass v. Miss Porter's School, 2009 U.S. Dist. LEXIS 99916 (D Conn, October 27, 2009); Ledbetter v. Walmart Stores Inc., 2009 U.S. Dist. LEXIS 126859 (D Colo, April 21, 2009); Romano v. Steelcase Inc; 2010 NY Slip Op 20388 (September 21, 2010).

E&O LOSS CONTROL FOR INSURANCE AGENTS AND BROKERS USING SOCIAL MEDIA



Colleen M. Murphy Goldberg Segalla LLP

Social media networking is expanding the ways in which insurance agencies and brokerages do business. The question no longer is "whether" an agency or brokerage will become involved in social media networking, but "when" and "to what extent." What follows is what we, as E&O attorneys see as the E&O exposures associated with social media networking, along with suggested E&O loss control tips.

E&O RISKS FROM USE OF SOCIAL MEDIA

- From taking advice/transactions out of normal agency processes
- Incorrect advice; misrepresentation of policy terms
- Business defamation; trade libel
- Negligent referrals
- Posting customer's private information on the social web
- Advertising liability

GENERAL E&O RISK MANAGEMENT TIPS

1. Have a social media policy guide that all employees understand and adhere to.

- A written social media networking policy should be designed to guard against your employees making false or unsupported claims about your own products or services that may be mistakenly relied upon by potential customers. These types of comments can lead not only to disgruntled customers, but suits based on false and misleading advertising or even consumer fraud.
- Make it clear that confidential or proprietary information about the company or its customers or insurers is not to be disseminated or discussed in social networking sites or blogs.
- Make clear that social networking sites related to a company's business should never be used for personal business or inappropriate reasons.
- Prohibit employees from making inappropriate comments about co-employees and supervisors.
- Insurance agency and brokerage staff should be trained regarding the social media networking policy.

2. Use standard disclaimers on social networking sites where possible such as:

"The ABC Agency cannot bind or alter coverages or accept reported claims via social networking. Further, the information provided is intended for general situations and questions relating to specific coverage should be discussed using the agency's regular workflows. Please contact a licensed agent directly."

3. Establish with the customer upfront how your agency does business including who and how the customer should contact you for their insurance needs.

4. If customer activity does occur through a social media platform, it should be documented in the agency management system.

TAKING ADVICE/ TRANSACTIONS OUT OF NORMAL AGENCY PROCESSES

Example: Social networking account used to communicate answers on customer applications.

Example: Customer notifies agency of a claim via a social networking account.

Example: Customer requests via social networking account—

- A change in coverage or limit;
- An additional insured be added;
- A certificate of insurance be issued.

Employees should know when to move from social web and into the agency's normal business workflows and how to communicate this to customers.

- Social contact to prospect
- General insurance topics to specific topics of individual or business

MISREPRESENTATION/ INCORRECT ADVICE

Example: Agent offers advice on co-insurance during blog exchange — someone sues alleging incorrect advice

- Venue doesn't matter — Best Practice remains the same
  - E-mail
  - Chat Room
  - Blog
  - Twitter
  - Phone Call

Risk Management Key:

- Establish clear agency direction on when to take the exchange "off-line"
- Document this direction in the Agency's social media policy, and communicate to all agency personnel
- Post disclaimers wherever technology permits

NEGLIGENT REFERRAL

Example: Agency blog lists or links to a vendor name for a wellness service provider, tax preparation service, or other services

Exposure: Allegation of damages resulting from inadequate services and that agency was negligent in making the referral

Risk Management Key:
- Best Practice: Don't recommend or link
- If you must, then at minimum provide two vendor names/choices
- Obtain prior written permission from vendor

BUSINESS DEFAMATION AND TRADE LIBEL

Business defamation and trade libel are business torts that have been around for as long as businesses have competed. With the dawn of the Internet and, more recently, social networking sites, these torts (sometimes referred to as "cyber slander" or "internet disparagement") have become of more concern for many businesses that have employees utilizing Twitter, Facebook, LinkedIn and company sponsored blogs for business and personal uses.

Information you or your employees post on social networking sites is transmitted instantly and can be redistributed to other sites worldwide without your knowledge. Once posted, your information can remain on the social web forever. In addition, social networking sites encourage more casual discussions that in the pre-Internet days may have been confined to the office water cooler. These casual conversations are not suited to the business discussions surrounding insurance transactions and should not be published on the Internet.

Simply stated, business defamation is a false statement about a business, its products or services that interfere with the company's businesses relations through damaging or derogatory remarks about its products or services that cause customers of those products and services to look elsewhere.

Hypotheticals:
- In an effort to be competitive, an insurance agent blogs that "ABC insurance company doesn't pay claims," or
- Gets lured into this type of discussion by seemingly agreeing with another blogger that public adjusters inflate claims

E&O loss control starts with creating and implementing a social media policy as described above. The reasons for a written social media policy extend beyond just protection from business defamation claims. This type of policy can protect against employment discrimination claims, false or misleading advertising claims and the inadvertent disclosure of proprietary business information.

RELEASE OF PERSONALLY IDENTIFIABLE INFORMATION

It is of utmost certain that ALL private information of insurance agency customers, employees, etc., be kept off the social web entirely, particularly in light of the devastating potential consequences. Private information has been defined as "information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public." With respect to the social web this would include, but not be limited to, something as basic as the individual's home address and telephone number, as well as their medical records, insurance score and social security number.

Example: During blog exchange, someone posts to agent a file containing personally identifying information. The blog is not encrypted, the information is intercepted and identity theft ensues.

Exposure is high:
- Third Party Liability (may or may not be insured)
- First Party Liability fines/penalties (not insured)

Risk Management Key:
- Best Practice: Agency's written social media policy and security plan should clearly state that no personal identifying information is to be posted or transmitted via social networking
- Post appropriate disclaimer and privacy statements where the technology permits
- Anywhere personal identifying information is collected:
  - Comply with state and federal laws and regulations
  - If no applicable regulations, then encryption and firewalls and security plan (ACT is an excellent resource)

ADVERTISING LIABILITY

Insurance agencies and brokerages have contended with a host of regulations concerning advertisements that vary state by state. It is imperative that insurance agencies and brokerages follow these regulations when advertising on the social web. Consult state insurance department bulletins clarifying the department's position on insurance agencies and brokerages advertising on the web.

For example, The New York State Insurance Department issued Circular Letter No. 5 2001, which provides guidance for New York licensees who advertise on the web. New York insurance agents and brokers should read and heed the entire letter. The following provisions concern advertisements and compensation for nonlicensees:

> *"Internet advertisements for products or services of insurance companies, agents or brokers can appear in many forms, including banners, tiles, hypertext links, frames or embedded links. Such advertisements must be clearly delineated as such and are permitted to appear on the website of a nonlicensee even if it leads the consumer to, or is linked to a website where insurance solicitation takes place, as long as the advertisement or website does not include, or the advertisement is not framed by, recommendations, endorsements or promotions from the nonlicensee concerning the insurance products or services.*
>
> *Accordingly, a nonlicensee hosting such advertisements on its website may receive compensation calculated in any manner, including flat fees for such advertisements or fees that are based upon the amount of insurance business produced as a result of such advertisements. Advertisements that appear on the Internet are subject to all applicable existing statutory and regulatory guidelines and restrictions applicable to advertisements in any other medium."*

Based upon these directives, it appears that a nonlicensee, such as a trade association, etc., cannot place an agency's banner and/or a hypertext link to the agency on such nonlicensee's website. It must be labeled as an advertisement and cannot contain any endorsements, etc., from the nonlicensee.

CONCLUSION

Social media networking appears to be a wonderful new tool for insurance agencies and brokerages. Like any tool, it is important that it be used wisely. So long as agents and brokers consider the E&O exposures, they may avoid any downside to this quickly evolving way of doing business.

Colleen M. Murphy is a partner at Goldberg Segalla, LLP, in Buffalo, New York, where she confines her practice to product liability and professional liability defense.

Lessons Learned from a Decade of Coaching

Six Characteristics of Effective Leadership

Kevin A. Nelson Huddleston Bolen LLP

I began my second "career" in 2001, coaching high school girls' soccer at an age when most have already coached for a decade or longer. While I had a late start, I was able to use my training as a litigator to communicate with and motivate my team while I caught up with the tactical and strategic acumen of some of my peers.

This past season, I steered our team through a difficult schedule to its third consecutive state title (and a first-time national ranking). In the process, I became more contemplative about coaching, and how, just as I think being a lawyer made me a better coach, being a coach has made me a better lawyer and leader at work.

As a result, I've recognized six traits of effective leaders that I believe are applicable to any management situation and will hopefully make you a more dynamic leader.

1. LEARN THE GAME.

You don't have to be the next "Undercover Boss" and clean toilets or pluck chickens with the same degree of skill that your employees exhibit. But knowing and understanding their jobs and what you can reasonably expect from them in their job performance, is an essential first step to being an effective leader. I'm too old to have played organized soccer as a youth, but joined an adult league 12 years ago to better understand the game. I don't think I would appreciate either the physical effort or the mental demands on my players during a match as well as I do had I never played.

Just as importantly, get to know your employees personally. If you truly care about them (and hopefully you do) let them know by understanding their life away from work.

Similarly, while lawyers can't usually go to work in a client's store or factory to learn their business, we can better understand our clients and the current issues that are important to them through Google Alerts or similar tools. As lawyers, we can also take the time to occasionally visit our clients and tour their workplaces—free of charge. This will help us gain a very practical understanding of their work environments, needs, and challenges.

2. SET GOALS AND ASSESS YOUR PROGRESS.

Every year during the first week of practice I talk to each of my players about their goals for themselves and the team for the upcoming season. While I'm involved in the process, I ultimately let the team (particularly when there is strong leadership among the upperclassmen) set the goals. This process allows each team member to become invested in the goals that they and their teammates have set for themselves and help us reach them, regardless of how much playing time they get during a particular game.

At the end of the first week, we sit down as a team and construct a pyramid with easily measured or attainable goals as the foundation, building up to our ultimate objective. Each of the last two seasons the ultimate goal was not to win a state championship, but rather finish

the year undefeated (figuring, logically, that since the playoffs are "one and done" if we went undefeated, we would be state champs). While in 2009 we fell short of that goal, it was achieved in 2010.

Setting goals, and periodically assessing our progress toward obtaining them throughout the year, allows the team to evaluate itself and me and for me to assess our progress throughout the season. It also provides motivation at times when a lesser opponent or difficult game would otherwise put the team or me in a less positive mood. If we can evaluate a specific performance in light of the "big picture" then everyone tends to walk away with positives from what might have been a negative experience.

3. COMMUNICATE.

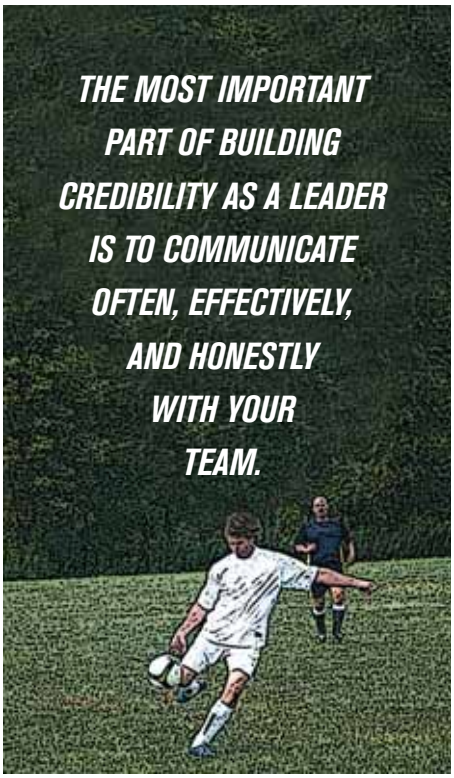
The most important part of building credibility as a leader is to communicate often, effectively, and honestly with your team. The goal-setting process gives structure to this and provides a built-in "excuse" for me to talk to everyone on the team one-on-one at least once a year, and for us to talk as a team several times during the year. Even when not part of a formal process, talk to your team members and tell them what they're doing well and what they're not doing well on a regular basis. All of one or the other will lead to the conclusion that you're either insincere or a jerk. Regular and honest communication is the foundation of motivation—if you don't know your players, and haven't had honest conversations with them, then when the time comes to have a heart-to-heart, either collectively or individually, you won't lose your audience—you'll never have one.

4. PLAN YOUR COMMUNICATION.

Think about what you're going to say before you say it. I am constantly amazed that lawyers, who are in one form or the other almost all in the communication "business," seem to rarely weigh the effect of their thoughts before they are expressed to colleagues and staff. We plan how to best communicate with clients, judges, juries, and opposing counsel, but rarely seem to put the same consideration into what we will say to those with whom we work. How you broach a topic and how you describe an issue can make a huge difference in how the message is received.

Planning communication also helps avoid topics and areas that just should never be discussed. Don't engage in or even condone sexual banter or bigoted comments, no matter the context or environment in which they arise, for instance.

In deciding how to approach a topic, whether with your team, a judge or jury, or a client or potential client, educate yourself about your audience. Understanding your audience and what it is interested in hearing, and how they would likely appreciate the medium in which the message is communicated, is paramount to its acceptance.



5. TREAT PEOPLE SIMILARLY IN SIMILAR SITUATIONS.

This does not mean treat everyone equally. It is probably more apparent on a playing field than in an office, but it is clear that some players are more talented, motivated, or intelligent than others, just as some employees are better than others. You should never approach a situation thinking that everyone is equal and will be treated equally at all times.

The first thing that I tell players (and, perhaps more importantly, their parents) at the start of a season is that high school athletics are competitive and that playing time will not be equal. But if you find yourself in a similar situation with two team members, you should treat them the same way. For example, we don't have a team rule that a player has to be at practice the day before a game in order to play. The reason is simple: I don't want to have to tell our best player that she can't play in the State Semi-Final because she missed practice the day before. Similarly, I will let our least talented player dress for a game the day after she misses a practice, and she will play in the game too if the circumstances allow it.

6. LEARN FROM YOUR MISTAKES OR TRYING SITUATIONS.

The seminal moments in each of our team's last two seasons have not been during or after big wins, but after losses, unexpectedly tough games, or less-than-stellar performances. There will be bumps in the road, whether the road is a fiscal year or a 20-game season. Some of them will be your fault, some of them will be your team's fault, some of them will be no one's fault, or at least no one within your control.

Regardless of who or what is to blame, don't point fingers and don't dwell on what went wrong. Instead, figure out why it went wrong and do your best to make sure it doesn't happen again. Trying times are the best times to communicate with your team, to let them know you're still supporting them and to allow them input regarding both the problem and the potential solution.

Obviously, there are limits to the comparison between a workplace or business and a high school soccer team. In sports, you only have to deal with one competitor at a time, and you (and your school) have more absolute authority to deal with problems, and problem team members, than businesses do. But I believe that the concepts of "team" and the traits that effective leaders of those teams exhibit are universal. While mine is not by any means an exhaustive list of those qualities, I believe that developing these skills is a good first step toward becoming capable of leading a winning team.

Kevin Nelson is Managing Partner of Huddleston Bolen's Charleston, West Virginia office. The primary emphasis in his legal practice is in employment law, where he has litigated matters involving trade secrets, discrimination, and wrongful discharge. He also provides his clients with risk management advice and review on a variety of employment matters and has been recognized for four consecutive years as one of The Best Lawyers in America.

In addition to his legal work, Mr. Nelson is the girls' soccer coach at Charleston Catholic High School and was named the 2008 Mideast Sectional Coach of the Year for girls' soccer by the NFHS Coaches' Association. His team has won three consecutive state titles and in 2010 finished with a 22-0-1 record and was ranked 24th in the Nation in the NSCAA poll.

AM I A "BUSINESS ASSOCIATE"? WHY SHOULD I CARE?

Paul F. Ebeltoft and Haylee Cripe Ebeltoft . Sickler . Lawyers

Complying with privacy and security rules protecting patient records set by the Heath Insurance Portability and Accountability Act (HIPAA) can be incredibly frustrating even for those directly involved in health care delivery and payment. However, it is critically important for attorneys, accountants, claim adjustors, billing service providers, medical expert witnesses, medical review consultants and many others who work only episodically within the health care industry to also know the HIPAA regulatory maze. The latest changes have opened the door for punishment of the unsuspecting.

WHAT IS A BUSINESS ASSOCIATE?

Merely providing services to a health care provider, health insurance plan or health care clearing house (covered entities) does not automatically make you a business associate. However, the federal Department of Health and Human Services (the Department) defines a HIPAA business associate in broad terms. If you are working with a covered entity in a way that involves the use or disclosure of individually identifiable health records or information, but you are not an employee of the covered entity, you are a business associate.[i] Outside counsel reviewing a threatened malpractice claim for a hospital, independent counsel on patient quality assurance reviews, insurance company claims personnel, utilization review consultants, benefits managers with access to health records, contract medical transcriptionist services and even independent medical record shredders are all business associates.

WHAT HAS CHANGED?

Until February 18, 2009, HIPAA placed the primary burden of privacy and security of protected health information on covered entities, charging them with ensuring that their business associates followed the statutory requirements. The means of doing so was (and remains) the requirement for a covered entity to maintain a written "business associate contract" with all of its business associates.

A business associate contract must identify the permitted uses of protected health information disclosed. It must set forth rules for permitted re-disclosure and must require the business associate to use certain safeguards to protect the health information. To view a sample business associate contract, visit http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html

However, the Health Information Technology for Economic and Clinical Health Act, (HITECH), passed in February 2009, is materially changing the regulatory landscape. An interim final rule to implement portions of HITECH removed the safe harbor available for covered entities to avoid a monetary penalty for violation of HIPAA privacy and security rules by claiming lack of knowledge of the violation. Previously, a covered entity was liable under the federal common law of agency for civil monetary penalties for the actions of any of its agents acting within the scope of its agency relationship. An exception to liability allowed a covered entity to show that it had obtained reasonable assurances from its business associates regarding the safeguarding of protected information and either that it did not know about the unauthorized activity or that it took reasonable steps to end the violation. The interim final rule holds a covered entity accountable regardless of whether the entity knew of the business associate's pattern of activity.

The interim rule also imposes new reporting burdens on business associates requiring self-reporting of any safeguard breach. The report must be made "without unreasonable delay" to their covered entity and in no event more than 60 days from when the business associate or any of its employees knew or should have known of the breach. In general, a reportable breach is an impermissible disclosure of protected health information that significantly risks

financial, reputational or other harm to the individual whose records were disclosed. Covered entities then must report "upstream" to the Secretary of the Department, to those whose records were disclosed and in some cases to the media.

WHAT IS COMING?

The short answer is more changes that seriously affect business associates. In July 2010, the Department issued a Notice of Proposed Rulemaking (NPRM)[ii] covering the portions of HITECH not addressed in the interim final rules. Even though only proposed, the Department's website cautions against complacency. "Although the effective date (February 17, 2010) for many of these HITECH Act provisions has passed, the NPRM, and the final rule that will follow, provide specific information regarding the expected date of compliance and enforcement of these new requirements." Currently the Department intends to provide only 180 days from the final rule's effective date to come into compliance. It would be well for all business associates to be aware of what the NPRM proposes and to prepare.

Among many other things, the NPRM enables the Department to impose monetary civil penalties on business associates for violations occurring after February 18, 2010. The fine for breach could be in one of four tiers at the discretion of the Department, taking into account the nature of the violation and the harm resulting from it. The four tiers are: $100, $1000, $10,000, and $50,000 per violation. Each tier has a cap on the amount a business associate can be required to pay for violations of an identical requirement or prohibition in a calendar year. The caps for each tier are $25,000, $100,000, $250,000, and $1,500,000 respectively.

