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From the Chair’s Desk

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INTRODUCING AN—ALL—NEW WAY TO
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This Fall, USLAW launches the ultimate tool for communicating with your professional network
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To learn more, log onto your USLAW membership account at http://community.uslaw.org.
As we prepare to close out the ten-year opening chapter in our NETWORK’S young history...it is easy, perhaps even expected, for one to sit back and eye the organization’s accomplishments. But as successful business men and women, we know that few successes sustain the test of time while in a state of non-motion. Snooze you lose comes to mind.

There will be no snoozing as we embark on our Next 10 years. There is much to be done to ensure that USLAW NETWORK continues to thrive and ensure that our member firm’s clients receive the finest legal representation possible. Our successes are not fleeting, but rather components of a strong foundation for growth.

NEW FACES IN THE NEXT 10. Diversity is key to our future growth and should be a cornerstone within our NETWORK’S foundation. It is imperative to the organization’s future success to position ourselves as an inclusive organization, comprised of individuals that mirror the diversity of the communities in which we serve. From a purely economical standpoint, diversity makes good business sense. But USLAW NETWORK’S ultimate goal for achieving diversity must primarily revolve around the simple, but humanistic aspect that inclusion is right...and exclusion is wrong. Right vs. Wrong...that’s what we do.

Already guidelines and initiatives are being written to help shape the direction our organization will travel towards achieving diversity. Unprecedented in its scope, these initiatives address diversity issues as they relate to the individual firms, our practice groups, our membership, and our clients.

STRONGER TIES WITH CORPORATE COUNSEL. Perhaps some of our “biggest fans” are the in-house corporate counsels of the world. More than any other market segment, they “get” what we do. They see our value and understand our worth. Through new services and targeted educational events, USLAW NETWORK will focus on nurturing and growing these relationships between our membership and the in-house counsel community.

THE NETWORK WITH HEART. It has become more and more apparent our very real, and expected, obligation as global citizens to give back to our communities. Our stepped-up efforts in supporting state chapters of Special Olympics has made “giving back” a very real part of our NETWORK. The Next 10 will be different only in our goal to intensify these efforts.

We look forward to Our Next Ten and I’m proud to lead us in this next chapter of USLAW NETWORK.

Sincerely,
Sheryl J. Willert
Incoming Chair, USLAW NETWORK, Inc.
Assessing where jurisdiction lies, and under what circumstances, is a consideration of primary importance to businesses and their insurers. For the past twenty-five years following the plurality decision of the United States Supreme Court in Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1986), it appeared that product manufacturers were headed toward a rule by which they were subject to jurisdiction wherever their products were sold and/or used. This issue has been exacerbated by global expansion of manufacturing and the demagoguery against foreign-made goods. On June 27, 2011, the Supreme Court of the United States issued two decisions, in J. McIntyre Machinery, Ltd. v. Nicastro1 and Goodyear Dunlop Tires Operations, S.A. v. Brown,2 which offer much needed relief to those concerned about the expansion of personal jurisdiction.

OVERVIEW OF PERSONAL JURISDICTION

Central to the determination of personal jurisdiction is the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Supreme Court confirmed that pursuant to the Due Process Clause a state court may exercise personal jurisdiction over a non-resident defendant only if there exists “minimum contacts” between the defendant and the forum state. Id. at 316. These “minimum contacts” must rise to a sufficient level so that subjecting the defendant to jurisdiction in the forum state does not offend “traditional notions of fair play and substantial justice.” Id. As the Supreme Court later affirmed, affording foreign defendants fair warning that a particular activity may subject them to the jurisdiction of a particular sovereign permits those entities to structure their conduct “with some minimum assurance as to where the conduct will and will not render them liable to suit.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).
Jurisdiction over a nonresident is classified as either specific or general. Specific jurisdiction exists where the lawsuit arises out of, or is related to, the defendant’s contacts with the forum. General jurisdiction exists when the activities of a nonresident in the forum state are substantial, continuous and systematic. Typically, specific jurisdiction is easier to assess and comprehend, and general jurisdiction much more difficult to establish.

**THE ASAHI PROBLEM**

The erosion of confidence in assessing jurisdiction in the global marketplace dates to the decision in *Asahi*. The facts of that case seemed innocuous enough. A Japanese component part manufacturer sold tire valve assemblies (in Japan) to a Japanese tire manufacturer, which sold the tires throughout the world, including the United States. One such tire was alleged to have caused a motorcycle accident in California. What remained when the case went to the Supreme Court was a third party action between the tire manufacturer and the component part supplier.