If the disclosing party did not know, and would not have known through reasonable diligence, of the breach, the fine will be at least in the $100 tier, but will not exceed $50,000 per occurrence. If the violation is due to reasonable cause but not willful neglect, the penalty will be at least $1,000 but not more than $50,000 per occurrence. If the violation is due to willful neglect, but corrected promptly after discovery, the fine is at least $10,000 but will not exceed $50,000 per occurrence. If the violation is due to willful neglect, but not corrected, the fine will be at least $50,000 per occurrence.

The NPRM also extends the scope of HIPAA privacy and security requirements. Previously, if a business associate properly hired a subcontractor to do the work of the business associate, the protections of the law could lapse, not extending to the subcontractor. The NPRM will close that loophole by making business associates responsible for compliance by an agent that performs functions for or provide services to a business associate, but is not a member of the business associate's workforce. Outside counsel (business associate) reviewing medical records created for an event from which a malpractice claim could arise against a client hospital (covered entity) will need a HIPAA compliant contract with a medical record reviewing service (subcontractor) that the lawyer employs to assist. The "downstream" subcontractor must comply with HIPAA privacy and security rule provisions regardless of whether there is a written contract with the business associate. However, since the business associate must take reasonable steps to ensure that the subcontractor is complying and immediately report any violations, a written contract is the only sensible course.

Interestingly, there is a whistleblower exception. A business associate does not violate the rules if the business associate discloses protected health information in a good faith effort to alert appropriate officials to conduct that violates professional or clinical standards or endangers patients, workers, or the public. However, this disclosure must be to an agency charged with health oversight or a public health authority authorized by law to investigate or oversee conduct or conditions the whistleblower believes are being violated. This can be a trap for the unwary however, so any business associate faced with the dilemma of disclosure should tread carefully and first seek advice concerning its legal obligations and options.

SIX STEPS YOU SHOULD TAKE NOW.

1. ***Determine whether you are a business associate or subcontractor.*** Do not rely on someone else to have made the determination for you. Review the type of information shared with you by covered entities or by third parties working on behalf of covered entities. If it includes protected health information, analyze existing rules and the NPRM. If you are a business associate of a covered entity, find and review your business associate contract. If you are a subcontractor, talk to your business associate. Get contracts in place if you do not have them.
2. ***Recheck your status.*** Establish a protocol to review newly developed associations with covered entities or business associates. Watch for the Department's final rules and use them to review again all existing customer/client relationships.
3. ***Develop your own contract.*** Preparing your own subcontractor contract will help you judge the fairness of contracts that covered entities or other business associates may ask you to sign. Be sure that the contract you develop appropriately mirrors your obligations under the contract with the covered entity for which you are working.
4. ***Use it.*** If you are a business associate who must outsource some of your work for a covered entity to others insist on putting a subcontractor contract in place. Do not forget third party computer technical support and off-site file and data storage vendors or those who may have access to protected health information indirectly while working for you.
5. ***Check your processes and procedures.*** A business associate or subcontractor is restricted to using protected health information for the purposes stated in the written agreement. Make sure that your protocols for privacy and security are HIPAA compliant and sound. Develop a decision-tree to determine who reviews a possible breach of privacy and security rules and who directs the course of action if a breach has occurred.
6. ***Check your current state law.*** HIPAA law and regulation will supersede less stringent state laws. If your state's laws exceed the federal requirements, you must comply with those requirements.

Paul F. Ebeltoft is President of Ebeltoft . Sickler . Lawyers. As a trial lawyer in North Dakota for more than 30 years, Paul is able to help all of his firm's practice teams, but he concentrates his efforts within its "Litigation Solutions" and "Alternatives to Litigation" teams.

Haylee Cripe is a law clerk at Ebeltoft . Sickler . Lawyers. She holds a Bachelor's of Accountancy from the University of North Dakota School of Business and Public Administration and is pursuing her J.D. from the University of North Dakota School of Law.

[i] 45 C.F.R. § 160.103 (2005).

[ii] Modifications to the HIPAA Privacy, Security, and Enforcement Rules Under the Health Information Technology for Economic and Clinical Health Act, 75 Fed. Reg. 40868-01 (July 14, 2010).

Product-Design Trade Dress: A Corporate Asset Worthy of Protection

Brendan T. Fitzpatrick and Glenn A. Kaminska
Ahmuty, Demers & McManus

Of the many goals of business are the stimulation of investment, profit, and the protection of corporate assets. Included in these corporate assets are patents, copyrights, trademarks, and trade dress. And through the able use of these assets, including trade dress, businesses compete in the marketplace for economic prominence. But what exactly is trade dress and what can a company and its counsel do when another entity infringes upon the use of their trade dress?

The simple answer to the latter question is to turn to the Lanham Act. The Act's purpose is to protect consumers and manufacturers from deceptive representations of affiliation and design. According to § 45 of the Act, it protects "any word, name, symbol, or device or any combination thereof to identify and distinguish goods…from those manufactured or sold by others and to indicate the source of the goods…" 15 U.S.C. § 1127. Section 43(a) of the Act provides some protection for a producer from the use by any person of "any word, term, name, symbol, or device, or any combination thereof…which…is likely to cause confusion…as to the origin, sponsorship, or approval" of their goods. 15 U.S.C. § 1125(a).

As for the first question, trade dress originally included a product's packaging or its "dressing." Over time, and under certain circumstances, it also provided protection for a product's design, which culminated with the Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000).

In order to prove trade-dress infringement, a plaintiff-manufacturer must first demonstrate that its trade dress is entitled to protection under the Act. To be entitled to protection, the Supreme Court ruled that a plaintiff's dress must be *either* inherently distinctive *or* be shown to have acquired distinctiveness through "secondary meaning." A mark will have acquired distinctiveness, even if it is not inherently distinctive, if it has developed secondary meaning, which occurs when, in the minds of the public, the primary significance of the mark is to identify the source of the product rather than the product itself.

The Supreme Court picked up the vexing issue of product-design trade dress in *Wal-Mart*. In *Wal-Mart*, Samara Brothers designed and manufactured a line of children's clothing. Wal-Mart contracted with a supplier to manufacture outfits based upon photographs of Samara's outfits. When Samara discovered this, it sued Wal-Mart for infringement of its unregistered trade dress under the Act. In rejecting Samara's claims, the Supreme Court ruled that in an action for infringement of an unregistered trade dress under the Act, a product's design is distinctive and warranting of protection *only* upon a showing of secondary meaning.

While *Wal-Mart* was a water-shed moment for trade-dress litigation involving product design, litigation in this complicated area of law continues. Following *Wal-Mart* we saw the courts step into line to ensure that only those product-design marks that have obtained secondary meaning are entitled to protection under the Lanham Act.

The Supreme Court found in *Wal-Mart* that the distinction between product design and product packaging, which may be inherently distinctive, may involve some hard cases at the margin. And just as the devil is always in the details, it is at the margins that litigation occurs.

Cases at the margins are more likely to require secondary meaning than those cases that clearly fall into packaging or dressing cases. The First Circuit took on such a marginal trade-dress case where the proponent of the mark claimed that a distinct combination of its products, the sizes, shapes, quantities, labels, and its display-design system were inherently distinctive

and entitled the trademark protection. The Court found that the combination claim fell into the category of product design/configuration, and thus, the proponent of the mark was obligated to obtain secondary meaning for it to be protected. *Yankee Candle Co. Inc. v Bridgewater Candle Co. LLC.*, 259 F3d. 25 (2001).

To determine whether or not a product design has achieved secondary meaning, various Federal Circuits have developed separate, but similar multi-part tests. The tests generally examine (1) the advertising expenditures made in support of the mark, (2) evidence that the consumer links the trade dress to a particular source, (3) unsolicited media coverage of the product, (4) the product's sales figures, (5) the continuous and virtual exclusive use of the trade dress, (6) consumer-survey evidence, (7) direct consumer evidence and proof of actual copying. None of these potential factors are exclusively determinative of whether a mark has obtained secondary meaning.

In 2007, the Sixth Circuit applied its seven-factor test to determine secondary meaning in finding that General Motors was able to demonstrate that the product design of the Hummer motor vehicle, including its unique grill, was entitled to protection. The infringing toy company, which had designed toys to resemble the Hummer, was obligated to pay an 8% royalty on sales and over $900,000 from profits. *General Motors Corp. v. Lanard Toys, Inc.* 468 F.3d. 405 (6th Cir. 2007) The Sixth Circuit credited a business report provided by General Motors that stated the Hummer had 96% brand recognition. The Court also credited a survey prepared for the litigation that concluded that Hummer's trade dress had secondary meaning to almost 77% of the respondents. While not all the respondents to the survey were able to necessarily identify General Motors, the Court found "knowledge that product comes from a single source, even without naming the source, is sufficient to establish secondary meaning."

Courts have long credited consumer surveys as a method to support the claim of secondary meaning. This is true of surveys taken either before the infringement occurs and for those surveys prepared in contemplation of litigation. Therefore, surveys will continue to be a primary source of proof in any trade-dress litigation.

In searching for secondary meaning and trade-dress protection, courts have been forced to review claims to determine if the alleged trade dress is too generic for protection. A generic mark in product-design context is a product design that is overbroad, generalized, or basic. Courts will not protect basic design features due to concerns that the producers will utilize trade-dress protection to monopolize a type of product. A mark can also be generic when it is so common to the industry or the marketplace that is not a designator of a specific source.

The proponent of the mark must demonstrate that the product design is not generic. Even a showing of secondary meaning is insufficient to protect a product design that is overbroad or generic. The proponent must also articulate the specific

elements that are claimed to constitute the protected trade dress. An inability to set forth the elements of the trade dress may result in a finding that the trade dress is too generic to be entitled to protection.

Assuming the proponent of a product-design trade dress case can demonstrate that its design is not generic and that its product has secondary meaning, the inquiry then shifts to whether or not the product design is functional, and whether or not there is a likelihood of confusion for the end consumer. A product's features are functional and cannot be protected if the design is essential to the use or purpose of the product, or it affects the cost and quality of the product. In determining functionality, it is reasonable to look to see if the product had ever been issued a utility patent. A utility patent, while not dispositive of the issue, would be strong evidence to demonstrate that the design served a functional purpose. It is some evidence that the main purpose of the design was not to designate the source of the product.

Ultimately, a trade-dress infringement claim cannot succeed for the proponent of the mark without proof that there is a likelihood of confusion by the consumer. Much like determining secondary meaning, the courts weigh a variety of factors to determine this issue. Factors considered include (1) the trademark's strength, (2) the similarity between the products, (3) the alleged infringer's intent, (4) evidence of actual confusion by consumers, (5) the relevant consumer's sophistication, and (6) similarities in how the products are marketed. The actual realities of the marketplace serve as a significant determining factor in whether or not the courts will find a likelihood of confusion.

Where there is a product marketed by catalog to a highly sophisticated consumer, one will be hard-pressed to find a likelihood of confusion. But providers of low-cost goods selling to a broad, unsophisticated market may find a greater likelihood of confusion. Even in such a circumstance, the product design may not be the final determining factor. Where virtually identical products are not packaged in the same manner, there may be no likelihood of confusion.

CONCLUSION

The Supreme Court and Federal Circuits continue to shape trade-dress litigation in the product-design context. Courts have set forth with certainty that product design will not be judged by an inherently-distinctive standard. Secondary meaning is the call to arms in these situations.

Protection for product design does not come easily. A proponent of a mark, in addition to showing secondary meaning, is saddled with the burden of showing non-genericness and the fact that the trade dress sought to be protected is non-functional. Even passing these high hurdles, the proponent of a mark still bares the responsibility of demonstrating a likelihood of confusion. While the burdens are many, the protection of corporate assets and continued profitability make Lanham Act claims a fight well worth undertaking.

Brendan T. Fitzpatrick is a partner at Ahmuty, Demers & McManus. Mr. Fitzpatrick is in charge of the firm's Appellate group. He is a frequent author and has been called upon to prepare amicus briefs to the New York State Court of Appeals.

Glenn A. Kaminska is a partner at Ahmuty, Demers & McManus. Mr. Kaminska is in charge of the firm's Insurance Coverage group. He has authored many articles and is a frequent lecturer.

25 QUESTIONS BEFORE ENFORCING A NON-COMPETE

John J. Gates Baty, Holm, Numrich & Otto, PC

The prevalence of non-competition and non-solicitation agreements (collectively, "non-competes") in American business has spawned a cottage industry for litigators and its own cannon of case law. A simple Google search reveals dozens of blogs dedicated to this narrow issue of the law.

Management and in-house counsel are typically aware that the general factors for enforcement of a non-compete are (1) whether confidential information or trade secrets are being protected; (2) whether the territory and temporal restrictions are reasonable; and, (3) whether public policy encourages enforcement.

Clients, however, are more often interested in addressing specific issues relating to enforceability. The following twenty-five questions are designed for employers to consider before undertaking to enforce a non-compete.

1 Does your state permit non-competes? A few states prohibit non-competes but allow enforcement of nondisclosure and confidentiality agreements. The remaining states fall into two camps: non-competes are treated as any other contract under a "freedom of contract" philosophy, or non-competes are presumptively void. This distinction is important for determining the employer's burden of proof and likelihood of success.

2 Do you possess a signed agreement? In the event of a "missing" non-compete, courts may still enforce an agreement if a witness testifies to personally observing the employee sign the agreement. The court may also permit an adverse inference if the employer shows that it possesses non-competes signed by every other employee, yet the former employee's is mysteriously missing.

3 Did someone witness the employee sign the non-compete? In order to avoid an allegation of forgery, it is best to have the employee's signature notarized or witnessed.

4 Does your state permit oral non-competes? Even in the absence of a written agreement, either through theft or poor record keeping, some states permit enforcement of oral non-competes; however, a non-compete exceeding one year may violate the statute of frauds.

5 Was the non-compete signed upon hiring? The initial employment relationship is typically adequate consideration, but some states require non-competes signed well after the hiring date to be accompanied by additional consideration, e.g. pay raise, promotion or threat of termination, beyond the mere continuation of employment.

6 Was the employee terminated for cause? If the employee was terminated for incompetence, it will be difficult to argue the likelihood of injury to the employer unless the employee's access to confidential information or client contacts was significant. If the employee was terminated for a serious violation of the law or company rules, many courts will go out of their way to enforce the agreement.

7 Was the employee terminated without cause? If the employee was terminated as part of a mass layoff, then the court may equitably estop the employer from enforcing the agreement. If the employee had an employment agreement for a term and was fired prior to expiration of the term, then the employer may also be equitably estopped from enforcing the agreement.

8 Is the territory restriction overly broad? While most courts will reform, equitably modify, or use their "blue pencil" to confine the non-compete to a territory in which the employer actually operates, some courts have held that it is not their responsibility to re-write a non-compete for the employer and simply invalidate the agreement.

9 Is the time period overly broad? Two years is generally considered an acceptable period. Some courts have even

been willing to reduce an overly broad period to a reasonable period rather than void the entire agreement.

10 What was the extent of the employee's customer contacts? The biggest threat to an employer is not always the disclosure of confidential information. A salesperson's ability to divert clients with whom she has built a relationship can often be devastating to a business. Such client contacts are a protectable business interest.

11 Is the employer's customer list truly confidential? If the employer's customer and prospective customer list is merely a section of the yellow pages or an industry directory, then it will probably not be protected. A confidential customer list, rather, is developed and protected by the employer. The ultimate test is whether the employer will be harmed if competitors gain access to the list.

12 Is the confidential information obsolete after only a short period? This is most often the case with pricing methodologies. Many businesses alter their prices every few months, thus rendering pricing data obsolete.

13 Do you share confidential information with your customers? It is difficult to argue that pricing data is confidential when the employer discloses such information to its customers. An employer's failure to require its customers to sign nondisclosure agreements covering such information may undermine the information's confidentiality. Remember, an employer must take reasonable steps to protect the confidentiality of trade secrets.

14 Would enforcement of the non-compete impose an undue burden on the employee? This is often relevant in rural venues where it is nearly impossible for an employee to find comparable work. In today's economy, an employee's inability to provide for her family if the non-compete is enforced may create an undue burden on the employee.

15 Was the employee promoted during his tenure? A non-compete tied to an employment agreement for a specific position may begin to run upon promotion and expire before the employee even leaves the company. It is important for an employer to have the employee acknowledge the application of the non-compete to his new position.

16 Has the employer enforced all similar agreements? An employer's prior failure to enforce even one non-compete may prove fatal to enforcement when it matters most. It may be advantageous to threaten a lawsuit and quickly settle with each employee who arguably competes if only to avoid a future contention that the employer has not enforced all similar agreements.

17 What causes of action are available? The most common is breach of contract, but attorneys too often forget the common law duty of loyalty and statutory trade secret claims. Regardless of whether the non-compete is enforceable, an employee may not begin soliciting or diverting customers before she resigns, and trade secrets are still subject to protection.

18 Should the subsequent employer be sued? Suing a subsequent employer for tortious interference with the non-compete or conspiring to breach the non-compete or violate state trade secret laws often convinces the subsequent employer that the employee is not worth the trouble of litigation.

19 What types of remedies are available? Although contract damages and injunctive relief are common, the most forgotten remedy is disgorgement, an equitable remedy wherein the employee must give up the value of every single benefit he received through his breach of the non-compete, including wages paid to the employee while he was employed but preparing for competition.

20 Does the agreement contain a liquidated damages clause? It is often difficult to place a value on a customer list, which is why some accounting and investment firms require a "forced purchase" of a book of business. The enforcement of a liquidated damages clause will depend on the relative bargaining power of the parties.

21 Is there an attorneys' fee provision? Even if the agreement provides for attorneys' fees, some courts have denied such fees when the court had to reduce the time or territory involved because fees are only available when the agreement is enforced as written. In such an event, trade secret statutes may contain attorneys' fees provisions.

22 Does the non-compete have a forum selection clause? The employer's failure to abide by a mandatory forum selection clause in the employer's own document may constitute an abandonment of the contract, thus rendering the non-compete void.

23 Has the employer changed its corporate structure since the non-compete was signed? A stock purchase agreement does not ordinarily impact a non-compete, but some courts have held that a non-compete is a personal service contract and non-transferable as part of an asset purchase agreement, or the non-compete may begin to run at the time of the asset sale because the employee no longer works for the employer. The subsequent employer may argue that the seamless transition of employment to the new employer constitutes consideration and acknowledgement of the enforceability of the non-compete.

24 Can the employer establish a prima facie case for injunctive relief? The universal elements for injunctive relief are that the employer's damages are not capable of ascertainment, the employer will likely succeed on the merits, the employer will suffer irreparable harm if injunctive relief is not granted, and public policy weighs in the employer's favor.

25 Has the employer made payroll, provided health insurance, paid vacation and holidays, and reimbursed expenses? An employer's failure to carry its end of the employment bargain may constitute a breach of the non-compete and estop the employer from enforcing the agreement.

BONUS: Is it worth it? Litigation is typically advisable when the employee will actually harm the employer's business (good salesmen) or the employee possesses truly confidential information (management); the employer is willing to drag customers into depositions; and, the legal and business cost of enforcement is reasonably proportionate to the level of proof required to enforce the non-compete.

John Gates is a partner with Baty, Holm, Numrich & Otto, PC, in Kansas City, Missouri. He concentrates his practice on business law, risk management, and commercial and personal injury litigation throughout Missouri and Kansas. John graduated from Vanderbilt University and the University of Kansas School of Law.