Although the Supreme Court unanimously agreed that there was no jurisdiction over the component part manufacturer in California, the Court could not agree on the proper test to assess jurisdiction. Delivering the opinion of the Court, Justice O’Connor wrote that “the placement of a product into the stream of commerce, without more, is not an act of the defendant purposely directed toward the forum state.” 480 U.S. at 112. However, in his concurring opinion, Justice Brennan held that “as long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit cannot come as a surprise.” Id. at 117.

Courts struggled to assess jurisdiction in the uncertainty created by the plurality decision in *Asahi*, with some courts following the O’Connor “stream of commerce plus” test and others simply requiring the Brennan “stream of commerce only” test. This conundrum reached a crescendo in a pair of state court decisions from New Jersey and North Carolina which threatened exposing manufacturers to unbridled jurisdiction.

**NICASTRO V. J. MCINTYRE MACHINERY**

*Nicastro* involved a worker who was injured while using a recycling machine manufactured by a UK company in England. The machine was sold and shipped to an unaffiliated exclusive distributor in Ohio, which sold it to the plaintiff’s New Jersey employer. Although the product could be sold in any state, there was no evidence that the manufacturer targeted New Jersey. The New Jersey Supreme Court held that jurisdiction exists over “a foreign manufacturer that places a defective product into the stream of commerce through a distribution scheme that targets a national market, which included New Jersey.” *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 987 A.2d 575, 589 (2010). The Court affirmed its intent to shape jurisdictional law to reflect the “new reality” that in the global marketplace, trade knows few boundaries. Further, the Court advised that foreign manufacturers would simply have to procure insurance to cover this “new reality.”

The United States Supreme Court flatly rejected the expansion of personal jurisdiction permitted by the New Jersey decision. More importantly, the majority rejected the stream of commerce test enunciated in *Asahi*, which had elevated foreseeability as the “touchstone of jurisdiction.” Instead, the *Nicastro* Court returned to the *International Shoe* understanding of personal jurisdiction, mandating that the principal inquiry “is whether the defendant’s activities manifested an intention to submit to the power of a sovereign.” 131 S.Ct. at 2788. Thus, it is the defendant’s action, not his expectations, which empower a Court to subject it to jurisdiction. Since the UK manufacturer in *Nicastro* had not engaged in conduct purposely directed at New Jersey, there could be no jurisdiction over that entity in New Jersey.

Unfortunately, Justices Breyer and Alito did not believe *Nicastro* presented a good opportunity for the Court to fully address the implications of global commerce on the personal jurisdiction issue, and concurred only in the result. The larger issue remains undecided.

**BROWN V. GOODYEAR DUNLOP TIRES OPERATIONS, S.A.**

Brown involved two minors from North Carolina who were killed in a bus accident in France, which was allegedly caused by a defective tire manufactured by a Goodyear affiliate in Turkey. Plaintiffs filed suit in North Carolina against Goodyear Tire and Rubber Company and a number of its foreign affiliates, including Goodyear Turkey. The affiliates each challenged personal jurisdiction.

Since the incident did not occur in North Carolina, the North Carolina Court of Appeals had to assess whether there was general jurisdiction over the Goodyear affiliates. Each of the affiliates is a wholly owned subsidiary of Goodyear Tire and Rubber Company (which consented to jurisdiction) and use the Goodyear distribution system to sell tires. Although their tires were primarily manufactured for foreign markets, some of their tires were distributed in North Carolina. Boldly going where none had gone before, the Court applied the *Asahi* “stream of commerce” to general jurisdiction and held that the affiliated were subject to suit in North Carolina.

Writing for a unanimous Supreme Court, Justice Ginsberg rejected the notion that a foreign corporation is subject to general jurisdiction merely because other entities distribute, in the forum state, products placed into the stream of commerce by the defendant. The decision reaffirmed that in order to find general jurisdiction over an entity, there must be “continuous and systematic general business contacts” between the entity and the forum.