COVERAGE B & THE "RIGHT OF PUBLICITY" A NEW COVERAGE FRONTIER IN THE DIGITAL AGE

Robert S. Nobel and John W. McGowan Traub Lieberman Straus & Shrewsberry LLP

The common law "right of publicity" gives rise to the tort for misappropriation of one's image or likeness and has been considered by many courts and scholars to be a subset of the broader right to privacy.[1] As stated recently by the Court of Appeals for the Eleventh Circuit, "[t]he right of publicity grew out of a long-standing recognition of the right to privacy under [State] law."[2] Although not recognized as a "privacy" right in all states, the elements of the "right of publicity" generally include 1) the defendant's use of plaintiff's identity; 2) the appropriation of plaintiff's name or likeness to defendant's advantage, which can be a commercial advantage or something else; 3) lack of plaintiff's consent; and 4) resulting injury.[3] Further, as set forth by the Restatement Second of Torts, "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."[4] As the Court of Appeals for the Ninth Circuit has held, "[t]he protection of name and likeness from unwarranted intrusion or exploitation is the heart of the law of privacy."[5]

Under a commercial general liability policy ("CGL policy"), the assertion of a claim based upon the violation of the right of privacy potentially implicates Coverage B as an "advertising injury."[6] In a standard CGL policy, an advertising injury includes a set of enumerated offenses, one of which is defined as "oral or written publication which violates a person's right to privacy." As the "right of publicity" is considered by

courts in a number of jurisdictions to be a "privacy" right, such claim could fall within Coverage B's "advertising injury" in those jurisdictions.

However, the "right of publicity" has also been compared to an intellectual property right insomuch as the focus in both instances is protecting the proprietary interest of the individual.[7] For example, in a 2008 case, *Doe v. Friendfinder Network, Inc.*,[8] the United States District Court for the District of New Hampshire classified the plaintiff's common-law right of publicity claim specifically as an "intellectual property" right.[9] In *Friendfinder*, the plaintiff brought a claim against a website operator for the unauthorized posting of her personal information on an adult dating site which she denied posting. The court there found several of plaintiff's claims to be barred pursuant to the Communications Decency Act of 1996 ("CDA"), codified as 47 U.S.C. § 230 (2006), which provides immunity to internet service providers ("ISPs") for information posted on websites by third-parties. Applicable in this case, however, was the CDA's exception for intellectual property claims,[10] which allowed plaintiff's claim for "right of publicity" to survive and pierce the shield of the CDA. While there were no coverage issues in *Friendfinder*, this case provides an example of a potential coverage dilemma and, for reasons explained further below, illustrates the potential challenges that may lie ahead.

As GCL policies provide for "advertising injury," which includes "right to privacy" violations, claims based upon or arising out of "intellectual property" law are, in some jurisdictions, barred because they are held not to constitute "advertising injury" in the first instance or because they are barred by an applicable exclusion. Thus, depending on the jurisdiction or classification of a claim as being a "privacy" right or an "intellectual property" right, coverage (whether as a duty to defend or duty to indemnify) may be affected. An example is a recent United States District Court case from North Carolina, *ISS Research, LLC v. Federal Insurance Company*,[11] wherein the court found a very specific intellectual property exclusion to bar a right of publicity claim from coverage. In *ISS Research*, the claimant alleged unauthorized use of his photograph by the insured. The policy at issue there excluded, in part, personal injury or advertising injury "arising out of" an "infringement or violation" of "any intellectual property law or right,"[12] which the policy defined to include copyright offenses, patent offenses, and "other right to, or judicial or statutory law recognizing an interest in, any…likeness."[13] Focusing on the word "likeness," the court found that this exclusion barred the claimant's publicity claims, but declined to address specifically whether such claim fell within the "right to privacy" language of the policy. Notably, in a footnote, the court expressly left open the question of whether the suit fell within the policy's coverage for violation of the "right to privacy" absent application of the exclusion.

...THE CASE ILLUSTRATES HOW THE "RIGHT OF PUBLICITY" CAN HOVER BETWEEN A TRUE "PRIVACY" RIGHT... AND AN "INTELLECTUAL PROPERTY" RIGHT... THUS MAKING COVERAGE DETERMINATION FOR SUCH A CLAIM MORE CHALLENGING.

Although the court's decision in *ISS Research* was simplified by the unique language of the policy exclusion before it, the case illustrates how the "right of publicity" can hover between a true "privacy" right (thus falling within Coverage B) and an "intellectual property" right (potentially not covered and/or susceptible to GCL exclusions), thus making coverage determination for such a claim more challenging.

As new avenues for liability are opened through social networking sites, blogs, and interactive websites, the traditional causes of action find new application and must be revisited as must the insurer's duty to defend and/or indemnify in the context of these new theories of liability. The "right of publicity" presents a case in point as the same facts can apparently fall within the right of privacy, so as to trigger Coverage B and yet also constitute an "intellectual property" right, which could be barred under the policy. In response to this dilemma insurers may follow the lead set by the insurer in *ISS Research* or bank on the law of the applicable jurisdiction. Either way, an increase in claims alleging violation of the right of publicity, while far from the "next asbestos," may well become more commonplace in this digital age.

While "right of publicity" claims have traditionally been asserted by celebrities seeking to protect their image or likeness from unpermitted commercial use by another, it is easy to imagine this cause of action gaining popularity as we boldly delve deeper into this new frontier, and technology makes it easier for information to be shared and disseminated through forums that are literally accessible to the world. Indeed, today anyone can become an overnight "internet celebrity" thanks to "YouTube" and other media online.

The "right of publicity" is just one example of a traditional tort that may need reconsideration in this digital age, especially with regard to coverage determinations. Digital technology, in providing a new format for expression, will continue to test the limits of liability, and undoubtedly affect coverage analysis.

Robert S. Nobel is a partner at Traub Lieberman Straus & Shrewsberry where he practices in the firm's general liability litigation, professional liability litigation, and insurance coverage departments.

John W. McGowan is a law clerk at Traub Lieberman Straus & Shrewsberry and is awaiting admission to the bar of the State of New York.

[1] *See, e.g.*, Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997) (internal citations omitted).
[2] Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1205 (11th Cir. 2009).
[3] Wendt, 125 F.3d at 811. (internal citations omitted).
[4] Restatement (Second) of Torts § 652(c) (1977).
[5] *Id.*
[6] We note that some CGL policies define this as "personal and advertising injury."
[7] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977).
[8] 2008 U.S. Dist. LEXIS 38177 (D.N.H. 2008).
[9] *Id.* at *2-3, n. 1.
[10] 47 U.S.C. § 230(e) (2006).
[11] 2010 U.S. Dist. LEXIS 122811 (W.D.N.C. 2010).
[12] *Id.* at *7.
[13] *Id.* at *8.

Bringing Technology to the Forefront

Douglas R. Morr, M.S., P.E., Gary J. Heydinger, Ph.D., P.E. and Ashley L. Dunn, Ph.D., P.E. SEA, Ltd.

With every passing year, let alone month, the scientific tools available to investigators and engineers evolve and advance. Continuous improvements in technology have enabled scientists to develop more accurate and efficient procedures for testing, measuring, data recording and data processing. As these technological advances become commercially available in a reliable, accurate, and court accepted manner, they are used in litigative matters by scientific experts. While the camera and measuring tape may never be replaced, new tools enhance the existing capabilities, usually with higher accuracy, higher repeatability, and more efficiency. These advances go far beyond just measurement and documentation; today's technological advances also provide experts with unsurpassed communication tools that allow clients and the court to truly visualize an event and its surroundings.

SEA has over 40 years experience in revealing the cause of a myriad of events. As an industry leader, the professional staff of SEA robustly applies the latest technological advances to litigative matters. Many such examples will be discussed in this article. For instance, prior to personal computers and the associated software, animations were created utilizing physical models and stop motion video techniques. Over time, however, these methods have been replaced with computer simulations and computer animations. A continuous effort to evolve, adopt, and create the most current technology has positioned SEA as a premier scientific fact-finding partner for clients worldwide. Nowhere is this more evident than in SEA's vehicle dynamics, accident reconstruction, product liability, and biomechanics groups.

Technology is at the forefront of many of the world's safety regulations. For example, the National Highway Traffic Safety Administration (NHTSA) requires the use of computer-controlled steering robots to conduct Federal Motor Vehicle Safety Standard (FMVSS) and New Car Assessment Program (NCAP) test protocols to evaluate dynamic vehicle rollover resistance and lateral stability of vehicles equipped with electronic stability control (ESC). Outside of government and automotive industry groups, SEA is one of the few organizations that has the tools and expertise to conduct these tests. Along with equipment specified in these regulations, SEA's engineers have developed the Automated Steering Controller (ASC) to be utilized in this testing and other vehicle dynamics research. Coupled with state-of-the-art GPS-based vehicle motion measurement technology, the ASC is also being applied to conduct forensic vehicle dynamics investigations.

In addition to dynamic vehicle testing on the test track, forensic engineers often rely on knowing the characteristic properties of vehicles that can be measured in a laboratory setting. Examples of these properties include vehicle weight, center-of-gravity (CG) location, static stability factor (SSF), weight distribution, and suspension stiffness and motion characteristics. The ability to make accurate measurements of these properties for case-specific vehicle conditions is a powerful tool in analyzing real-world events. Realizing the need to make these kind of measurements, SEA experts designed and manufacture the Vehicle Inertia Measurement Facility (VIMF). The VIMF is the benchmark for making measurements for the NHTSA NCAP star-rating program with respect to passenger vehicle stability and rollover propensity, and it is being used by manufacturers worldwide. This unique position of technological development and test performance has enabled SEA to have both the equipment and personnel needed to make these laboratory measurements for all types of automotive and off-road vehicles in support of litigative investigations.

Throughout the world, there are facilities designed to evaluate the performance of commercial products with respect to standards, regulations, or claimed occurrences. SEA's vehicle dynamics and biomechanics expertise, coupled with its experience in test device development, has led to the development of unique testing, evaluation, and analysis tools over the years, including, most recently, the SEA Roll Simulator. The Roll Simulator is an indoor facility enabling the precise control of both linear and rotational motion. These capabilities are being used to evaluate occupant response and protection in a variety of products for development, regulatory compliance, and litigative matters. The availability of this technology to the investigators and scientific experts on a case-by-case basis enhances the current capabilities both at SEA and industry-wide.

Biomechanics is the science of applying engineering sciences to the understanding and evaluation of the human body. For decades, regulatory bodies and researchers have used surrogates for evaluating human exposures without putting humans at risk. These surrogates are both physical and computer based. Physical surrogates include impact headforms and anthropomorphic test devices (ATDs). From their humble beginning of being uninstrumented high-end mannequins of an average male, ATDs have become the gold standard in measuring and replicating the exposure of a variety of ages, gender and sizes of humans, and are included in standards and regulations worldwide. In litigation, ATDs allow biomechanical engineers to conduct repeatable tests that are specific to the conditions of a particular event and evaluate alternative scenarios. The applications of this technology within litigation are endless and include: vehicular crash tests, child safety seat testing, helmet testing, personal protective equipment testing, child product testing, and case specific impact event testing.

Numerous academic and commercial entities are involved in the development of computer-modeling software that enables the assessment of human response to various environments and events. This software varies from finite element programs evaluating brain injury such as NHTSA's Simulated Injury Monitor (SIMon), to whole-body simulation programs capable of accurately evaluating both the motion (kinematics) and the forces (kinetics) a person is exposed to in almost any event.

MADYMO is used worldwide to evaluate occupant response in motor vehicle crashes, determine human protection performance of safety equipment, and help in the design and performance evaluations of consumer products. In litigative matters MADYMO has become a mainstay for biomechanical engineers to evaluate occupant response in accidents involving motor vehicles, off-road vehicles, and construction equipment and is being utilized to evaluate the effects of various personal protective equipment.

Another proven research tool that has been adapted for test and analysis purposes for biomechanical engineers involved in litigative matters is motion capture. As opposed to the previously discussed surrogates, human volunteers are utilized when this technology is applied. Motion capture technology, including motion sensing and force measuring technologies, has been an integral part of biomechanical research and clinical facilities for decades. It has also been used within ergonomics to characterize, evaluate, and aid in the design of safer work environments. The entertainment industry has harnessed the power of this technology in replicating realistic human movement in video games such as Guitar Hero and EA Sports releases like Madden NFL, NBA Live, and FIFA and by producing incredible special effects in movies including The Lord of the Rings and Avatar. Forensically, this technology has been used to determine human response both in timing and motion under case-specific conditions, to evaluate human impact response in specific events, and to perform case-specific ergonomic studies.

From top to bottom: a) Motion capture in use replicating a real-world event at SEA, b) The 3D point cloud visualized within the motion capture software, and c) SEA's animation directly using the data from the motion capture tests

While many people have a reasonable understanding of passenger vehicle technology, fewer have the expertise and tools to forensically assess heavy vehicles. SEA's Trucking and Heavy Equipment Practice Group has experience in both developing and utilizing technology in research and litigative investigations. One vital system on heavy vehicles is the air brake system. SEA utilizes the "Air Brake Expert" as a tool to simultaneously record multiple air pressure states within a truck's braking system to analyze the brake system timing, leak rates, and air compressor recovery capacity. Another important and highly advanced system with today's heavy vehicles is the engine control module (ECM). Similar to many passenger vehicles' airbag control modules (ACMs), many of today's ECMs store data that can be retrieved for further analysis. The safe retrieval and accurate interpretation of this data requires the correct technology and expertise. SEA actively maintains a position at the forefront of these technologies and in doing so continues to provide the industry with the scientific data necessary to evaluate real-world heavy truck accidents.

Applying a multidisciplinary approach to forensic science, SEA has also been involved in identifying technology that can be utilized by multiple areas of science. A prime example of this is exhibited in accident scene documentation. Regardless of an investigator's area of expertise, documentation of the scene of a particular event is a critical step in the investigation process. Although cameras, measuring devices, and written notes are irreplaceable, a new technology is now being incorporated in this process – 3D laser scanning. This equipment allows investigators to collect precise measurements of scenes three-dimensionally without the need to touch or move any of the potential evidence. Be it a fire scene, the site of a structural collapse, an accident scene on a busy highway, or the site of an incident within a manufacturing facility, use of this technology allows for robust, accurate, and permanent documentation of the site. Demonstratively, 3D laser scanning allows SEA to bring the scene to their clients or a jury and allows the viewers an unprecedented opportunity to visit the scene virtually.

When applied appropriately, technology can be an outstanding partner in applying the scientific method to litigative matters. Whether this technology is a computer program, such as MADYMO, a test device, such as the Automated Steering Controller, or an entire test facility, like the Roll Simulator, utilizing today's technology within the investigation and analysis of litigative matters is vital. Equally vital in today's visual society is having the increased ability to effectively communicate highly technical or scientific information visually. Having experience developing and applying tomorrow's technology also is critical to enable its application within litigative matters in the future. Technology, by its very nature, is never stagnant and changes at an amazing rate. While being more reactive than proactive, the courts allowance of technology also is always changing, making the knowledge and use of technological tools vitally important to qualified experts.

Douglas R. Morr, M.S., P.E. received his Bachelor of Science and Master of Science degrees in Mechanical Engineering from The Ohio State University. Since arriving at SEA, he has performed hundreds of accident investigations and reconstruction analyses, biomechanical analyses relative to injury mechanisms and injury causation, and mechanical engineering analyses of failure events, and is an expert in his fields with over eight years of testimony experience.

Dr. Gary J. Heydinger, Ph.D., P.E. is the Director of Vehicle Dynamics for SEA, Ltd. His expertise includes modeling, simulating, testing and analyzing vehicle handling dynamics, braking characteristics, vehicle rollover, suspension dynamics and tire dynamics for passenger cars, vans, trucks, recreational vehicles, race cars, and military vehicles. Dr. Heydinger is also an adjunct professor at The Ohio State University.

Dr. Ashley (Al) Dunn, Ph.D., P.E. is a Project Engineer in Mechanical Engineering at SEA. His commercial vehicle expertise includes brake systems, braking and stability evaluations, and ABS system performance. Dr. Dunn received his Master's Degree from OSU in 1999. Al received his Bachelor of Science degree in Mechanical Engineering from North Carolina State University (NCSU) in 1986.

DEFENDING EMPLOYMENT CLAIMS: DID THE PLAINTIFF ATTEMPT TO MITIGATE?

Chad L. Staller, MBA, JD, MAC, AVA and James Markham, PhD, JD, CPCU The Center for Forensic Economic Studies

SCENARIO:

Bob Barrister, a corporate attorney for a hospital in northern New Jersey, is one of several employees dismissed in a 2006 reduction in force.

He makes out a Title VII claim seeking five years of back-pay damages—his $150,000 salary, offset by the amount he made working several temporary assignments, roughly $50,000 per year. The back-pay claim is $500,000.

He seeks front-pay damages for ten years, again offset by $50,000 per year in probable future earnings as a temp.

The total claim: $1.5 million in back and front pay.

What are Bob's actual damages?

Plaintiffs in employment-discrimination matters have the duty to mitigate their damages by using reasonable diligence to find work similar to the job with the defendant employer.

Under Title VII, Bob's back-pay claim may be reduced by the amount he could have earned had his search been diligent. 42 USC Sect. 2000 e-5(g)(1)(1994) holds that back-pay awards are to be reduced by the "interim earnings or amounts earnable with reasonable diligence by the persons or person discriminated against."

Similarly, courts have held that front-pay awards can be reduced or denied if the plaintiff fails to use reasonable diligence in mitigation. See *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 55, 8 AD Cases1265 (2d Cir. 1998); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176(2d Cir. 1992); *Hansard v. Pepsi-Cola Metro Bottling Co.*, 865 .2d 1461 (5th Cir. 1989).

Has Bob met his duty to mitigate? The defendant employer has the burden of proving failure to mitigate. *Robinson v. SEPTA- Red Arrow Div.*, 982 F. 2d 892, (3rd Circuit 1993). How does the defense determine whether the mitigation efforts were reasonable?

The employer's burden is a two-step process: 1) showing that "substantially equivalent" work is available to the plaintiff and 2) showing that the claimant did not exercise reasonable diligence in seeking employment.

In the current economic climate, step 1 can be a challenge since, obviously, work in many sectors is hard to find. The bleak picture painted in the media, however, does not reflect the reality of the job market for certain occupations and in selected geographic areas. In some geographic areas and in some occupations, work is available and mitigation is not impossible. For example, while the

overall jobless rate is currently around 9.5%, unemployment for those with bachelor's degrees or higher is reportedly 5%, according to the Bureau of Labor Statistics.

The Occupational Employment Statistics (OES), produced by the Bureau of Labor Statistics, shows employment and wage estimates for over 800 occupations by date and geographic area. The OES indicates that the year in which the attorney plaintiff was laid off, 2006, in the relevant geographic area, (Newark, NJ), 7,380 individuals were employed as attorneys. Median tenure of employees in legal occupations was 5 years, according to the OES, so by implication work was available due to the ongoing turnover rate.

The OES also shows that average annual earnings for attorneys in the Newark metropolitan area were $120,710.

In addition to the OES, an examination of want-ads in the *New Jersey Law Journal's* 2006 and 2007 issues shows that more than two dozen employers sought attorneys with the plaintiff's qualifications (experience in health care law).

It is clear that "substantially equivalent" work was available to the plaintiff. Did Bob exercise reasonable diligence in his job search?

The methods employed by the job seeker can indicate just how diligently work is being sought – simply listing one's resume on Monster.com or similar Web sites and sitting back and waiting for employers to call would not be considered a diligent and active job search. Almost every job-search counselor stresses the importance of personal contact (networking) and direct employer contact. These two techniques are, according to two widely used job-search guides, by far the two most effective methods of job search, while responding to want ads and reliance on internet-based job searches are significantly less effective.

A guide produced by the US Department of Labor[1] recommends "informal" job-search methods such as networking with personal contacts and direct employer contact. According to the Guide, only one-third of jobs are obtained through more "formal" methods such as wants ads, employment agencies, hiring halls and civil-service tests. The Guide suggests that the job seeker employ a number of job-search techniques and not rely solely on Internet-based searches. The techniques recommended by the Guide include:

- networking,
- sending resumes or letters to target companies,
- contacting target companies by phone,
- visiting target companies in person,
- responding to classified advertising in newspapers or trade journals,
- using private employment agencies and executive search firms (headhunters),
- using public employment agencies,
- using Internet job banks.

What Color is Your Parachute, perhaps the most popular and widely used guide to job search, reports that networking is five times more likely to lead to a job than simply sending resumes to potential employers. According to the book, an internet-only based approach—relying only on job-search sites such as Monster.com—results in a 4% rate of success (of 100 internet-only job seekers, only 4 will find a job). Answering ads in professional journals results in a 7% success rate and answering want-ads in general newspapers results in a 5% to 24% success rate. By contrast, using personal contacts (networking) results in a 33% success rate, and contacting employers directly results in a success rate of 47%.

The takeaway: diligent job search cannot begin and end by simply posting a resume on the Internet and hoping for the best. An active job search entails contacting both employers who have advertised openings and "cold calling" potential employers.

Another indication of diligence is the extent to which the job seeker utilized personal contacts (networking), and other potential sources of job opportunities such as alumni associates and professional organizations.

In deposition, Bob testified that his search consisted of posting resumes on Monster.com and two other job-search Web sites and registering with four temporary legal staffing agencies.

Significantly, his search did not include the most-effective methods listed in the Department of Labor's Job Search Guide and What Color is Your Parachute: direct contact with potential employers and networking. Bob apparently did not bother to consult these job-search guides or, if he did, chose to ignore the advice given.

Beyond mitigation, the claim that Bob's earning potential is forever limited to $50,000 per year is unwarranted. It is likely that Bob would have caught up to and surpassed his earnings with the defendant employer relatively quickly had he performed a diligent search. If he was worth $150,000 a year to the defendant, he would arguably have the same market value (or more) to a competitor or a similar business. The Bureau of Labor Statistics Current Population Survey tracks re-employment of displaced (laid off) workers by occupation, region and earnings. The 2008 Displaced Worker Survey indicates that laid-off workers generally catch up to their pre-separation earnings after a period of three years, suggesting that Bob would have been caught up by 2009, obviating any front-pay damages.

Proving failure to mitigate is an exercise in both macroeconomics and focused discovery. Any employment claim warrants a close look at the relevant job market and the plaintiff's skills, experience and job-search methods. Finding substantially similar work, even in the current economic climate, might be more likely than the overall unemployment rate would suggest.

Chad L. Staller is the president of the Center for Forensic Economic Studies, the Philadelphia-based national firm providing economic and statistical analysis and testimony. His practice focuses primarily on the analysis of commercial damages, personal-injury and wrongful-death damages, and damages and liability in labor and employment matters. He has testified in jury trials, bench trials and arbitrations in state and federal courts. He publishes articles and presents seminars on forensic economics. He can be contacted at cstaller@cfes.com or at 800-966-6099.

James Markham, a Senior Economist at the Center for Forensic Economic Studies, concentrates on the analysis of issues arising in labor and employment litigation, commercial matters, personal-injury and wrongful-death claims and insurance coverage and claims matters. Prior to joining the Center, he served as Senior Vice President and head of the curriculum department at the American Institute for CPCU (Chartered Property and Casualty Underwriter), where he developed many of the Institute's academic courses and programs. He has also worked as a liability claims examiner and has practiced law. He can be contacted at jmarkham@cfes.com or at 800-966-6099.

[1] Job Search Guide: Strategies for Professionals , US Department of Labor, Employment and Training Administration, United States Employment Service (USES), 1993, ISBN 9780160416835, http://www.labor.state.ny.us/careerservices/findajob/tableco.shtm

"Who Moved My Eighty Pound Wheel of Cheese?"

A Love Story

Syndi O'Brien and Joel Mullis Ringler Associates

True confession, this article explores how folding structured settlements and data analysis into a free model can give your company or firm the business intelligence needed to gain a competitive edge. The title was to get you to read this far.

Business intelligence refers to skills, processes, technologies, applications and practices used to support decision-making. How does an industry leader stay on top? How are elite companies making correct business decisions consistently? Business intelligence is the answer. Refined, accurate data is fast replacing the "gut" instincts of decision makers. Progressive companies make decisions based upon intelligence derived from statistical data. It's all about numbers and metrics and you don't have to look far to see books, articles and speakers detailing how data analysis drives the most successful companies. But, is it possible to provide this service to clients at no cost? The answer is Yes, and the process is simple. Using the free model exploited by Google together with the structured settlement compensation model, we provide companies an opportunity to harness the power of data to make better bottom line business decisions at no cost.

Traditional structured settlement brokers provide quotes, attend meditations and assist in the settlement process and in turn, life companies pay a commission when an annuity is purchased as part of those settlements. Ringler Associates has provided structured settlement services since 1975 with annuity premiums in excess of $21 billion. Today Ringler Associates is involved in one of every four structures where an independent broker is used and continues its legacy as an industry leader. It is Ringler's philosophy, legacy and reputation for unparalleled service to our clients which has enabled us to create and implement the model which is the subject of this article.

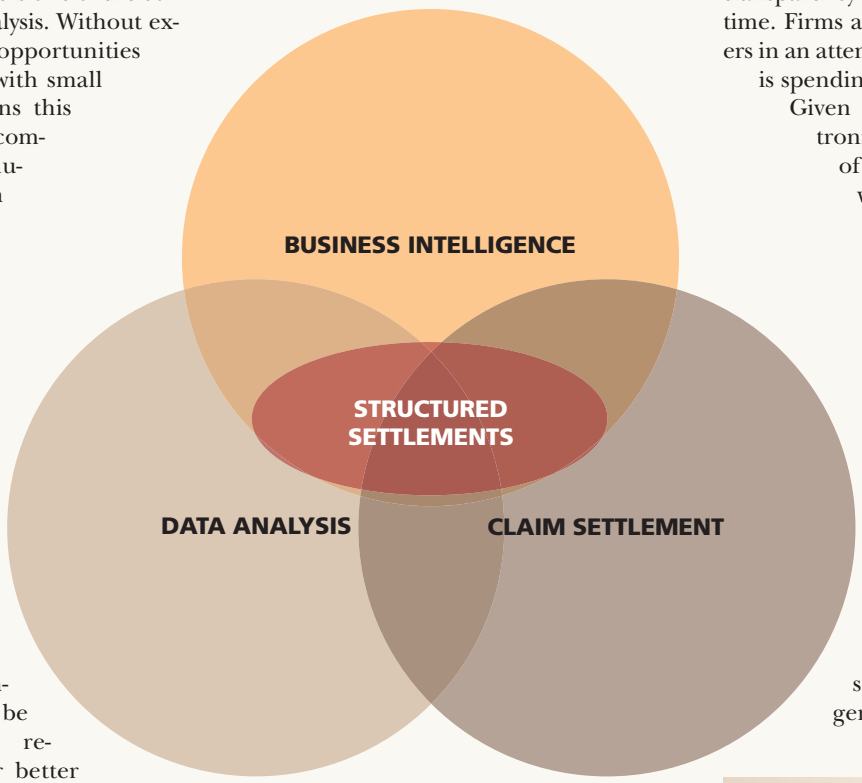
Historically, the structure broker's involvement ends when the case is settled and the structure is placed. In our model, we have expanded our service a step farther by partnering with our clients on all of their structure opportunities. It is through this partnership that we provide the analysis which allows our clients to leverage the data at their disposal and use it in their decision-making process. This model works for clients who want to develop an exclusive long-term partnership focused on continual

improvement. This partnership is graphically depicted in the Venn diagram and shows how the structured settlement compensation model is leveraged for the client's benefit.

We work hand in hand with the client to compile the most robust data possible. Clients should not hesitate to embark down this path out of concern over their data quality. Data improvement is one of the collateral benefits of this analysis. Without exception, clients discover opportunities to improve data quality with small changes. No client begins this analysis with data that is complete, accurate or as granular as possible—it is an ongoing process, hence the partnership.

We begin the process by analyzing closed claim data. Through segmentation and bucketing we are able to format the data in a "side-by-side" comparative model which provides insight into the drivers and variables impacting claim outcome. This comparative view reveals trends, outliers and anomalies, which may need to be eliminated, controlled, reduced and managed for better business outcomes. The "drill down" analysis does not necessarily provide "answers" but identifies areas where better, more specific questions should be asked.

By way of real world example, we recently worked with a client in the worker's compensation arena and ultimately identified a causal relationship between parts of the business that was completely unexpected. Through segmentation, bucketing and refinement, we identified an association within a group of claims, and drivers common to that association, which under normal scrutiny would have gone unnoticed. This analysis identified a common driver whose genesis could be traced to a cost savings business decision related to sourcing and distribution. Once this "causal link" was identified, the client had a specific business issue to address. They quantified the cost of changing the distribution model, specifically reducing the size and weight of the item (you got it…an 80 pound box of cheese), against the historical cost of the claims that our analysis revealed was driven by this item. The client was able to immediately take steps to mitigate future claims until such time as the permanent changes in sourcing and distribution could be made. The analysis used in this example produced business intelligence that revealed a cause-and-effect relationship that otherwise may have gone unnoticed and uncorrected at the expense of the bottom line.



Most companies have more opportunity to use data than they realize. Data is everywhere. The key is to determine what data you have, whether it is accurate and complete and if not, how to make the most with what is available and improve it along the way. Data compilation is a circular process that continually evolves toward the goal of granular accuracy. It is not something that can be achieved in a vacuum, nor is data analysis merely determining the "average" and seeking to improve it.

No discussion of metrics or data would be complete without addressing the use of "average" as a measurement. We are bombarded with the average: average rainfall, average temperature, average claim cost, so we are lulled into thinking that average is a meaningful measurement. The average is not a measurement that provides any type of transparency unless it is used in comparison to quartile metrics to demonstrate its limitations. Quartile metrics are much different and provide just the kind of fidelity needed to conduct robust data analysis. It takes little time for clients who have had no experience with quartile metrics to appreciate the precision and range this kind of measurement illustrates.

The use of quartile metrics to gain insight into law firm performance provides transparency into litigation costs and cycle time. Firms are often "measured" by carriers in an attempt to determine if the carrier is spending their defense dollars wisely. Given the widespread use of electronic billing, firms have a wealth of data at their disposal. Firms who keep their own metrics and can demonstrate their results and impact through objective measures are always well received when marketing to carriers.

Partnering with our clients for the long-term allows us to help them develop robust data and continually refine business practices through analysis. The long term goal of these partnerships is to reach predictive analysis capabilities which provides the most sought-after business intelligence: predictive modeling.

Syndi O'Brien and Joel Mullis are structured settlement brokers with Ringler Associates and both are certified Six Sigma Black Belts trained in statistical data analysis and process development. Syndi received her training at GE Insurance Solutions where she developed the methodology and process to measure and analyze the cost quality of legal services. Joel received his training at IBM and used the techniques in nation building, resource and source management and inter-service liaising throughout his 22-year military career. Together they developed this model drawing from their extensive background in data analysis and past experience in law, insurance, claims, marketing and the military which is the basis of their structure business and the foundation for this article.

MALTA... THE PEARL OF THE MEDITERRANEAN

Dr. Pierre Mifsud EMD Advocates

The Maltese archipelago, an ex-British colony, lies virtually at the centre of the Mediterranean and in close proximity to mainland Europe, the Middle East and North Africa being 93 km from Sicily, Italy and 345 km from Libya. The archipelago consists of three islands: Malta, Gozo and Comino with a total population of 416,333 inhabitants (Eurostat Estimate 2010). The main contributors to the Maltese economy are tourism, manufacturing and financial services. The Maltese financial services sector is becoming a cornerstone of the economy accounting for around 12% of GDP. The Government's objective is to increase the industry's contribution to 25% of GDP by 2015. Malta is a full member of the European Union since 2004 and has adopted the Euro as its currency since January 2008.

The Global Financial Centres Index, published by the City of London, ranked Malta 4th out of 66 jurisdictions as a financial centre "that is most likely to increase in importance over the next few years," behind only Dubai, Shanghai and Singapore. It also ranked Malta 5th amongst the "top financial centres, where organizations may open new operations in the next two to three years," behind Dubai, Luxembourg, Singapore and Mumbai.

FINANCIAL SERVICES REGULATOR

The Malta Financial Services Regulator (MFSA) is the single regulator for financial services activities in Malta. It regulates and supervises credit and financial institutions, investment services, funds, insurance business and trusts and also houses the Registry of Companies. The MFSA has a proven ability to react promptly to developments in the industry and afford a pro-business approach to regulation. The MFSA is known as a regulator which is approachable and willing to listen to promoters without in any manner undermining investor confidence and investor protection.

The MFSA has to date signed 21 bilateral and multilateral Memoranda of Understanding with overseas regulators, including with the Dubai Financial Services Authority, the China Securities Regulation Commission, the China Banking Regulatory Commission and the Australian Prudential Regulation Authority.

BANKING

Malta has an EU compliant banking sector of world-class sophistication currently hosting 24 foreign or privately owned credit institutions with total assets of 41 billion Euro as of December 2009. The World Economic Forum's Competitiveness Index 2009-2010 has ranked Malta's banking system as the 13th soundest in the world.

Malta's international banking centre has been gaining considerable ground in establishing itself as a finance hub in the Mediterranean with some of the most highly respected names in the industry establishing operations in Malta; the most recent arrival being Deutsche Bank. The spread of products and services being offered by banks in and from Malta include retail banking, private banking, commercial banking, trust business, investment banking, trade finance, treasury operations and syndicated loans.

INSURANCE

The insurance sector in Malta boasts a mature market with a compliment of life and non-life insurers and reinsurers operating locally and overseas as well as a burgeoning international captive sector. The regulatory demand for transparency and compliance, coupled with the intrinsic right of insurers and reinsurers to passport their business throughout the European Economic Area (EEA), indicates that the growth of the insurance sector is likely to continue. One can also find a wider definition of a "Captive" under Maltese law, which includes members of a trade, industry or profession association insuring risks related to the particular trade, industry or profession.

Malta is the only full European member state to offer Protected Cell Company ("PCC") legislation, allowing companies to establish a cell within a PCC and write risk through that cell.

FUNDS AND ASSET MANAGEMENT

The number of investment funds licensed in Malta is growing at an ever-increasing rate. This growth has been registered across the entire scope of fund business, from retail funds marketed to domestic savers to the rapid development of Professional Investor Funds being a diverse class of funds promoted to certain categories of investors which includes hedge funds. In view of the progression of the funds industry, Malta has witnessed the development of a dynamic fund administration and management sector catering to the needs of foreign fund promoters.

THE GLOBAL FINANCIAL CENTRES INDEX RANKED MALTA 4TH OUT OF 66 JURISDICTIONS AS A FINANCIAL CENTRE "THAT IS MOST LIKELY TO INCREASE IN IMPORTANCE OVER THE NEXT FEW YEARS," BEHIND ONLY DUBAI, SHANGHAI AND SINGAPORE.

Another advantage that the island holds over established domiciles is that funds registered in Malta, while required to appoint at least one resident Director, are not required to appoint a local administrator or manager.

FOREX SERVICES

A recent phenomenon is the surge in interest from various market players in the foreign exchange field, ranging from specialist software providers interested in using Malta as a base for their operations, to FOREX specialised asset managers and FOREX trading platforms looking to use Malta as a launch platform from where to penetrate overseas markets. Interest has also been shown from established U.S. firms, one of which has already established a fully fledged operation. Businesses which provide services in relation to FOREX would normally require a license from the MFSA. The possibility of establishing a branch or carrying on business on a cross-border basis within the EEA without requiring a license in each case is an added advantage.

BUSINESS WITH NORTH AFRICA

Malta has traditionally acted as a hub for business with North Africa. A large number of businesses operating in North Africa, such as the oil and gas, mechanical and electrical engineering, land and geophysical surveying, medical and other areas of the services industry, have established their company in Malta. Moreover they would typically base their families here in view of the excellent level of education and healthcare present on the island, apart from its political stability.

OTHER BENEFITS

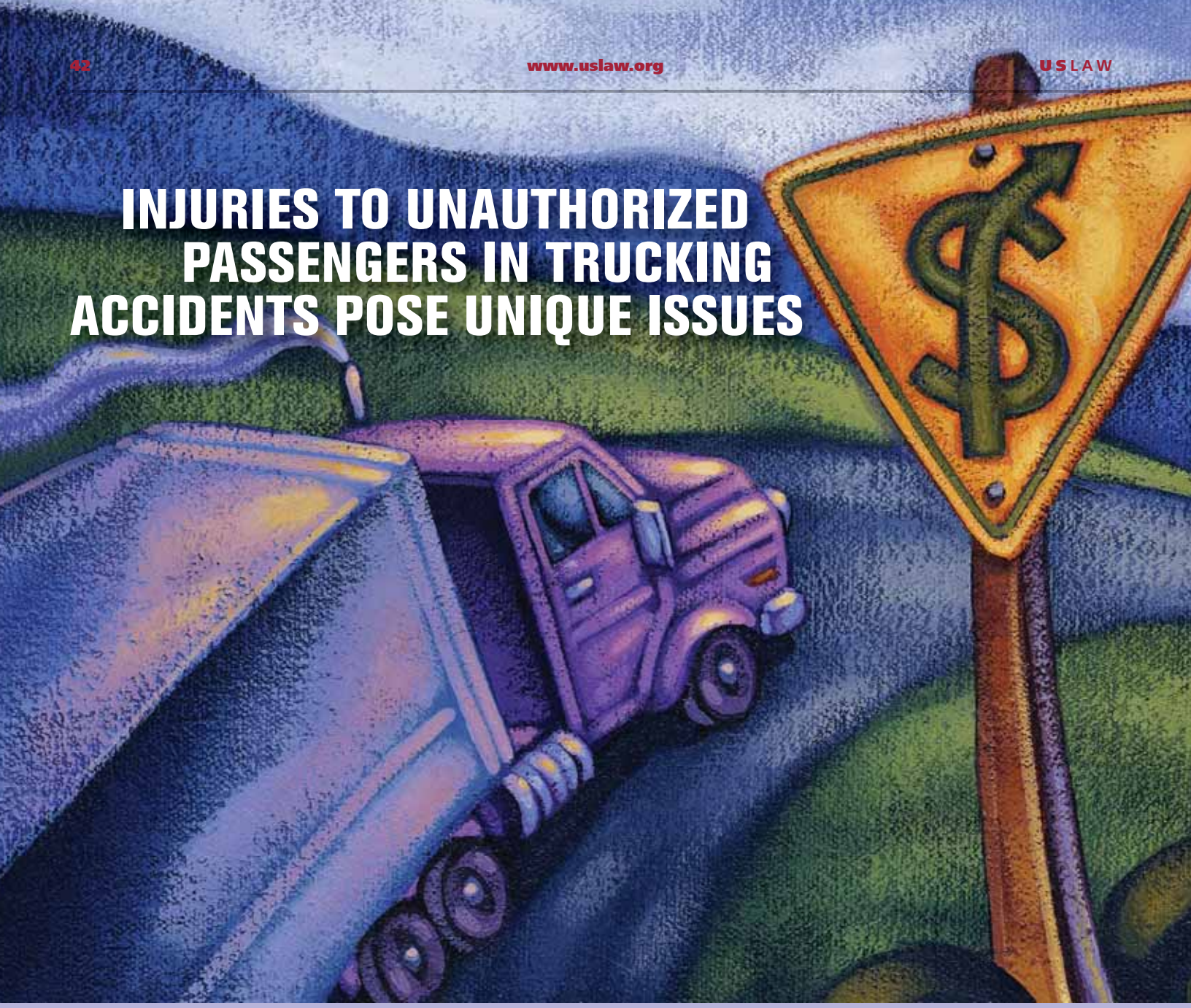
Another significant benefit is the ability for companies to re-domicile themselves to Malta without having to be wound up in their current domicile, should the latter permit re-domiciliation.