**CONCLUSION**

*Nicastro* and *Brown* confirm that the constitutional underpinnings of personal jurisdiction remain intact and have not fallen prey to the loud claims of the plaintiff’s bar. Unfortunately, *Nicastro*, like *Asahi* before it, is only a plurality decision. Although the Supreme Court has rejected the *Asahi* stream of commerce test, there is no conclusive determination of the effect of global manufacturing and sales.

Litigating jurisdictional issues can be expensive and tedious. Since this fight is waged at the beginning of the lawsuit, recordkeeping is essential. Manufacturers need to know where they do business, not only with respect to manufacturing, marketing and sales, but also where their employees travel. The more information available to defense counsel and the Court, the easier the decision will be.

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Today, there is an ever-present need to obtain discovery from people or organizations who are involved in disputes within the United States, but located in foreign jurisdictions. Lawsuits frequently arise where the need to obtain evidence from sources located abroad is critical to a case. This article will address the practical issues involved in obtaining discovery from people and organizations located abroad for purposes of proceedings in the United States. It will examine situations where the person from whom evidence is sought is subject to the court’s jurisdiction, as well as how to proceed when a party is not subject to the court’s jurisdiction.

When discovery is being sought from a person or organization who is a party to the action and located abroad, and thus subject to the court’s jurisdiction, the process is comparable to obtaining discovery from a party located within the United States. State and federal discovery rules apply and will govern requests, production of documents, and the taking of depositions. Generally, Federal Rule of Civil Procedure 26 details general discovery rules to be followed, Federal Rule of Civil Procedure 30 describes the procedure for taking depositions, and Federal Rule of Civil Procedure 34 governs production. State discovery rules and the Federal Rules of Civil Procedure allow a court to order persons located outside of the United States to produce documents and attend depositions in the United States so long as that person is subject to the personal jurisdiction of the court. Additionally, a party can obtain discovery from certain nonparties located abroad. Federal Rule of Civil Procedure 45 allows a party to subpoena documents from a nonparty witness and potentially subpoena a witness for deposition if that nonparty is located within the territorial jurisdiction of the court or has a place of business in the United States.

Federal Rule of Civil Procedure 45 allows a party to subpoena documents from a nonparty witness and potentially subpoena a witness for deposition if that nonparty is located within the territorial jurisdiction of the court or has a place of business in the United States.

Alternatively, when seeking to obtain evidence from a person or organization located abroad that is not subject to the court’s jurisdiction, the process begins with a determination as to whether the other country has consented to be bound by the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (“Convention”). The Convention was created to help parties obtain evidence in both civil and common law legal systems, and most signatories to the Convention allow some form of discovery when dealing with cross-border disputes. To determine whether a country has consented to be bound by the Convention, one should consult the Hague Conference on Private International Law website. A country must be a party to the Convention in order to be bound by the Convention, as opposed to just a member of the Hague Conference.

If the discovery originates in a country that is not a party to the Convention, Letters Rogatory will typically be used to obtain evidence instead of the Convention. Letters Rogatory is one of the oldest discovery procedures used to conduct discovery abroad. The process involves applying to the United States court where the action is pending and requesting that that court send a formal request for assistance, or Letters Rogatory, directly to the foreign court. The Letters Rogatory can also be requested through diplomatic channels. Once the foreign court or foreign authority receives the request, it issues the Letters Rogatory under
seal and conducts the discovery pursuant to the specific request of the petitioning party. It is important to note that the foreign court is under no legal obligation to issue Letters Rogatory and, thus, should only be used where discovery under the Convention cannot be obtained.

When the evidence sought is located in a country that is a party to the Convention, that country has agreed to be bound by the Convention and a legal obligation does exist. These countries are considered Contracting States and have “consented to be bound by the treaty, whether or not the treaty has entered into force.” The Convention provides a mechanism to obtain evidence located in these Contracting States in both civil or commercial matters. Proceeding under the Convention is the most frequently used procedure, as it is less time consuming, less costly, and requires less involvement of government and court officials.

Most Contracting States consider the Convention to be the exclusive mechanism to obtain evidence in other Contracting States. The United States, however, is one of the minority countries that views the Convention as a permissive, alternative means to obtain evidence, rather than as an exclusive, mandatory procedure. In Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, the Supreme Court found that the parties have the option of using the Convention to obtain discovery that is located abroad, but that foreign discovery can also be taken using typical United States discovery procedures in both civil or commercial matters. Proceeding under the Convention is the most frequently used procedure, as it is less time consuming, less costly, and requires less involvement of government and court officials.

When evidence is to be obtained under the Convention, it involves the submission of a formal “Letter of Request,” which can then be sent to a judicial authority or, more informally, sent to diplomatic officers, consular agents, and commissions who then gather evidence. Each process is discussed in chapter one and chapter two of the Convention, respectively.

A Letter of Request may be submitted in the state or federal court where the action is pending. This domestic court then directs the Letter of Request to the designated Central Authority in the foreign Contracting State where the documents or witnesses are located. If the Letter of Request is approved, the Central Authority will send it to the appropriate judicial authority, who will then assist in obtaining answers to interrogatories, production of documents, and other discovery requests. The Letter of Request can also be directed to a diplomatic officer, consular agent, or commissioner, but only if there have been no objections filed to chapter two of the Convention. This more informal process of obtaining evidence through diplomatic officers, consular agents, or commissioners is subject to the published reservations and declaration of the Contracting State.

The Letter of Request should be written in the language of the Contracting State to whom the request is being made, but that Contracting State should also accept a Letter of Request in English or French. However, the receiving Contracting State may object and request that another language be used. The Letter of Request must clearly and concisely identify various items in accordance with chapter one, including: (1) the nature of the proceedings, (2) the names and addresses of the person(s) to be examined, (3) the questions to be put to that person, (4) the documents or other material to be inspected, (5) the form of oath to be used, (6) how the testimony is to be recorded, and (7) a specific request to ask questions of the person(s) if so desired.

One potential issue to be aware of when drafting Letters of Request is that certain countries request the right not to execute Letters of Request issued for the purpose of obtaining prretial discovery. In general, a Letter of Request will be executed as requested, but Article 23 of the Convention allows Contracting States to declare that they will not execute Letters of Request “issued for the purpose of obtaining pretrial discovery of documents as known in the Common Law countries.”

Almost every signatory to the Convention, with the exception of Barbados, Israel, the United States, the Czech Republic, and the Slovak Republic, has made a declaration in accordance with Article 23 and indicated that it will not execute Letters of Request aimed at acquiring prretial discovery. One way to avoid this potential issue is to draft the Letter of Request without using the term pretrial discovery, and to emphasize the fact that the evidence will be used for trial purposes instead.

Once a Letter of Request has been approved and executed, the authority to whom the request was made is expected to apply the same “measures of compulsion” as it would if the same request was made by a domestic party or authority in internal proceedings. Discovery will be sought to the extent that internal law allows and thus the foreign party requesting the evidence is treated the same as a domestic party.

While the Convention is not considered a mandatory means of obtaining foreign discovery in the United States, it is clear that it is a useful and efficient means to do so. It is important to be aware of the scope of the Convention, as well as the different reservations and designations of each Contracting State so as to be better prepared when seeking evidence from a particular Contracting State. The Hague Conference, or HCCH website is a useful resource and provides relevant and insightful information, such as the list of Contracting States, full text of the Convention, and various handbooks and examples of documents, such as Letters of Request. The Convention was designed as a means to facilitate cross-border discovery and should be utilized to the extent possible when seeking discovery abroad.
It is increasingly common for US companies to do business with entities around the globe. For many, international trade is critical to remaining competitive in the US marketplace.

But what if something goes wrong with a foreign product? What if a new line of office chairs the company imported from India collapses under its customers? What if the factory machine it purchased in Taiwan injures a company employee on the job?

What if subsequent letters to the foreign manufacturer demanding compensation or indemnification go unanswered?

The answer is that the US company faces some tough choices, including whether to file a claim or – if the US company is itself being sued – a cross-claim that will bring the foreign manufacturer into US court.

How is this done?

Once a complaint is filed in the appropriate venue, the US plaintiff is required to notify the foreign defendant that a lawsuit is pending against it. Until this service of process takes place, the action cannot proceed.

Domestically, this type of notice is a relatively straightforward matter: a process server, constable or sheriff typically hand-delivers the court papers to an officer of the defendant corporation and swears out an affidavit of service.

Internationally, however, who may serve process and how service may be effected is a complex matter, governed by multiple (often conflicting) sets of legal rules.