Furthermore, all of Malta's laws are published in English and Maltese since both are official languages. This gives our legislation clarity and ease of understanding which is absent in some other jurisdictions. Moreover, operating costs are very competitive when compared to other jurisdictions.

Malta's tax system, which is fully approved by the EU Commission, is also very attractive through its imputation tax system and tax refund mechanism. Tax refunds can be of 5/7, 6/7, 2/3 or a full refund depending on the circumstances, resulting in a net effective tax ranging between 0 and 10%. Malta has an extensive network of double taxation treaties concluded with over 50 countries, including one with the U.S. which should come into force shortly.

Dr. Pierre Mifsud is a partner at EMD Advocates. He holds a doctorate in law and a Master of Arts degree in Financial Services from the University of Malta as well as being an active member of the Malta Institute of Financial Services Practitioners. Dr. Mifsud lectures on corporate and commercial law at the University of Malta. His firm's legal practice focuses on investment services, funds, insurance, banking and corporate and commercial law.

INJURIES TO UNAUTHORIZED PASSENGERS IN TRUCKING ACCIDENTS POSE UNIQUE ISSUES



Kevin L. Fritz and Patrick E. Foppe Lashly & Baer, P.C.

Not so long ago, a good samaritan came upon the scene of a horrific tractor-trailer accident that occurred in the dark of night along an interstate highway. He immediately tried to determine if anyone was injured. As he ran up to the chaos, he could see that the front of the tractor was obliterated in the crash. Next to what remained of the front passenger door of the tractor, he found a woman struggling to open the passenger door crying in a panic, "I cannot get to my grandbaby Abby." He helped pry open the door. In the crushed passenger compartment of the tractor, he was stunned to find a lifeless three-year-old girl in the front seat.

In the days following the accident, the investigation determined that the driver of the tractor-trailer had been transporting her granddaughter without the trucking company's permission. Tragedies such as these should never happen, but every year trucking accidents occur that involve injuries to unauthorized passengers. Unfortunately, it is not uncommon to see trucking accidents when the truck driver was impermissibly transporting a spouse, family member, friend or even a hitchhiker. Personal injury claims brought by unauthorized passengers against trucking companies and their drivers invariably pose unique legal issues. This article highlights some of the issues that should be considered in handling these types of claims.

First, the Federal Motor Carrier Safety Regulations (49 C.F.R. § 392.60) generally prohibit drivers of commercial motor vehicles from transporting passengers without specific written authorization from the motor carrier. Accordingly, trucking companies should effectively enforce a written policy barring their drivers from allowing passengers to ride in a commercial motor vehicle without the company's written permission. We recommend that all trucking companies have their drivers sign a form indicating they have received and understand the company's policy regarding unauthorized passengers. Ideally, fewer injuries to unauthorized passengers would occur if these policies were better enforced.

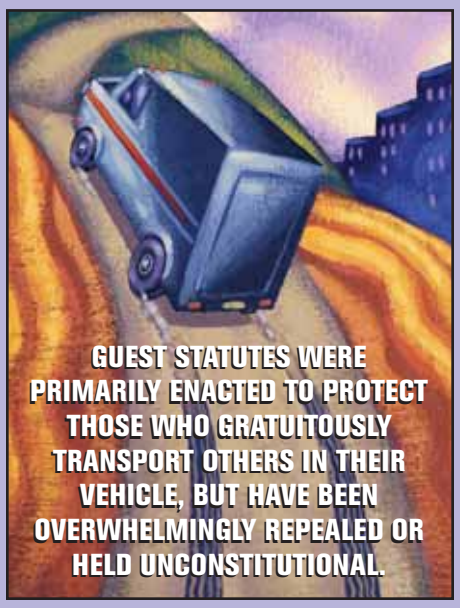
Nevertheless, when accidents do occur, the written policy regarding unauthorized passengers can be instrumental to the trucking company's defense of the personal injury claims brought by the unauthorized passenger. About half the states recognize some variation of the "unauthorized passenger doctrine," which can bar an unauthorized passenger from recovering directly

from the trucking company for the negligence of its driver, when the trucking company expressly prohibits the carrying of unauthorized passengers.[1] Today, most courts frame the issue in terms of the driver not having "actual" or "apparent authority" to invite others to ride with him or her. Trucking companies that have a written policy against unauthorized passengers may be able to defeat claims against the trucking company for the negligence of its driver. Only a couple of courts have found that the federal regulations making a motor carrier vicariously liable for injuries to the traveling public preempt the common law unauthorized passenger rule, and these cases may no longer be authoritative.[2] In any event, the "unauthorized passenger doctrine" can be an important tool to seek to preclude vicarious liability claims against the trucking company in certain situations.

In addition, a trucking company's policy against unauthorized passengers can also assist in defeating claims that the trucking company negligently trained or supervised its drivers.[3] Also, claims that a trucking company is *per se* negligent by virtue of its driver failing to follow the Federal Motor Carrier Safety Regulations pertaining to unauthorized passengers should fail.[4]

Of course, the motor carrier's insurer may nevertheless have to indemnify the driver for his or her negligence.[5] However, it is important to consider the special defenses the motor carrier's driver may have against claims brought by unauthorized passengers. Generally, a driver has a responsibility not only to persons outside the vehicle, but also to passengers inside the vehicle. However, the laws of several states may provide the driver immunity, albeit in exceedingly rare instances.

In years past, a driver usually could not be held liable to guest passengers in most states for injuries caused by the driver's ordinary negligence because of special protective statutes called "guest statutes." Guest statutes were primarily enacted to protect those who gratuitously transport others in their vehicle, but have been overwhelmingly repealed or held unconstitutional.[6] Today, only Alabama, Indiana, and Illinois have guest statutes. Alabama's guest statute (Ala. Code § 32-1-2) precludes actions for injury



or death by any guest against an owner or operator absent "willful or wanton misconduct." Indiana's guest statute (IC 34-30-11-1) only precludes actions by a non-paying parent, spouse, child, step-child, or sibling of the driver, or by a hitchhiker, unless the driver's conduct was wanton or willful. Further, the Illinois guest statute (625 ILCS 5/10-2010) applies only to hitchhikers.

Likewise, it was once widely recognized that no tort actions could be maintained among household family members. In other words, passengers who were family members of the driver could traditionally not bring a personal injury claim against the driver. The so-called "parental immunity" rule generally barred claims brought on behalf of injured unemancipated children against their parents. Similarly, the "spousal immunity" rule generally barred actions between spouses. The traditional justifications for intra-family immunity were mainly to promote family harmony and to avoid fraudulent and collusive claims. Since the 1960s, however, most states have significantly qualified or repudiated the doctrines of parental immunity and spousal immunity. Nevertheless, states which still have a qualified version of the parental immunity doctrine in motor vehicle accident cases include: Alabama, Arkansas, Colorado, Georgia, Indiana, Louisiana, and Nebraska.[7] Similarly, the spousal immunity doctrine is still available in Georgia and Louisiana in cases involving motor vehicle accidents.[8]

In conclusion, when faced with a personal injury claim brought by a passenger in a trucking accident case, numerous issues should be considered. First, it is important to ascertain whether the passenger was an authorized or unauthorized passenger. Trucking companies should allow drivers to carry passengers only with special written authorization. If a trucking company does not provide the driver with permission to haul the passenger, then a company may be able to preclude the unauthorized passenger from suing the trucking company directly. Further, the truck driver may have immunity from claims brought by certain passengers under guest statutes and/or the parental or spousal immunity rules that still exist in some states. These considerations should assist in the successful resolution of these types of claims.

1 *See, e.g., Beardsley v. Farmland Co-Op, Inc.*, 530 F.3d 1309 (10th Cir. 2008); M*id-States Plastics, Inc. v. Estate of Bryant ex rel. Bryant*, 245 S.W.3d 728 (Ky. 2008); *Builders Transport, Inc. v. Grice-Smith*, 167 S.W.3d 1 (Tex. App. 2005). *See also*, 74 A.L.R. 163; Restatement (Second) Agency § 242. *But see Rahman v. State*, 208 P.3d 566 (Wash. App. 2009).

2 *Smith v. Johnson*, 862 F. Supp. 1287 (M.D. Pa. 1994); *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984). *But see Bays v. Summitt Trucking, LLC*, 691 F.Supp.2d 725, 730 (W.D.Ky. 2010) (noting the 1992 amendments to the federal regulations may invalidate some prior decisions).

3 *See, e.g., Builders Transport, Inc.*, 167 S.W.3d 1.

4 *See Hill v. Western Door*, 2005 WL 2991589 (D.Colo. Nov. 08, 2005); *Santana v. Arpin America Moving System, LLC*, 2009 WL 2462500 (Tex. App. 2009).

5 *See, e.g., Reisch v. M & D Terminals, Inc.*, 884 P.2d 242 (Ariz. App. 1994).

6 *E.g.*, Neb.Rev.St. § 25-21,237, repealed effective July 15, 2010; Tex. Civ. Prac. & Rem. Code Ann. § 72.001, declared unconstitutional by *Colvin v. Colvin*, 291 S.W.3d 508, 511 (Tex. App. 2009). *See also* 66 A.L.R.3d 532.

7 *See, e.g., Smith v. Smith*, 922 So.2d 94 (Ala. 2005); *Greenwood v. Anderson*, 324 S.W.3d 324 (Ark. 2009) (except if injury arose in connection with parent's business activity); *Schlessinger v. Schlessinger By and Through Schlessinger*, 796 P.2d 1385 (Colo. 1990) (except if parent engaged in willful and wanton or intentional misconduct or parent was pursuing a business or employment activity at time of accident); *Blake v. Blake*, 508 S.E.2d 443 (Ga. App. 1998); C.M.L. *ex rel. Brabant v. Republic Services, Inc.*, 800 N.E.2d 200 (Ind. Ct. App. 2003); LSA-R.S. 9:57; *Frey v. Blanket Corp.*, 582 N.W.2d 336 (Neb. 1998).

8 *Larkin v. Larkin*, 601 S.E.2d 487 (Ga. 2004) (citing Ga. Ann. Code § 19-3-8 (2002)); *Cloud v State Farm Mut. Auto. Ins. Co.*, 440 So.2d 961 (La. App. 1983) (citing LSA-R.S. 9:29).

Kevin L. Fritz and Patrick E. Foppe are attorneys at Lashly & Baer, P.C. in St. Louis, Missouri who specialize in transportation law and handle claims involving trucking accidents. Kevin is currently Chair of the USLAW NETWORK Transportation Practice Group. Patrick was selected for inclusion in the 2010 Missouri & Kansas Rising Stars.

How Recent Changes in the Tax Law May Affect You, Your Family and Your Business

Bradley Wm. Bowen Strong & Hanni, PC

President Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the "Act") on December 17, 2010. The Act extends the Bush-era tax cuts for two years, even though some of those tax cuts had already expired. The following is a brief summary of some of the changes which will likely affect you, your family and your business.

ESTATE, GIFT & GENERATION SKIPPING TAX PROVISIONS

• **Estate Tax.** The Act reinstates the estate tax, but allows the executor of estates of decedents who died in 2010 to elect to apply the §1022 modified carryover basis provisions. If an election is not made, the reinstated estate tax provisions apply to the estates of decedents who died in 2010. The Act extends the due date for (1) filing an estate tax return; (2) paying the estate tax; and (3) making disclaimers under IRC §2518(b) for nine months after the date of enactment. Similarly, the Act extends the due date for filing generation-skipping transfer tax returns.

• **Exclusion from Estate Tax.** The Act increases the applicable exclusion amount to $5 million, which is adjusted for inflation

after 2011. It also reduces the maximum estate and gift tax rate to 35%. The Act significantly changes existing law by providing that a surviving spouse's applicable credit amount may be increased by the unused exclusion of a deceased spouse. However, new IRC §2010(c)(5) requires the executor of the deceased spouse to make an irrevocable election on a timely filed Form 706 to permit the surviving spouse to claim the unused exclusion. The surviving spouse may only use the unused exclusion of his or her "last deceased spouse." This rule is intended to prevent the accumulation of unused exclusions of multiple spouses, but could have the unintended effect of reducing the exclusion of the surviving spouse where the "last deceased spouse" had a smaller unused exclusion than a prior deceased spouse.

• **GST Tax.** The Act retroactively reinstates the federal GST tax on transfers to grandchildren, more remote descendants and/or trusts for their benefit as of January 1, 2010. The GST exemption has been increased from the $1 million amount allowed from 2001 through 2009 to $5 million. The GST tax is 0% for 2010 only, and 35% thereafter.

These new estate, gift and GST tax provisions expire on December 31, 2012, and the Internal Revenue Code will then apply the rules as though the amended provisions "had never been enacted." Significant planning opportunities exist, but the time to craft your strategy is limited. The following are just a few of the many alternatives you may want to implement:

• **Dynasty Trust.** A gift of assets to an irrevocable dynasty (multi-generational) trust removes the value of the asset and any future appreciation from the donors estate.

• **Installment Sale to Grantor Trust.** You may sell an asset for fair market value to an irrevocable grantor trust in exchange for a promissory note bearing interest at the Applicable Federal Rate ("AFR"). If the asset sold appreciates in value faster than the AFR, the appreciation will have been transferred, tax-free, to the trust. The grantor usually makes a gift to the trust sufficient for it to be able to make the payments required under the note. The higher gift and GST exemptions create the opportunity for larger sales and larger gifts, such that greater tax-free wealth transfers can be achieved.

• **Leveraging Gifts.** The higher gift and GST exemptions make the possibility of leveraging gifts through the structuring and sale of business interests, and the acquisition of life insurance in an irrevocable life insurance trust more attractive than ever before. Such planning opportunities have been limited in the past due to a $1 million GST exemption. The much higher $5 million exemption facilitates a number of planning opportunities, and the grantor trust can be enriched further by the grantor's payment of any income taxes owed by the trust. In addition, life insurance may be used in the trust to accomplish a "multiplier effect." Relatively small premiums can generate large, income and estate tax free benefits for generations of future trust beneficiaries, with proper planning. There are a multitude of strategies that can be used that reach far beyond the scope of this article, and which must be tailored to the individual needs of each client.

These new estate, gift and GST tax provisions expire on December 31, 2012, and the Internal Revenue Code will then apply the rules as though the amended provisions "had never been enacted."

INDIVIDUAL INCOME TAXES

• **Income tax rates.** The 10%, 25%, 28%, 33%, and 35% individual income tax brackets are extended for an additional two years, through 2012. The maximum individual income tax rate would have increased to 39.6% if the Act had not passed.

• **Dividend and Capital gains rates.** Without the Act, capital gains tax rates would have increased to 10% for taxpayers below the 25% bracket and to 20% for taxpayers in the 25% bracket or higher. Dividends would have been taxed at ordinary income tax rates. The Act extends the 0% rate and 15% rates, respectively, on both dividends and capital gains for an additional two years.

• **Payroll Tax Holiday.** **For 2011 only**, the Act reduces the Social Security tax rate on individuals to 4.2% from 6.2%, and reduces the self-employment tax rate to 10.4% from 12.4%. The income base on which payroll taxes are computed remains at $106,800 for 2011. The Medicare tax continues to apply to all earned income.

• **Alternative Minimum Tax (AMT).** The AMT exemption amount is set at $72,450 for 2010, and at $74,450 for 2011 for those who are married and filing joint returns. For single individuals, the exemption amount is $47,450 for 2010, and $48,450 for 2011.

• **Personal Exemptions.** Personal exemptions were being phased out for higher income individuals, but will now be allowed for an additional two years—regardless of income.

• **Distributions from IRA's to Charities.** The Act permits taxpayers age 70-1/2 or older to distribute up to $100,000 to charities from traditional and Roth IRAs.

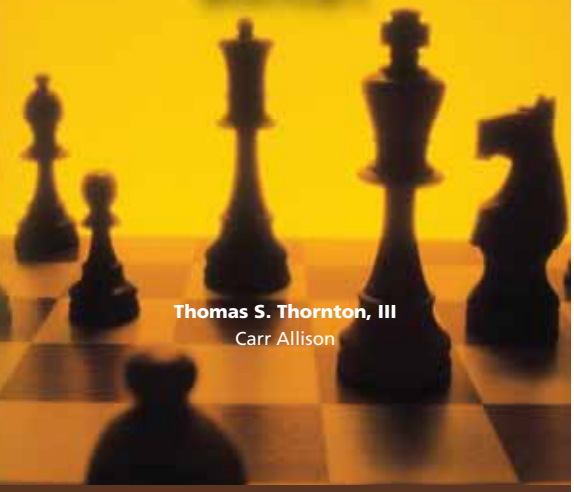
BUSINESS TAX PROVISIONS

The Act extends many credits and incentives applicable to businesses, but they vary from one industry to another. If your business was benefitting from such a credit or incentive, it is likely that it has been extended, and you should check with your tax advisor to ensure that your business is taking advantage of all of the savings opportunities available to it.

Mr. Bowen's law practice is focused on representing companies and high net worth individuals in complex business planning, contract drafting, tax and estate planning matters, including the acquisition, ownership and leasing of aircraft. He has been employed by the law firm of Strong & Hanni in Salt Lake City, Utah since 1985 and may be reached at 801-532-7080 or at bbowen@strongandhanni.com.

MEDICARE SECONDARY PAYER EXPOSURE

WHAT IS THE NAME OF THE NEW GAME?



Thomas S. Thornton, III
Carr Allison

Since the passing of Section 111 of the MMSEA in December 2007, both defense attorneys and in-house risk and litigation managers have been inundated with information relating to the associated requirements under the Medicare Secondary Payer Act (MSP). We are all aware that a Responsible Reporting Entity pursuant to Section 111 will have to report as of the date of this publication, beginning in the first quarter of 2012, all payments in excess of $5,000.00 to a Medicare beneficiary where medicals have been claimed or released; regardless of the nature of the underlying action. However, I believe collectively we are just now beginning to feel the true impact this legislation will have on liability claim handling and litigation; and the current name of the game is *risk tolerance and assessment.*

Increased pressure is being placed upon in-house risk and litigation managers to attempt to quantify, and in some instances ensure, their acceptable risk tolerance in conjunction with the claim and settlement protocols and procedures which they are implementing to ensure MSP compliance. Likewise, defense attorneys are being pressed to guarantee that their clients' interests have been completely protected with any potential settlement or judgment with an individual plaintiff, despite the potential limited knowledge or expertise in this now specialized, and continuously developing, area of the law.