SERVICE IN INDIA, PURSUANT TO THE 1965 HAGUE SERVICE CONVENTION

Take, for example, the case of a defendant located in India. In India, service is governed not just by US state or federal rules but also by terms of a judicial assistance treaty (the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters or
“Hague Convention”) and Indian law. US courts have consistently held that, where the Hague Convention is in effect, application of that treaty’s provisions is mandatory and that its channels supercede and abrogate inconsistent state and federal rules for service. In short, if your defendant is in a Hague signatory country, Hague rules exclusively dictate how service can be effected.

Hague Convention rules, in turn, defer to the laws of the destination state. Each signatory nation is asked to file formal declarations and reservations regarding permissible methods of service in its territory. In this regard, India declared that it objected to direct service by diplomat (as provided by Article 8), service by mail (as provided by Article 10(a)) and service by judicial officer (as provided by Article 10(b)). Thus, any attempt by a US attorney to serve by mail or agent in Indian territory — even if provided for under US domestic rules — would result in defective service under both US and Indian law.

How then must service be accomplished? The “Requesting Authority” in the United States must file a formal Hague Service Request with a designated “Central Authority” in India (as provided by Article 5) — in this case, the Indian Ministry of Law and Justice. The Indian Central Authority then vets the Service Request to ensure compliance with the treaty and, in turn, refers the court papers to a competent lower court for service. There, a judge instructs a court bailiff to effect service pursuant to the laws of India.

Once the papers are served, the lower court returns its local proof to the Indian Central Authority, which annexes it to a Hague Certificate, or international proof of service, along with a duplicate copy of the papers served, and sends the entire file back to the United States.

In India, service takes from four to nine months; it is virtually impossible to expedite execution of a Hague Service Request through the Indian court system. Since most state and federal rules provide that service must be effected within 30 to 120 days, counsel for the plaintiff will need to show diligence in attempting service to the US court and apply for special extensions of time.

There are sometimes other issues associated with service in India. Since India is a common law country, the court bailiff generally effects personal service, but occasionally service is effected by insertion in a letterbox, or by posting at an abandoned “registered office” for the defendant. While this may constitute good service under Indian law, anything short of personal service is likely to be problematic from the point of view of US law, since due process rights under the US Constitution dictate that service must be reasonably calculated to give the defendant actual notice. Did the owner of the letterbox in which service was left receive actual notice? A second attempt — and another four to nine months — may be needed to cure such service.

Likewise, language can add a wrinkle to the process. India is home to several hundred languages. Because English is one of its official languages, a translation of the court papers to be served is rarely required. At the same time, under US notions of due process, plaintiffs have a duty to serve documents upon defendants in a language that the recipient will be likely to understand. For example, if an Indian court bailiff elects to effect sub-service of English language court papers upon a security guard who does not speak English, has service been perfected?

SERVICE IN TAIWAN, PURSUANT TO LETTER ROGATORY

Not all foreign countries are signatory to the Hague Convention. Service of process in Taiwan, for example, presents a completely different set of issues.

In the absence of any treaty, service in Taiwan is governed by US rules and Taiwanese law. US rules must be met in order to commence the action in US court. At the same time, Taiwan rules should be strictly observed: Taiwan has indicated that it will not enforce any ensuing US judgment if service of the underlying action was not effected through its courts. In other words, it is possible to arrange for service by private agent in Taiwan pursuant to US rules only, but if the case is won, and a US money judgment is awarded, the judgment will be unenforceable in Taiwan because the original service is deficient under Taiwanese law. The US company may well have litigated its case for nothing.

How does a US company avoid this type of issue? It must seek issuance of an international judicial assistance request, or letter rogatory, and transmit it through diplomatic channels.

A letter rogatory is a formal request from a US court seeking judicial assistance from a foreign court. US attorneys draft the letter rogatory, and then apply to the US court for its issuance. In the letter rogatory, the US court asks a foreign court to arrange for service on its behalf through a foreign judicial officer on the basis of reciprocity and international comity. Once issued, the letter rogatory is transmitted to the US State Department which sends it by diplomatic pouch (for a hefty transmission fee of $2,275) to the US embassy in-country, which presents it to the foreign government which in turn, assigns it to one of its courts for execution. The entire letter rogatory, including the court papers, must be accompanied by a certified translation in the language of the destination state. Once executed, the letter rogatory is returned to the US through the same chain of authorities.