Now more than ever it is imperative that an open and clear line of communication exist between a defense attorney and the client as relates to the client's expectations and requirements for addressing potential risk under the MSP. While we as defense attorneys know we must identify and determine whether a Plaintiff is a Medicare beneficiary at the time of settlement or judgement, and that Medicare's interest must be protected, we must also determine from our clients when dealing with a Medicare beneficiary their levels of risk tolerance and preferred means for addressing same.

In the beginning, a clear plan of action should be established in preparation for settlement negotiations relating to the stipulations which our clients will require to be included to ensure Medicare's interest will be protected as to any existing conditional payment claims. We can only guarantee our clients that they are protected under the MSP relating to existing conditional payment claims if we either: 1) include Medicare as a payee on a settlement check; or, 2) resolve the case with our client agreeing to directly satisfy Medicare's formal conditional payment demand. Realistically, many clients ultimately must consider and weigh other options relating to Medicare's interest being protected against the benefit of resolving a tort claim while attempting to avoid the potential of a *pro se* plaintiff retaining counsel or the risk of full-blown litigation.

Risk and litigation managers must also address potential exposure relating to Medicare's future conditional payment interest. Without question, Medicare can make an argument that their interest in future conditional payments must be protected when a Medicare beneficiary is receiving proceeds through a settlement or judgment where such are being paid to a beneficiary who has either claimed or released future medicals. The question of "if" and "how" this issue will be addressed, for example by a client with a self-insured retention, is one which should be considered by not only the company, but by the primary and excess carriers where appropriate to avoid the risk of losing future coverage. Waiting until the last minute to address this issue could result in losing a potentially beneficial resolution of a matter.

As the requirements and impact of the MSP Act continue to be integrated into our claim and litigation handling approaches, we will see new issues and concerns arise. Some of which to date include:

a) The misconception that there will only be one reporting "occurrence" by either party at the time of payment; in respect to the fact that a Responsible Reporting Entitie's Section 111 obligations are different than having to notify the Coordinator of Benefits Contractor of a potential conditional payment recovery situation in order for either party to obtain a formal conditional payment demand.
b) The misconception that the Section 111 reporting obligations do not apply to a settlement under an EPL Policy where medicals are either claimed or released;
c) Understanding what procedural avenues are available in the event an adverse judgment at trial is rendered which allows a defendant to ensure that Medicare's interest is still protected and the judgment properly satisfied;
d) The potential additional exposure with implementing a policy whereby Medicare is included as a payee in a settlement with a pro se Plaintiff without considering other potential tort actions which could arise from this policy;

The Medicare Secondary Payer Act and Section 111 reporting does not have to serve as a deterrent to liability claim handling or litigation. First and foremost, one must assess potential responsibility and exposure under a tort claim. Then, with confirmation of a claimant's Medicare beneficiary status, a plan of action should be put into place to ensure compliance with the Medicare Secondary Payer Act while still accomplishing the goal of obtaining a resolution to the claim.

Once an entity's *risk tolerance and assessment* has been established, the rest should follow.

Thomas S. Thornton, III is a shareholder with the firm of Carr Allison and practices in its Birmingham, Alabama office. He is a former chair of the USLAW NETWORK Retail Practice Group and is a Member of the Medicare Advocacy Recovery Coalition. He is also a member of the Defense Research Institute and serves on the Strictly Retail and MSP Compliance committees. He has spoken on a wide range of topics from defending and claim handling best practices with regard to premises liability, liquor liability, product liability and general tort and workers compensations claims. Mr.Thornton also serves as National CMS Coordinating Compliance Counsel for his national business and insurance clients.

Leaders in Economic Analysis and Testimony


Chad Staller


James Markham


Steve Rosen


Bernard Lentz

The Center for Forensic Economic Studies has built a national reputation as a leading provider of expert analysis in matters arising in litigation, with a focus on economic loss and expert-witness testimony on damages.

Since 1980, our team of economists, statisticians, accounting experts and other forensic professionals has worked with leading firms across the US, assisting with discovery, uncovering key data, critiquing opposing claims and producing clear, credible reports and testimony. Attorneys and their clients have relied on our expertise in thousands of cases in jurisdictions across the country.

Our main areas of concentration include:

Personal Injury Damages / Wrongful Death Damages

What actual economic damage did the tort victim or the victim's family members suffer?

Commercial Loss / Business Interruption

What did a business lose as the result of a tort or breach of contract? Does a business interruption claim overlook or overstate elements of damages?

Economic Damages Claims in Employment Matters

What is the impact of an individual or group dismissal, layoff or other employment decision?

Employment-Discrimination Analysis

Was a layoff or other employment action biased against a group or individual? Does applied statistical analysis reveal any actual bias?

Business Valuation

What is the economic value of a business or professional practice?

Contact the Center for Forensic Economic Studies to discuss how we can assist you in the preparation and presentation of your damages case.

Celebrating thirty years of service: 1980 - 2010

THE CENTER FOR
FORENSIC ECONOMIC STUDIES

Personal Injury / Wrongful Death Commercial Matters Labor & Employment Statistical Analysis

1608 WALNUT STREET, PHILADELPHIA, PENNSYLVANIA 19103

WWW.CFES.COM 215.546.5600 800.966.6099 CFES@CFES.COM

IF I "SEE TO IT" THAT THE INSURER IS TIMELY NOTIFIED OF A CLAIM, WHY IS THE INSURER DISCLAIMING COVERAGE?

William J. Mitchell Ahmuty, Demers & McManus

Imagine you are a property owner that leases an office and work space to a particular tenant. The tenant recently renovated the space, and is now enjoying a remodeled office and facilities. The tenant's general contractor, satisfied with a job well done, has since moved on to the next job. One day, you check your mail and find a letter from a law firm—or worse, legal papers—indicating a claim is being made against you, based on an alleged accident months earlier in the tenant's space, involving a subcontractor's employee. You had no idea any such accident took place. What do you do?

Somewhere else, in a place far, far away, there is an insurance policy that the same general contractor purchased a year or so ago, which was in effect on the date of the accident. According to the additional insured endorsement in the policy, perhaps due to requirements in the construction contracts, you are an additional insured. The policy is written on the standard occurrence-based coverage form prepared by the Insurance Services Office, or ISO, including the policy condition for timely notice.

After reviewing the claim, your first reaction is that the contracts should pass the risk of loss to someone else; either the general contractor or the subcontractor (and their insurance carriers) look like good candidates. So you get in touch with the general contractor's principal, via letter, stating the situation and enclosing a copy of the paperwork you received that morning, with a request that he contact his insurance carrier. You telephone the general contractor a week later, and he confirms that he sent the papers to his insurance broker, who, in turn, forwarded the papers to the general contractor's insurance carrier. Is this notice to the carrier sufficient?

The typical policy requires information about the nature of the accident, the name of the injured party, the identity of any witnesses, the nature of the injury and location of the injury, and that these be included in your first notice from the injured party. You provided this information in your letter to the general contractor.

Imagine for a moment a different scenario. An employee of an electrical subcontractor alleges he fell off a ladder at a project that was finished a year ago. Similar to the first example, the construction manager's first notice that anything happened was receipt of pleadings. The construction manager forwards the pleadings to its broker, who forwards the notice to the carrier. It is generally accepted that this chain of notice is acceptable. The broker is obviously acting on the insured's behalf, and the identity of the insured will be clear to the carrier.

Going back to the first situation, however, your identity and your request for coverage may not be as clear, and thus can lead to problems. An issue may arise because of the potential loss or modification of information as it passes from one hand to the other, or the "telephone game." The notice that you initiated, as additional insured, will pass through at least two hands before it reaches the carrier. When the initial claim handler reviews the claim, your initial letter to the general contractor may have already been replaced by various fax cover pages and a broker's Notice of Occurrence form.

As a result, while the insured general contractor will be identified to the carrier, you may not be, except that the original attorney's letters or the complaint will indicate that you are a target. If that is the case, the claim handler may respond to the named insured in a manner she deems appropriate, but may ignore you at this point.

As happens often enough, some event transpires subsequently that arguably prejudices the insurer. Or, if you are in a jurisdiction where the precedent is the lingering "no-prejudice" rule, the insurer need not

prove any prejudice; it is presumed. Either way, several months and several threats from the plaintiff follow before you renew your efforts and eventually the carrier responds to you, with a disclaimer for untimely notice. The issue now, at least in the carrier's mind, is whether you ever (or at best, belatedly), provided notice to the general contractor's carrier before the insurer was prejudiced.

And so, the battle lines are drawn. You, as the additional insured property owner, who had no idea as to the identity of the general contractor's insurer, forwarded the paperwork that was your first notice of an accident to the general contractor with a demand that it be forwarded to the contractor's insurer. This in fact was done, and you believe you did all that was expected of you. The claim handler at the insurance company, who received a notice of occurrence form from the general contractor's broker, argues that she only received from her insured, the general contractor. She advises that you, as an additional insured, have "an independent duty to provide notice," which you did not do here until it was too late.

Ultimately you should prevail. The path to that result may vary, because you have several arguments available to you that are generally accepted by the courts.

THE NOTICE CONDITION IN THE POLICY

As you might expect, the language of the insurance policy itself should be your primary source of guidance. That being said, however, the local interpretation of this policy may be significantly affected by statutes and judicial interpretation.

The standard notice provision in most ISO policies reads something like this: "You must see to it that we are notified as soon as practicable of an occurrence or offense which may result in a claim." If a suit is brought, you must "notify" the insurer "as soon as practicable," and "see to it that we receive written notice" of the suit as soon as practicable.

Initially, it is fairly clear that you do not have to physically walk the papers into the carrier's office. You must "see to it" that the papers reach the carrier. To paraphrase one court, "The policy does not require written notice to come directly from the insured's fax machine; it simply requires that the additional insured 'see to it' that the carrier received notice." Certainly, you should also preserve any documents evidencing notice to an insurance carrier.

In a handful of states, insurance policy notice provisions are regulated by statute. In Michigan and New York, for example, statutory language provides that "notice given by or *on behalf of* the insured…shall be deemed to be notice to the insurer." Georgia has a similar statute. Endorsements with those state-specific requirements are then incorporated into policies issued in their respective states. What follows is that those policies require that you "see to it" that the carrier is notified, and if that is not clear enough, allow notice "on behalf of" the insured.

Thus, you must see to it that the insurer is notified as soon as possible of an accident or suit. By the plain language, another person or entity can satisfy that obligation on your behalf.

JUDICIAL INTERPRETATION

The majority of courts allow for notice to come from an intermediary, such as an attorney, another insurer, a medical provider, a claims administrator, an insurance broker, or a plaintiff. Some, however, have traditionally not allowed notice from one insured to benefit another insured, where their interests are adverse, citing an independent obligation: "the duty to give reasonable notice as a condition of recovery is implied in all insurance contracts." In other words, if *you* want something, *you* have to ask for it.

Other courts have found this view "absurd." In a case where the insurer learned of a claim from the additional insured, but the insured himself was silent, the court found that "The only difference in this case is that the appellant mailed the complaint rather than the insured. We fail to understand how the notice of a lawsuit would have been timely if the insured had done the mailing, but untimely because it was mailed by appellant."

It is noteworthy, however, that even in jurisdictions where each insured has an independent obligation to give notice, a trend is emerging concerning the word "you."

In some recent cases, several courts have incorporated the policy's definition of "you" to the policy's notice provision, i.e., "you must see to it that we are notified as soon as practicable." These courts hold that because this notice provision applies only to "you"—which is defined in the Declarations to mean only the Named Insured—the notice provision does not apply to additional insureds. As a result, where an insurance policy places the burden of notice upon a named insured, an additional insured may then rely on the named insured's notice to the insurer for compliance of any notice obligation.

SO HOW DO I ACQUIRE THE COVERAGE TO WHICH I AM ENTITLED?

Going back to the first example above, you have now been sued, and considerable time has passed since you asked the general contractor to place his carrier on notice. You have just put the carrier on notice again—this time directly—and the carrier has now disclaimed coverage to you based on late notice. How do you convince the carrier, or the court, that you have fulfilled your obligations under the policy? Keep the following in mind:

- Preserve any information surrounding the "chain of notice." Remember, this is your notice to the carrier; the general contractor did not start it, nor did the general contractor send notice to his insurer with a demand that the insurer defend the general contractor. You can prove this was your request, albeit sent through intermediaries.
- The carrier has the information necessary to defend the claim; the notice provision is not meant to be a technical trap for the insureds.
- Remember the policy does not require notice to come directly from you. Most courts allow notice to come from third-parties on your behalf, although remember that some will reject notice from other insureds.
- If a statute modifies the policy's notice requirements in your state, the state-specific endorsement should be in the policy when you review it. That endorsement is likely to help your cause.
- Some courts will rule that the notice provision applies only to the named insured, thus relaxing notice requirements with respect to additional insureds.

To recap, the general contractor's carrier received the notice you initiated; the policy's notice provision should not be a hyper-technical hoop the insured must jump through or else lose coverage. While the courts sometimes vary on how they will treat notice from intermediaries to the insurance carrier, there are several methods you can use to approach any issue that arises, and preserve your insurance coverage.

William J. Mitchell is an attorney with Ahmuty, Demers & McManus in New York. His practice focuses on insurance coverage litigation, for both policy holders and insurers, and may be reached at william.mitchell@admlaw.com.

Successful Recent USLAW Law Firm Verdicts

Cox Smith Matthews Incorporated (San Antonio, TX)

Cox Smith Matthews Incorporated recently won a case for Jefferson State Bank before the Texas Supreme Court. A clerk of the court forged letters of administration and presented them to the bank to obtain ownership of the account. After the fraud was discovered, the successor executor sued the bank on a breach of contract theory. The supreme court held that the successor executor was placed on notice of the fraud when the bank made the statements available for review at its office. It held, under section 4.406 of the Texas UCC, that the notice period begins to run when a court appoints an administrator of the estate. In this case, the administratrix waited almost two years after her appointment to notify the bank of the unauthorized transactions.

Goldberg Segalla (Buffalo, NY)

Goldberg Segalla Product Liability Practice Group lawyers, led by David S. Osterman, Cheryl A. Possenti, John J. Jablonski and Steven S. Vahidi, helped a major U.S.-based children's clothing supplier defeat a nationwide class action arising from the sale of certain garments that allegedly caused rashes and allergic reactions to sensitive children's skin. The class action was originally filed two years ago, after several televised news reports featuring a handful of angry consumers and the issuance of a joint "Safety Alert" put out by the client and the United States Consumer Product Safety Commission (CPSC). The adverse news reports prompted the filing of a class action asserting claims of consumer fraud, breach of warranty and California Unfair Competition and False Advertising claims. In all, over 100 million garments were at issue and plaintiffs sought to certify a class of all purchasers, regardless of whether their children had suffered a rash or not, seeking the return of the full purchase price, plus other incidental costs. In February of 2011, the Federal District Court in California denied the plaintiffs' motion to certify the class, essentially adopting the arguments raised in our briefs, including a relatively novel judicial standing argument.

Johnson Trent (Houston, TX)

Congratulations to Chris Trent, Rafe Taylor and the entire Johnson, Trent, West & Taylor trial team for a defense verdict in the matter of *Trenado v. Cooper Tire & Rubber Company* pending in the United States District Court for the Southern District of Texas. Plaintiffs alleged that there were numerous design and manufacturing defects in a tire designed and manufactured by Cooper Tire & Rubber Company that caused an accident where two people died and three were injured. After a 7-day trial, the jury deliberated for less than four hours before completely exonerating Cooper Tire from all liability.

Jones, Skelton & Hochuli, P.L.C. (Phoenix, AZ)

Ed Hochuli and Blake DeLong of Jones, Skelton & Hochuli in Phoenix obtained a unanimous defense verdict on behalf of a restaurant following an eight-day dram shop trial. Plaintiff, who was injured by a drunk driver, claimed the driver had patronized the restaurant and was unlawfully served alcohol there. Plaintiff's key injury, a fractured wrist, was complicated by infections that culminated in the amputation of three fingers on the injured hand. Defendant denied liability and argued the injury complications were the result of Plaintiff's failure to mitigate by taking reasonable measures to bring her longstanding diabetes under control. Plaintiff suggested an award of $40 million during her closing argument. The jury deliberated for less than an hour before it returned the defense verdict.

Lashly & Baer, P.C. (St. Louis, MO)

Stefan J. Glynias and Sarah J. Hugg, attorneys at Lashly & Baer, recently won summary judgment for their client IPC International Corporation in a wrongful death case filed in the City of St. Louis. The plaintiffs alleged that IPC was negligent in its provision of private security services, and that such negligence led to the shooting death of their family member. A thorough investigation of Plaintiffs' claims and extensive discovery, revealed that the decedent's death was the result of a premeditated, targeted assassination that was carried out despite the presence of witnesses and armed police officers. Accordingly, IPC's conduct could not have been the proximate cause of the plaintiffs' injuries. The Circuit Court for the City of St. Louis agreed, and entered judgment in favor of IPC, dismissing Plaintiffs' claims against IPC with prejudice and denying Plaintiffs leave to amend their Petition against IPC.

Modrell Sperling (Albuquerque, NM)

The Modrall firm's partners, Larry Ausherman, Stuart Butzier, Stan Harris and Jim Houghton, successfully challenged the designation of a 660 square mile area centered on the summit of Mount Taylor as a Traditional Cultural Property (TCP) by the New Mexico Cultural Properties Review Commission (CPRC). Several Pueblos and tribes had asked the State to list Mount Taylor as a State TCP on the New Mexico Register of Cultural Properties on an emergency, and later a permanent, basis as part of a strategy to hinder, prevent or discourage uranium mine development activities on and around Mount Taylor. Those Native American groups assert that Mount Taylor is a significant site of religious, cultural and traditional importance to them. The Court considered a range of arguments challenging the listing, and issued a 24-page opinion in favor of the Modrall firm's clients.

Murchison & Cumming, LLP (Los Angeles, CA)

Gina E. Och and Corine Zygelman of Murchison & Cumming, LLP obtained summary judgment on behalf of their client, a distributor of motion picture cameras, digital intermediate systems, and lighting equipment. The plaintiff sued his employer, the defendant, for negligence and products liability, claiming to have sustained injury while moving a scanner down a city street for a customer. The defendant moved for summary judgment and the court granted the motion, finding that the plaintiff's claims were barred by the workers' compensation exclusive remedy, and that the plaintiff failed to show that he fell within the exception regarding a dual employer based on the employer's role as the product manufacturer, as the scanner was manufactured by a parent company. The court further found that plaintiff failed to show (1) he was a consumer or end user of the product and (2) the defendant company was the manufacturer of the product.

Pierce Couch Hendrickson Baysinger & Green, L.L.P. (Oklahoma City, OK)

In the case styled *Gregory B. Sims and Joann Sims v. Lou Jean Prince, Robert E. Prince, Luther Hunt d/b/a Luther Hunt Inspections and Lon Parks and Betsy Parks d/b/a Re/Max Professional Realtors*, CJ-2008-366 filed the District Court of Comanche County, Hugh A. Baysinger and Eric A. Jacocks won a defense verdict for their clients Lon and Betsy Parks d/b/a Re/Max Professional Realtors. The case involved a claim by the buyers of residential property claiming that the seller and the real estate agents, the Parks, failed to disclose known material defects in violation of the Oklahoma Residential Property Conditions Disclosure Act. After a seven day trial, the jury returned a defense verdict with respect to the realtors. The Co-Defendants, the Sellers, got hit with a $22,400.00 judgment. Plaintiffs' most "reasonable" settlement offer was $168,000.00 to all the defendants.

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

John E. Tull III, E. B. (Chip) Chiles IV, and Joseph R. Falasco of Quattlebaum, Grooms, Tull & Burrow PLLC in Little Rock, Arkansas, obtained a defense verdict for their two pesticide-formulator clients, Nufarm Americas Inc. and Albaugh, Inc., in a recent four-week trial concerning allegations of crop damage due to widespread pesticide drift over several Northeast Arkansas counties. The plaintiffs contended that aerial application of the pesticide 2,4-Dichlorophenoxyacetic acid (2,4-D) to rice fields in Northeast Arkansas in 2006 caused yield loss to thousands of acres of cotton and alleged that the defendant formulators' product labels should have precluded the aerial application of the pesticides in Northeast Arkansas during the summer months. The plaintiffs sought more than $4 million in compensatory damages for claims based on allegations of negligence and strict liability. The plaintiffs' claim for punitive damages was dismissed on directed verdict by the court. After hearing nearly four weeks of testimony and deliberating for approximately five hours, the jury found in favor of all defendants.

Robinson & Wood, Inc. (San Jose, CA)

In a case with profound implications on the construction industry and following entry of Judgment on behalf of developer client, UDC Homes, Inc. in the trial court, attorneys at Robinson & Wood successfully defended on appeal the Judgment against engineering subcontractor CH2M Hill, Inc. which required CH2M to reimburse UDC's fees and costs incurred to both defend an underlying Homeowner Association construction defect lawsuit and prosecute its cross-complaint, despite a jury finding of no negligence on the part of the subcontractor. UDC had settled the underlying construction defect case brought by the Homeowner's Association with all parties except for cross-defendant, CH2M which refused to settle. At trial, the jury found that CH2M was not negligent, but based on its contract the trial court ordered CH2M to reimburse UDC for the developer's fees and costs of defense and prosecution of its cross-claim. CH2M appealed this decision and in *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10 the Court of Appeals for the Sixth District affirmed the judgment, holding that CH2M had a duty to defend UDC under the indemnity contract which required CH2M to "to defend any suit, action or demand brought against Developer or Owner on any claim or demand covered herein" and to indemnify as to claims "arising out of or connected with any negligent act or omission." The Appellate Court agreed that the indemnity language created a duty to defend even though the HOA never alleged that its damage arose from the CH2M's negligence or that its work was defective (the general description of defects in the project did implicate the subcontractor's work) and the jury found no fault in its work. The duty to defend arose upon the developer's tender and was independent of tort liability. The California Supreme Court has refused review of the case. Robinson & Wood partners Jon Zimmerman and Hugh Lennon handled the appeal. The underlying case was also tried by Jon Zimmerman.

Traub Lieberman Straus & Shrewsberry LLP (Hawthorne, New York)

Daniel G. Ecker, a partner with Traub Lieberman Straus & Shrewsberry LLP's New York office, won a jury verdict for the defendants in the matter of *Griffin v. Highland Falls-Fort Montgomery Central School District, et al.* (Supreme Court of the State of New York, Orange County). The plaintiff, the School District's former cook manager, sought to recover damages for unlawful employment practices in violation of the New York State Human Rights Law and, in particular, for discriminating against her and terminating her employment based upon an alleged disability. Plaintiff, who had suffered several injuries to her shoulder and knees, alleged that she would have been able to perform the essential functions of her job had her request for a reasonable accommodation, that she receive assistance with heavy lifting, been granted. Following a two-week trial and four hours of deliberation, the jury returned a verdict for the School District, holding that the plaintiff failed to prove that she could have performed the essential functions of her job with the requested accommodation.

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

Wicker Smith O'Hara McCoy & Ford P.A., recognizes Richard E. Ramsey and Steven Y. Leinicke for successfully obtaining a defense verdict in a medical malpractice case in which it was alleged that the obstetrician caused a baby to suffer an ischemic stroke during delivery due to negligent use of a vacuum designed to assist with delivery. The damages included significant brain damage and hemiplegia to the child, who is now seven years old. The defense tendered the $1 million policy limit before the trial and also served a proposal for settlement in the same amount, both of which were rejected. The plaintiff sought the recovery of $14 million. The jury returned a complete defense verdict in 75 minutes.

Thorndal Armstrong Delk Balkenbush & Eisinger (Las Vegas, NV)

Thorndal Armstrong's Reno shareholders Steve Balkenbush and Kathy Parks recently obtained a defense favorable verdict on behalf of Union Pacific Railroad in a federal case concerning an industrial injury. Plaintiff was a brakeman for UP who alleged he was injured on the job while riding the side of a boxcar. During the two-week trial Plaintiff argued to the jury he had suffered physical injuries and lost income worth approximately $2,900,000 and produced expert witnesses to support this contention. Throughout the trial Mr. Balkenbush and Ms. Parks consistently argued the employee had contributed to his own injury by violating UP regulations that explicitly prohibited him from riding the side of a boxcar. The jury deliberated for 1.5 days before returning its verdict. The jury determined the plaintiff had been injured, but was 43% responsible for his injuries. Thus, of the $2,900,000 requested, the jury Plaintiff was thus limited to a recovery of only approximately $137,000, or 4.7% of what he had claimed.

Firms on the Move

Baird Holm LLP (Omaha, NE) is proud to announce Scott P. Moore, a partner with the Firm, has been selected by the Fair Housing Center of Nebraska-Iowa as the recipient of the inaugural "Fair Housing Centers Founders' Award." Mr. Moore is being recognized for his service to the Board of Family Housing Advisory Services and his history of litigation of important fair housing cases at the trial and appellate levels.

David J. Kramer of **Baird Holm LLP** in Omaha, Nebraska, departed for Tunisia on February 26 to assist in transforming the country into a multiparty democracy. Mr. Kramer said he expects his role to be helping groups in the Northern Africa nation to develop election strategies, platforms, and communications plans.

Indiana USLAW Firm **Bingham McHale LLP** received the Indianapolis Bar Association's Pro Bono Firm of the Year award. The award recognizes the volunteer efforts and community involvement of firms throughout the city. In addition, firm partner Phil Fowler was named the Pro Bono Attorney of the Year for his work in two cases.

Thomas Thornton a partner with the **Carr Allison** firm (Birmingham, AL) was recently named Marketing Chair for the Second Annual Defense Research Institute 2011 Strictly Retail Conference in Chicago. He was also named Co-Chair for the Defense Research Institute's first Hospitality Conference to be held in September 2011 in Arizona.

Tamara B. Goorevitz, a Principal with **Franklin & Prokopik, PC**, in Baltimore, Maryland, was appointed Vice Chair of the Trucking Law Committee of DRI – The Voice of the Defense Bar. Andrew T. Stephenson, also a Principal with Franklin & Prokopik in Baltimore, Maryland, was appointed Co-Chair of the ABA's Transportation Megaconference (New Orleans, March 2011).

Attorney Michael Callahan of **Gallagher, Callahan & Gartrell** (Concord, NH) was recently reappointed to the New Hampshire Court Accreditation Commission by the NH Supreme Court. The statute creating the commission provides that one of its members shall be "a lawyer of experience in the trial of cases at all court levels," and Attorney Callahan will serve as the commission's lawyer representative.

Don Myles of the **Jones, Skelton and Hochuli** firm (Phoenix, AZ) has been appointed to the Board of Directors as a Vice President with the Federation of Defense and Corporate Counsel.

Malinda Matlock of **Pierce Couch Hendrickson Baysinger & Green, L.L.P.** (Oklahoma City, OK) has been elected Vice President of the Oklahoma Association of Defense Counsel and is on track to be President of the organization in 2013. Dan Sullivan was reelected to his fourth term in the Oklahoma House of Representatives and has won the position of Majority Floor Leader in the Oklahoma House of Representatives for the current session.

On January 1, 2011, **SmithAmundsen LLC** (Chicago, IL) and Madsen, Farkas, & Powen LLC merged their practices. The attorneys and staff formerly of Madsen, Farkas, & Powen concentrate on serving clients in the aerospace and aviation industries, have significant trial and commercial litigation experience, and will be headquartered in SmithAmundsen's Chicago office.

Williams Kastner (Seattle, WA and Portland, OR) was presented a 2010 Beacon of Justice Award on October 6, 2010 by the National Legal Aid & Defender Association. The award honors law firms that have "made a significant commitment to pro bono representation in the area of immigration." Williams Kastner commits most of its pro bono efforts in Seattle to the Northwest Immigrant Rights Project ("NWIRP"). The mission of the NWIRP is dedicated to providing justice for low-income immigrants, helping to defend and pursue their legal status.

Successful Recent USLAW Law Firm Transactions

Clark Hill, PLC (Detroit, MI)

Clark Hill, led by attorney Roger Swets, developed a plan for the city of Greenville to issue $800,000 of low interest bonds in order to purchase the equipment for the solar transition. With Clark Hill's assistance, the City obtained the first allocation of Qualified Energy Conservation Bonds from the Michigan Department of Labor Energy and Economic Growth, allowing it to issue the first Qualified Energy Conservation Bonds in the State at an effective interest rate of 0.60%. Greenville will be the first municipality which, along with the local school district, will run its public buildings entirely on solar energy, resulting in an annual savings of $370,000 for the schools, and $350,000 for the city.

Dillingham & Murphy, LLP (San Francisco, CA)

Tyrrell M. Prosser of Dillingham & Murphy, LLP represented Seagate Technology LLC in the acquisition of its new executive headquarters building in Cupertino, California from Symantec Corporation. The transaction for the sale of the approximately 142,000-square-foot office building and parking structure comprising a part of the Cupertino City Center complex closed on December 29, 2010.

Hinckley, Allen & Snyder LLP (Hartford, CT)

William W. Bouton III, co-chair of the Financial Services Practice of Hinckley Allen & Snyder LLP, led a team of securities and banking lawyers in the "2nd step conversion" of Rockville Financial, Inc. to a fully public company, and the full conversion of First Connecticut Bancorp, Inc. to a public company. These offerings are expected to raise more than a total of $300 million in new capital for the two institutions and alter the competitive landscape for banking services in Southern New England

Roetzel & Andress, LPA (Cleveland, OH)

Roetzel & Andress, LPA represented a national fast food franchisee in the $18.4 million acquisition of 14-stores in the Midwest in the acquisition of 11 parcels of real property, leasehold interest in three parcels, and all of the assets, inventory and goodwill associated with the operation of the 14 restaurants. A number of the parcels being acquired by the franchisee had formerly been gas stations or were adjacent to gas stations.

Rothgerber Johnson & Lyons LLP (Denver, CO)

Congratulations to L. Martin Nussbaum, David Kunstle, and H. William Mahaffey of USLAW member Rothgerber Johnson & Lyons LLP on their work forming and obtaining tax-exempt status for the Catholic Education Capital Corporation (CECC). CECC was incorporated in 2010 as a nonprofit conduit issuer for tax-exempt financing for Catholic educational and cultural institutions. CECC may provide an avenue for Catholic institutions to obtain tax-exempt financing in states and local jurisdictions that prohibit or limit such financing for sectarian institutions. Tax-exempt financing offers substantial benefits in comparison to taxable debt or other sources in financing capital construction projects or the cost of acquiring new facilities. Also, through CECC, a Catholic institution with outstanding taxable borrowings can lower its debt service cost by refinancing such loans with tax-exempt financing. This financing is now available to National Catholic Educational Association (NCEA) member educational facilities such as schools, seminaries, parishes, colleges and universities across the country. The bond funds may not be used to construct purely religious spaces such as churches or chapels, but they may be used for classrooms, recreational facilities, dormitories, administrative spaces or other educational facilities.

ABOUT USLAW NETWORK

In today's global marketplace, legal needs often transcend geographic boundaries.Clients with complex legal needs turn to USLAW NETWORK member firms to represent them in the courtroom and the boardroom, next door, across the United States and around the world.

When a complex legal matter emerges — whether it's in a single jurisdiction or nationwide — USLAW is there. We represent some of the country's leading businesses in matters ranging from complex commercial litigation, employment law, products liability, and professional malpractice defense.

USLAW NETWORK is an international organization composed of over 65 independent, defense-based law firms with over 5,000 attorneys covering the United States and Latin America. Among the firms, there are over 150 offices in 47 US states. An alliance with the Trans-European Law Firm Alliance (TELFA) gives us access to 25 European law firms and over 700 attorneys each representing its own jurisdiction and a similar relationship with ALN Limited enables USLAW to partner with 10 firms in East and Central Africa.

USLAW NETWORK law firms:

- Are fully vetted and subject to a rigorous review process prior to admission;
- Become part of the USLAW NETWORK by invitation only;
- Possess broad commercial legal capabilities;
- Have substantial litigation and trial experience.

Using a USLAW NETWORK firm provides clients with national access to some of the best trial lawyers in the country when needed for the litigation and trial of complex, difficult issues and cases. These law firms are highly skilled at early case evaluation and resolution, when possible, while providing cost effective representation.

The commitment of member firms is to provide high quality legal representation to major corporations, captive insurance companies, insurance carriers, and to both large and small businesses across the United States.

USLAW NETWORK is founded on the relationship between its lawyers and their clients throughout the organization.

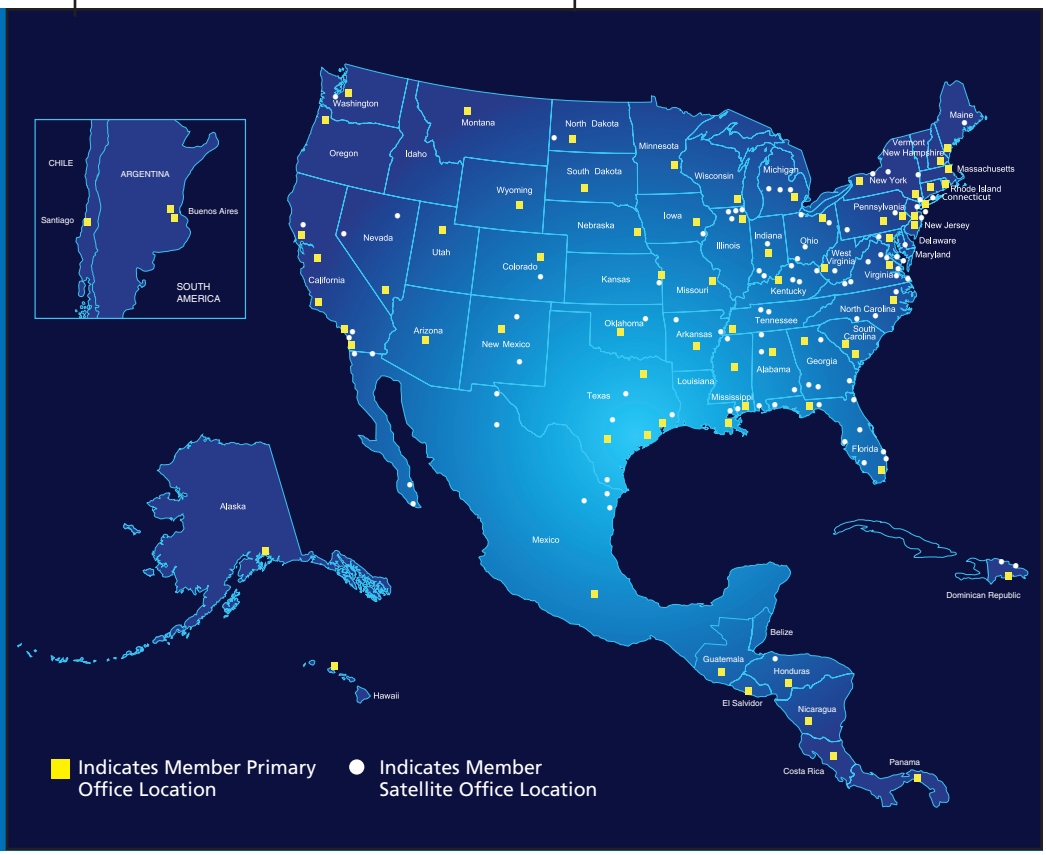
Working with USLAW NETWORK firms helps clients:

- Streamline the law firm procurement process;
- Access top-quality CLE and ongoing legal education opportunities through our Spring and Fall client conferences, regional meetings, and virtual programs.
- Access a variety of USLAW-sponsored resources, including our Rapid Response Handbook, our web site and a series of compendiums on US law and other issues.

2001-2011 10TH ANNIVERSARY
USLAW NETWORK, INC

USLAW NETWORK firms and their member attorneys include:

- Lawyers who have the highest professional and ethical standards exemplified by the "AV" rating in Martindale-Hubbell
- Lawyers who are active members as well as presidents and past-presidents of various industry and trial organization, including:
  - American Board of Trial Advocates
  - American College of Trial Lawyers
  - Federation of Defense and Corporate Counsel
  - International Association of Defense Counsel
  - Association of Defense Trial Attorneys
  - Defense Research Institute
  - Professional Liability Underwriting Society
  - American Bar Association
  - Local associations of defense and trial counsel in their respective states



2011 MEMBERSHIP ROSTER

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

ALASKA | ANCHORAGE
Richmond & Quinn
Robert L. Richmond ....(907) 276-5727
brichmond@richmondquinn.com

ARIZONA | PHOENIX
Jones Skelton & Hochuli, P.L.C.
Donald L. Myles, Jr. ....(602) 263-1743
dmyles@jshfirm.com

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

CALIFORNIA | LOS ANGELES
Murchison & Cumming LLP
Friedrich W. Seitz ....(213) 630-1000
fseitz@murchisonlaw.com

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

CALIFORNIA | SAN FRANCISCO
Dillingham & Murphy, LLP
Patrick J. Hagan ....(415) 397-2700, ext. 216
pjh@wirepaladin.com

CALIFORNIA | SAN JOSE
Robinson & Wood, Inc.
Joseph C. Balestrieri ....(408) 792-5903
jcb@robinsonwood.com

CALIFORNIA | SANTA BARBARA
Snyder Law, LLP
Barry Clifford Snyder ....(805) 683-7750
bsnyder@snyderlaw.com

COLORADO | DENVER
Rothgerber Johnson & Lyons LLP
Ben M. Ochoa ....(303) 628-9574
bochoa@rothgerber.com

CONNECTICUT | HARTFORD
Hinckley, Allen & Snyder LLP
Noble F. Allen ....(860) 725-6237
nallen@haslaw.com

FLORIDA | MIAMI
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

GEORGIA | ATLANTA
Hall Booth Smith & Slover, P.C.
John E. Hall, Jr. ....(404) 954-5000
jeh@hbss.net

HAWAII | HONOLULU
Goodsill Anderson Quinn & Stifel LLP
Thomas Benedict ....(808) 547-5716
tbenedict@goodsill.com

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

INDIANA | INDIANAPOLIS
Bingham McHale LLP
James M. Hinshaw ....(317) 968-5385
jhinshaw@binghammchale.com

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

KENTUCKY | LOUISVILLE
Greenebaum Doll & McDonald PLLC
Mark S. Riddle ....(502) 587-3623
msr@gdm.com

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

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

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

MASSACHUSETTS | BOSTON
Adler Pollock & Sheehan P.C.
John F.X. Lawler ....(617) 603-0516
jlawler@apslaw.com

MICHIGAN | DETROIT
Clark Hill, PLC
Daniel Scully ....(313) 965-8468
dscully@clarkhill.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.
Greg Copeland ....(601) 427-1313
gcopeland@cctb.com

MISSOURI | KANSAS CITY
Baty, Holm, Numrich & Otto, PC
Robert P. Numrich ....(816) 360-8102
bnumrich@batyholm.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
Jill Robb Ackerman ....(402) 636-8263
jrackerman@bairdholm.com