To make matters more complex, the United States has no diplomatic relations with Taiwan, does not recognize its existence, and maintains no embassy there. Indeed, US courts are prohibited from sending letters rogatory which refer to Taiwan as “the Republic of China.” Instead, the US maintains a “cultural center” (The American Institute in Taiwan), to handle its local affairs, including the transmission of letters rogatory.

Currently, it takes between five and seven months to perfect service in Taiwan by letter rogatory. Again, it is difficult to expedite this process.

Because international service is expensive, time-consuming and fraught with unexpected problems, it behooves US plaintiffs to do their homework in advance. It is always best to effect service by the most conservative means possible (generally through the foreign court system and its judicial officers): to do it once, to do it properly, and to give your attorneys the time they need to secure jurisdiction over the defendant. Accordingly, as a US company, you should always consult with a qualified attorney and process server with international litigation experience to obtain the best advice on how to proceed.

Cara LaForge is the manager of international litigation support for Legal Language Services. Cara has more than 15 years’ experience in the field and is a frequent lecturer on judicial assistance topics for the ABA International Section, the National Association of Professional Process Servers and various CLE panels.

Phillip R. Anderson is a 1997 graduate of the University of Kansas School of Law and currently serves as in-house counsel with Legal Language Services, specializing in international service of process and the taking of evidence abroad. Mr. Anderson also has extensive litigation experience in products liability defense, commercial law, and family law matters.
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A consumer walked into a cell phone store to purchase a cell phone and a service plan. As part of this sale, the consumer agreed to the terms of a service contract. This contract, and like thousands of others executed every day, contained an arbitration clause. The purpose of the clause is to require the resolution of any dispute between the parties to the contract through arbitration. The arbitration clause contained in this particular contract, like many others, included language seeking to prevent consumers seeking to dispute a term of the contract from banding together to proceed on a class-action basis. If enforced, the impact of this clause is to require consumers to individually pursue their own claims.

Until April, 2011 the enforcement of class-action waiver clauses varied depending upon the jurisdiction. For instance, the Third, Fourth, Fifth, Seventh and Eleventh Circuits had enforced class action waivers. The First and Ninth Circuits, in addition to Alabama, California, Illinois, New Mexico, Oregon, and Washington refused to enforce class-action waivers. The authors’ home state of Nevada joined this list of jurisdictions refusing to enforce class-action waivers in March, 2011. The result of this split created unequal and inconsistent enforcement of contracts, frustrating attempts to create a more predictable litigation environment.

The Supreme Court of the United States has now addressed the enforceability of the class-action waiver provisions. AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011) arose from a promotion in which the consumer alleged AT&T offered a “free” phone but then charged sales tax upon the sale of the phone. The consumer filed suit in California and sought class-action status so as to expand the claim to include other AT&T customers who might have been improperly charged sales tax. AT&T sought to enforce the arbitration clause in the contract, requiring arbitration and waiving the right to seek relief as a class. The lower courts refused to do so, relying upon a California decision invalidating such clauses in many instances. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

In Concepcion the question concerned whether the state rule invalidating class-action waiver clauses was preempted by the Federal Arbitration Act (“FAA”). The Supreme Court noted the primary goal of the FAA is to enforce arbitration agreements to promote informal and more efficient resolution. Concepcion concluded California’s Discover Bank case conflicted with the FAA because it impeded the goal of informal and efficient resolution. Therefore the FAA preempts Discover Bank and governed the contract between the consumer. The arbitration clause containing the class-action waiver was enforceable.

Why does this matter? Litigating consumer class-action lawsuits is frequently hugely expensive and time consuming for companies. Efforts to restrain these costs and promote efficient, predictable resolution of the claims constituting class-actions are high on the priority list for many legal departments. Concepcion recognized this fact as one reason to promote enforcement of class-action waivers. “First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” 131 S.Ct. at 1751. The court also noted class-actions require procedural formality, greatly increase the risk to defendants due to the lack of several levels of appellate review, and that arbitration is, at a fundamental level, not suited to class-action matters.

The impact of Concepcion appears to be far-reaching. First, there should now be more uniformity for companies operating in multiple states. Before this decision the enforcement of a class-action waiver clause varied from state to state. To the extent states once refused to honor such waivers, they may now be forced to enforce them.

Second, Concepcion provoked strong reactions from both consumer and industry advocacy groups. Consumer groups have expressed concern the decision will force many to forego their claims due to even the minimal expenses of arbitrating small claims. Industry groups are rightly supportive of the opinion, primarily for the reasons stated by the majority opinion.

Many companies could be well-served by well-crafted and thoughtful arbitration clauses precluding class-action status, whether in retail sales contracts or other situations. One perceived advantage to the AT&T clause was the manner in which it was constructed could be argued as far less draconian than some clauses that seek to vest all control over the arbitration with the company. By carefully drafting the arbitration clause to comport with creating a fair, but efficient proceeding the clause is more likely to be enforced. When combined with a class-action waiver the advantages grow as the scope of each claim may be limited as well as the exposure and potential liability. Clearly this comports with the Court’s goal promoting the FAA’s intent of efficient and informal resolution of claims.

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CONSUMER FRAUD CLASS ACTIONS
COMING OUT SWINGING OR KEEP YOUR POWDER DRY?

CONSIDERATIONS WHEN RESPONDING TO THE CONSUMER FRAUD CLASS ACTION COMPLAINT

Many jurisdictions have enacted consumer protection statutes that were intended, at least originally, to protect consumers against sharp business practices. However, today some would posit that these enactments have been turned on their heads, and now are used more as a sword than a shield by attorneys seeking to maximize fees rather than vindicate consumer rights. Often, a representative consumer acts as nothing more than a stalking horse for counsel purusing a claim that by itself would appear to be of no worthwhile concern either because it is based on a de minimus infraction or mere customer dissatisfaction. Nevertheless, such allegations are the makings of statewide or nationwide class actions. Whatever one’s view concerning the propriety of such suits, because of relatively easy state court procedural hurdles to achieve class certification, these lawsuits have teeth and are of concern to all businesses that sell or market merchandise to the general public. Such lawsuits raise two separate basic concerns for the practitioner representing a commercial entity: (1) how to advise a commercial entity to avoid such suits, and (2) how to best respond to the action if suit is filed. This article will address these two basic questions.

LITIGATION AVOIDANCE

Clients that sell or market merchandise of any kind should be encouraged to familiarize themselves with the consumer protection statute(s) that govern the particular jurisdiction in which they do business and ensure compliance where appropriate. Often, even where a business complies with applicable state administrative codes and regulations, the consumer protection statute may place additional obligations upon a commercial entity with respect to selling or marketing goods to the general public. A commercial client who is unfamiliar with the applicable statutory requirements is in danger of running afoul of the statute, thereby inviting claims. Indeed, courts in certain states have held that even a de minimus violation of a consumer protection statute can form the basis for a consumer fraud action.

In other contexts, such as a franchisor/franchisee relationship, some companies have sought to include exculpatory waivers in their agreements. However, exculpatory waivers are often held invalid, especially where they seek to take away statutory rights conferred upon the general public by a remedial statute, such as those statutes designed to protect against consumer fraud. Such waivers are often struck down as void against public policy – after all, a consumer protection statute cannot accomplish its remedial goals if it can simply be avoided by agreement. A practitioner advising a commercial client in this context must be familiar with the law regarding exculpatory waivers in the applicable jurisdiction to determine whether such a waiver is enforceable.

Still, another option outside of an outright waiver is to relegate a consumer’s statutory claim to arbitration, by way of contractual arbitration clause. Generally speaking, agreements to arbitrate do not violate public policy. On the contrary, public policy favors arbitration. The language of the arbitration clause must clearly mandate the waiver of a jury trial concerning any and all claims, including those that are statutory in nature, in favor of submitting any controversy to arbitration. In such instances, plaintiff’s statutory claims survive, but they will be resolved in an arbitration forum, rather than a court of law. Arbitration clauses are desirable because submitting a dispute to an arbitrator rather than a jury generally allows for a more predictable outcome and a smaller chance of a large damage award.

A final option is to seek redress in the state legislature. In jurisdictions that have particularly consumer friendly statutes that might be subject to abuse, lobbying efforts to change the law are always a viable option. Indeed, in New Jersey for example, a bill was introduced in the state legislature (Assembly Bill No. A-3333) in October 2010 that seeks to significantly amend the New Jersey Consumer Fraud Act (“NJCFA”). See www.njleg.state.nj.us/bills/BillView.asp. This measure, if passed, will cap the amount of prevailing parties attorney’s fees available, make treble damages a discretionary rather than a mandatory remedy, and further limit the applicability of the NJCFA to transactions otherwise permitted or regulated by any other state regulatory body. If passed, this amendment would significantly curtail consumer fraud suits, including class actions. Thus, petitioning the legislature for a change to the law is also an effective preventative measure.