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

NEW HAMPSHIRE | CONCORD
Gallagher, Callahan & Gartrell
R. Matthew Cairns ....(603) 545-3622
cairns@gcglaw.com

NEW JERSEY | ROSELAND
Connell Foley LLP
Kevin R. Gardner ....(973) 533-4222
kgardner@connellfoley.com

NEW JERSEY | FLORHAM PARK
Clyde & Co US LLP
Jeffrey L. O'Hara ....(973) 210-6720
Jeffrey.Ohara@clydeco.us

NEW MEXICO | ALBUQUERQUE
Modrall Sperling
Timothy C. Holm ....(505) 848-1817
tch@modrall.com

NEW YORK | ALBERTSON
Ahmuty, Demers & McManus
Michael Rabus ....(646) 536-5748
michael.rabus@admlaw.com

NEW YORK | BUFFALO
Goldberg Segalla LLP
Neil A. Goldberg ....(716) 566-5475
ngoldberg@goldbergsegalla.com

NEW YORK | HAWTHORNE
Traub Lieberman Straus & Shrewsberry LLP
Stephen D. Straus ....(914) 347-2600, ext. 705
sstraus@traublieberman.com

NORTH CAROLINA | RALEIGH
Poyner Spruill LLP
Thomas K. Lindgren ....(919) 783-2827
tlindgren@poynerspruill.com

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

OHIO | CLEVELAND
Roetzel & Andress, LPA
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
Eric J. Neiman ....(503) 944-6943
eneiman@williamskastner.com

PENNSYLVANIA | HARRISBURG
Thomas, Thomas & Hafer LLP
Todd B. Narvol ....(717) 237-7133
tnarvol@tthlaw.com

PENNSYLVANIA | PHILADELPHIA
Sweeney & Sheehan, P.C.
Warren E. Voter ....(215) 963-2439
warren.voter@sweeneyfirm.com

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

SOUTH CAROLINA | CHARLESTON
Buist Moore Smythe McGee P.A.
James (Jim) D. Myrick ....(843) 720-4643
jmyrick@buistmoore.com

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

SOUTH DAKOTA | PIERRE
Riter, Rogers, Wattier & Northrup, 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 | BEAUMONT
Orgain Bell & Tucker, LLP
Donean Surratt ....(409) 838-6412
sds@obt.com

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

TEXAS | HOUSTON
Johnson Trent
Brian P. Johnson ....(713) 860-0509
bjohnson@johnsontrent.com

TEXAS | SAN ANTONIO
Cox Smith Matthews Incorporated
Brett W. Schouest ....(210) 554-5269
bwschoue@coxsmith.com

UTAH | SALT LAKE CITY
Strong & Hanni, PC
Stanford P. Fitts ....(801) 323-2014
sfitts@strongandhanni.com

VIRGINIA | RICHMOND
LeClairRyan
Charles G. Meyer, III ....(804) 783-7535
cmeyer@leclairryan.com

WASHINGTON | SEATTLE
Williams Kastner
Sheryl J. Willert ....(206) 628-2408
swillert@williamskastner.com

WEST VIRGINIA | HUNTINGTON
Huddleston Bolen LLP
Richard J. Bolen ....(304) 691-8420
rbolen@huddleston bolen.com

WISCONSIN | MILWAUKEE
SmithAmundsen, LLC
Patrick J. Lubenow ....(414) 282-7103
plubenow@salawus.com

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

INTERNATIONAL

ARGENTINA | BUENOS AIRES
Rattagan, Macchiavello, Arocena &
Peña Robirosa Abogados SC
Juan Martin Arocena ....+(5411) 4010-5007
jma@rmlex.com

CENTRAL AMERICA AND THE DOMINICAN REPUBLIC
Central Law
Jesús Humberto Medina ....+(504) 2550-2800
jhmedina@central-law.com

CHILE | SANTIAGO
Carey & Allende Abogados
Luis Felipe Arze ....(562) 4852093
larze@careyallende.com

MEXICO | MEXICO CITY
Bryan Gonzalez Vargas & Gonzalez Baz
Aureliano (Kir) M. Gonzalez-Baz ....+52 (55) 5279-3601
agb@bryanlex.com

2011 USLAW Sponsors

USLAW Premier Partners

Ringler Associates

OFFICIAL STRUCTURED SETTLEMENT SPONSOR OF USLAW NETWORK

www.ringlerassociates.com
John L. Machir
Senior Vice President
5311 Worthington Drive,
Bethesda, MD 20816
Phone: (301) 229-2852
jmachir@ringlerassociates.com

With offices in over 75 major litigation centers in the U.S. and U.K., Ringler Associates is the nation's oldest & largest structured settlement firm. Since 1975, the company's structured settlement specialists have placed over 170,000 annuities totaling over $24 billion in claim settlements for casualty carriers and self-insured corporations.

Since its establishment, Ringler Associates has used a partnership approach to build a team of highly-seasoned professionals. Ringler settlement experts average over 10 years of experience in claims, insurance, law and negotiations; many are former senior claims officers and attorneys. As experts in all aspects of structured settlements involving tort liability, representatives from Ringler Associates help settle cases faster, save money on claims administration costs, and reduce caseloads and paperwork. With access to all major life insurance carriers offering the structured settlement product, Ringler Associates is always able to offer clients the lowest annuity rates from leading companies. Structured settlement specialists provide fast, accurate quotes, call with updates on rate changes, secure substandard life ratings where possible, and are available around-the-clock to meet with clients and help review files.

Development of settlement annuity plans by the company's experts includes analyses and life care plans which define the needs and costs for the claimant's entire future. On-site support is offered during all phases of settlement negotiations. Our specialists will assist in the handling of closing documents and follow-up after cases are closed. In-house seminars covering the structured settlement process are readily available.

Please refer to our website for further information and office contact details. While online, check out our top rated legal podcast series, RINGLER RADIO, with over 1,000,000 total listeners!

SEA, Ltd.

OFFICIAL TECHNICAL FORENSIC EXPERT SPONSOR OF USLAW NETWORK

www.sealimited.com
J. Kenneth Corwin
National Account Executive
7349 Worthington-Galena Road,
Columbus, OH 43085
Phone: (614) 888-4160, Fax: (614) 885-8014
Email: jcorwin@sealimited.com
Chris Torrens
National Account Executive
3403 N. Sam Houston Parkway W., Suite 350
Houston, TX 77086
Phone: (800) 880-7324
Email: ctorrens@sealimited.com

SEA Limited is a multi-disciplined engineering and fire investigation company specializing in failure analysis. SEA Ltd. also conducts environmental and industrial hygiene analysis. They offer a complete investigative service, which includes mechanical engineering, electrical engineering, metallurgical engineering, civil engineering, fire investigation, environmental and work place safety analysis, and a fully equipped chemical testing laboratory. These disciplines interact to provide a thorough and independent analysis that will support any subsequent litigation. SEA's full-time staff of investigators, engineers, and chemists are licensed/registered professionals and are court-qualified experts in their respective fields. With ten offices located throughout the US, SEA Ltd. has provided professional services to manufacturers, attorneys and the insurance industry Nationally and Internationally. SEA has also developed specialized practice groups in construction, marine, trucking, vehicle dynamics and quality control laboratory testing.

USLAW Support Partners

D4

OFFICIAL E-DISCOVERY SPONSOR OF USLAW NETWORK

www.d4discovery.com
Martha MacPherson
Director of Marketing
Mmacpherson@d4discovery.com
300 Main Street, Suite 4-102, East Rochester, NY 14445
Phone: (585) 385-4040, Fax: (585) 385-9070

D4 has been providing E-Discovery services since 1997. D4 handles end-to-end E-Discovery services spanning the entire EDRM model. From forensic collections through early case assessment (ECA), hosted review to production, D4 brings a unique approach to all of its engagements. D4 combines advanced technology with an experienced and thoughtful staff to help its clients extract clarity and significance from what could otherwise be a deluge of data.

D4's computer forensic team provides services to its clients comprising forensic collection, examination, and expert testimony. D4 also provides expert consulting and testimony services for 26(f) meet & confer conferences, litigation readiness planning, and ESI plan creation.

D4 is headquartered in Rochester, New York. They have full service locations located throughout the United States.

Legal Language Services

OFFICIAL TRANSLATION, INTERPRETATION AND INTERNATIONAL LITIGATION SUPPORT SPONSOR OF USLAW NETWORK

www.legallanguage.com
Victor Hertz
President
Email: vhertz@legallanguage.com
Rosaline Astefanous
Contract Administrator
rastefanous@legallanguage.com
18 John Street, Suite 300, New York, NY 10038
Phone: (212) 766-4111, Fax: (888) 754-8438

Since 1983, Legal Language Services, expert linguists working in 157 languages and dialects, has been assisting law firms, corporations and insurance companies with professional translation and international litigation support. They provide certified translations of evidentiary documents, statutes, complaints, judicial proceedings and other legal documents.

Their international litigation support services are offered in more than 90 countries around the world. Such services include international service of process, the compulsion of foreign evidence and skip tracing. Legal Language also provides interpreting, transcription, video depositions and the cataloging and summarization of discovery documents in all languages.

Legal Language Services is headquartered in New York City, with offices throughout the United States as well as affiliates in Europe, Asia, South America and the Middle East.

USLAW Support Partners

Magna Legal Services, LLC

OFFICIAL JURY CONSULTANT SPONSOR OF USLAW NETWORK

www.magnals.com
Robert Ackerman
President
Email: RAckerman@magnals.com
Maria Hutnick
Director of Marketing
Email: mhutnick@magnals.com
1635 Market Street, 8th Floor,
Philadelphia, PA 19103
Phone: (866) 624-6221
Fax: (866) 579-0819

Who are the worst and best jurors for your case? Is your trial story believable? What are the strengths of your case you can emphasize, and the weaknesses that you can eliminate? These are only some of the questions that Magna Legal Services can help you answer.

Our consultants can assist in:

- Focus Group Research
- Mock Trial Research
- Thematic Development Research
- Perception Studies
- Case Risk Assessment
- Change of Venue Studies
- Jury Selection Assistance
- Witness Communication Training
- Shadow Jury Studies

By conducting Jury Research, Magna assists you and your clients in identifying the best pathway to a favorable verdict. Let Magna Legal Services help you see your case through the jurors' eyes. Call about our exclusive cost-effective on-line focus groups.

Med Legal Consulting Source

OFFICIAL MEDICAL RECORD ANALYSIS, MEDICAL BILL AUDIT, AND LIFE CARE PLANNER SPONSOR OF USLAW NETWORK

www.medlegal-la.com
Nancy Fraser, RN
Chief Executive Officer
Email: nfraser@medlegal-la.com
1000 Wilshire Blvd., Suite 260
Los Angeles, CA 90017
Phone: (213) 347-0203
Fax: (213) 347-0209

Through expert interpretation of critical information at the center of bodily injury liability cases, Med Legal consistently delivers case changing information to their clients. Attorneys, risk and litigation managers and claims professionals turn to Med Legal as a part of a greater innovative approach to mitigating damages.

Since its foundation in 2000, Med Legal's approach to medical record analysis, life care plans and medical bill reviews has been grounded in the concept of building a strategic partnership. Med Legal has been working with litigation and claims teams to build strong cases based on facts discovered in the medical records. By bridging the gap between the medical and legal worlds, Med Legal improves cases from the start resulting in improved outcomes with a more limited investment of time and money.

Med Legal Consulting Source is headquartered in Los Angeles. You can follow Med Legal on twitter@medlegalLA.

The Center for Forensic Economic Studies

OFFICIAL ECONOMIC ANALYSIS SPONSOR OF USLAW NETWORK

www.cfes.com
Chad L. Staller, Esq., MBA, MAC,
President
Email: cstaller@cfes.com
1608 Walnut Street, 8th Floor,
Philadelphia, PA 19103
Phone: (215) 546-5600
Fax: (215) 732-8158

The Center for Forensic Economic Studies is a leading provider of economic and statistical analysis and expert testimony. Center economists analyze damages and liability issues in injury and death matters, mass torts, commercial litigation, employment actions and insurance-related issues. In addition, the Center consults in non-litigation areas such as labor-law compliance, business valuation, feasibility studies and wage negotiation.

We assist with discovery, uncover key data, critique opposing claims and produce clear, credible reports and testimony. Since 1980, attorneys and their clients have relied on our expertise in thousands of cases in jurisdictions across the country.

Our main areas of concentration include:

Personal Injury/Wrongful Death Damages
What economic damage did the tort victim or the victim's family members suffer?

Commercial Damages/Business Interruption Claims
What did a business lose as the result of a tort or breach of contract? Does a business-interruption claim overlook or overstate elements of damages? How long can one reasonable project lost profits for?

Economic Damages in Employment Matters
What is the economic impact of an individual or group dismissal, layoff or other employment decision? Will the employee have an on-going economic loss? What did the employee do to mitigate his/her loss? What does economic data suggest about a person's ability to re-enter the labor force?

Employment Discrimination
Was a layoff or other employment action biased against a group or individual?

Business Appraisals
What is the economic value of a business or professional practice?

US Legal Support, Inc

OFFICIAL COURT REPORTING SPONSOR OF USLAW NETWORK

www.uslegalsupport.com
Charles F. Schugart
President & CEO
363 N. Sam Houston Parkway E., Suite 900, Houston, TX 77060
Ph: (832) 201-3834 Fax: (713) 653-7172
cfschugart@uslegalsupport.com
Jim Cunningham
Division President – IL
200 West Jackson Boulevard, Suite 600, Chicago, IL 60606
Ph: (312) 236-8352 Fax: (312) 236-3344
jcunningham@uslegalsupport.com
Pete Giammanco
Division President – CA Reporting
15250 Ventura Boulevard, Suite 410, Sherman Oaks, CA 91403
Ph: (818) 995-0600 Fax: (818) 880-4248
pgiammanco@uslegalsupport.com
LeeAnn Watson
Div. Pres. – TX Records & Reporting
363 N. Sam Houston Parkway E.
Suite 900, Houston, TX 77060
Ph: (832) 201-3872 Fax: (713) 653-7172
lwatson@uslegalsupport.com

U.S. Legal Support has been providing services to the legal community for more than 20 years. With 42 offices across the nation and the combined years of experience of our staff, U.S. Legal Support can provide nationwide coverage with local expertise. Utilizing U.S Legal Support's Court Reporting services provides access to over 1200+ superior court reporters using state of the art technology including: Complete online office with 24/7 access including online scheduling and calendar access, the ability to view invoices online, transcript/exhibit /document repository, electronic delivery, RealTime Reporting including Summation & Livenote, daily and expedited delivery, Interactive PDF transcripts, Legal Videography, text/video synchronization, condensed transcripts / word indexes, conference rooms, video conferencing and Interpreters.

U.S. Legal Support is one of the most experienced firms in managing large, complex cases. The Power of our Commitment differentiates us from our competitors. We pride ourselves in our ability to create personal relationships and partnerships with firms by creating custom solutions tailored to their individual legal needs. We schedule and coordinate depositions, provide exhibit indexes and databases, schedule and manage online reports of your discovery process and monitor all stages of the billing cycle. Let U.S. Legal Support show you the Power of our Commitment today.

Still ignoring E–Discovery?

***Qualcomm, Inc. v Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008)**

The Court ordered Qualcomm to pay $8,568,633 for failure to produce tens of thousands of documents requested in discovery. The Court also sanctioned six attorneys from an outside law firm for blindly accepting Qualcomm's claims that their E–Discovery searches were adequate as well as intentionally hiding or recklessly ignoring relevant documents.

Call on an expert to guide you through E–Discovery.

D4 isn't new to E–Discovery. With over a decade of E–Discovery experience, D4 has been involved in hundreds of cases. Let us show you our multi–phase approach to E–Discovery and how we can provide you with defensible and cost effective solutions. D4 offers a full range of E–Discovery services including:

- Litigation Hold Tools & Discovery Readiness Plans
- Data Collections & Preservation
- Meet and Confer 26 (f) Consulting
- Early Case Assessment
- Computer Forensics
- Data Reduction & Analytics
- Electronic Data Processing
- Web–based Document Review with solutions such as Relativity and Clearwell
- Document Production

800.410.7066

www.d4discovery.com

D4

Smarter Discovery™

EMPOWERING YOU with

Strategic Information

for Better Decisions

and More Favorable **Results**

To learn more visit: www.medlegal-la.com

MED LEGAL™
1000 Wilshire Blvd., Suite 260
Los Angeles, CA 90017
P 213.347.0203

CLIENTS JOIN THE NETWORK

INTRODUCING USLAW'S CLIENT MEMBERSHIP PROGRAM

No Cost. Loaded with Benefits. Absolutely No Obligation.

Since 2001, USLAW Membership has been open to law firms. With the growth and success of the NETWORK and with many clients seeking a closer affinity to our group, we now introduce USLAW Client Membership.

Client Membership is available to Regional, National and Multinational clients of USLAW member law firms.

Membership is in the Name of the Company, is complimentary and renewable annually. Each Client Member can designate (1) One Primary Contact and Up to (9) nine Additional contacts who have access to membership benefits.

Client Members are NEVER OBLIGATED to hire USLAW Member Firms. *Our first priority is to ensure that Client Members receive the finest representation possible within their budget regardless of whether this comes from a USLAW member firm or not.*

Client members will have access to a multitude of benefits with no obligation. These benefits will...

- Assist Client Members to better service their company;
- Be a source of timely information/education;
- Provide a consistent and cohesive response to national or multi-state legal needs;
- Potentially decrease overall legal expenses.

Just a few of these benefits include:

- Client-Only Access to password-protected Client Intranet on USLAW.org. Resources include
  - Past educational session articles, papers and PowerPoint presentations.
  - Exclusive Client Member only articles and legal papers.
  - Repository of USLAW NETWORK member firm electronic newsletters.
- Opportunity to access USLAW NETWORK's Client Lawsuit Notification System, which alerts clients' of lawsuits filed against them in most jurisdictions around the country.
- Designation of (1) One Designated Contact from each USLAW Member Firm who is responsible for better understanding the client company's business, general scope of legal needs and how client prefers to handle matters when they arise.
- Custom USLAW Client Member Emergency Response Book including emergency contact information for the Client's Designated Contact for each USLAW Member Firm.
- Invitation to USLAW NETWORK "client-focused" social networking sites on LinkedIn and Facebook.
- Invitation to Client-Only Forum to take place at each semi-annual USLAW NETWORK Client Conference.
- Automatic Invitation for client and guest to USLAW Dinners and Social Events taking place at Industry Conferences in which the client is attending.
- Automatic Invitation for client and guest to USLAW Dinners and Social Events at USLAW Regional and Practice Group Meetings if located in client's geographic market.
- Opportunity to conduct USLAW "Panel Counsel" Meeting at USLAW Client Conferences at USLAW expense.
- Access to USLAW NETWORK's New Group Purchasing Program, providing client members discounts on commonly used products and services.
- Preferred discounts from USLAW Corporate Sponsors.

...and much, much more.

USLAW NETWORK, INC

NATIONAL COUNSEL RIGHT NEXT DOOR

For more information about USLAW Client Membership, please contact Roger M. Yaffe, USLAW Executive Director, at (800) 231-9110 or roger@uslaw.org.

To register for membership, please visit www.uslaw.org.

www.uslaw.org
USLAW
5905 NW 54th Circle
Coral Springs, FL 33067

2001 - 2011 CELEBRATING OUR FIRST TEN YEARS

AND LOOKING AHEAD TO OUR NEXT TEN

2001-2011 10TH ANNIVERSARY
USLAW NETWORK, INC

10

THE Next 10