RESPONDING TO THE CONSUMER FRAUD CLASS ACTION

Ultimately, despite whatever preventative measures are taken, a commercial entity may someday be faced with a consumer fraud class action. It goes without saying that a well-reasoned litigation strategy must be developed to respond to the suit. Some of this will obviously be determined by the merit of the lawsuit on its face. If the cause of action set forth in the complaint is susceptible to a well-known and strong defense, a motion to dismiss in lieu of an answer may be in order. If, on the other hand, the suit appears meritorious on its face it may prove more productive to interpose an answer and proceed through preliminary discovery. A commercial entity and its counsel can then determine whether the suit can be attacked on other grounds after more is learned about the facts giving rise to the suit.
A. REMOVAL TO FEDERAL COURT

An important initial consideration is whether to remove the case to federal court. It is generally accepted that the Class Action Fairness Act of 2005, 28 U.S.C. 1332(d), (“CAFA”) has made it easier for defendants to remove putative class actions to federal court. Business groups and tort reform supporters had lobbied for the legislation, arguing that it was needed to prevent class action lawsuit abuse. The Act gives federal courts jurisdiction over certain class actions in which the amount in controversy exceeds $5 million, and in which any of the members of a class of plaintiffs is a citizen of a state different from any defendant, unless at least two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of states in which the actions were originally filed. The Act expands federal diversity jurisdiction under 28 U.S.C. 1332 and gives out-of-state defendants greater ability to remove matters out of more plaintiff-friendly state venues.

This is an option that should be explored with the client, assuming the amount in controversy requirement can be satisfied. Of note, it must be stressed that alleging the amount in controversy requirement of $5 million is satisfied for purposes of a removal petition is not an admission or acknowledgment that plaintiff’s suit has such a value nor that plaintiff’s suit is even legally viable. Removal is certainly a strategy to employ where plaintiff’s suit is vulnerable to dismissal on the pleadings because, generally speaking, an Article III Judge is more inclined to dismiss a suit on motion than the average state court judge. Usually, the district court judge, who is appointed for life, is less likely to be subject to local bias. Indeed, this is the underlying principle to diversity jurisdiction in the first place – to protect out-of-state defendants from local prejudices.

B. THE MOTION TO DISMISS

Federal Rule of Civil Procedure 23 governs certification of putative class actions. Each state has its own procedural rule(s) regarding certification but generally speaking these rules mirror the federal model. Under subsection (a) of this rule, one or more members of a class may sue or be sued on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. These requirements are commonly referred to as numerosity, commonality, typicality and adequacy of representation. After establishing that the requirements of Rule 23 (a) have been met, plaintiffs seeking to certify a class most often look to satisfy one of the elements enumerated in Rule 23 (b), which provides that:

- The questions of law or fact common to the members of the class predominate over other questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

To predominate, common issues must constitute a significant part of individual class members’ cases. However, where individual rather than common fact issues predominate, this requirement cannot be satisfied.

1. Individual Fact Issues Concerning Reliance or Proximate Cause Predominate

Consumer fraud class actions are generally considered vulnerable on this issue. Most fraud claims, even those codified by statute, usually require proof of reliance. Reliance is an element of proof that depends on each individual plaintiff’s factual circumstance as well as their credibility. Therefore, where reliance is an element, it can be successfully argued that individual questions of fact, rather than common questions, predominate – such that a class action cannot be maintained. In states that do not require plaintiff to establish reliance as part of statutory fraud claim, similar predominance arguments can be made by attacking the requisite element of causation.

2. Field Preemption

Another argument available to defendants is field preemption. Here, defendant seeks to infer a legislative intention to preempt a particular state’s consumer fraud statute because the regulatory scheme established by another statute is so pervasive as to “occupy the field” in that area of the law, so as to warrant an inference that the legislature did not intend the consumer fraud statute to apply. This argument is most often made where the other applicable statute contains a provision making it the sole remedy for the harm claimed in the complaint. This is generally seen in the context of product liability suits that also allege consumer fraud statutory claims. Courts will often conclude that the product liability act governs, and excludes any claims under the consumer protection statute. In addition, other areas of business may be so heavily regulated by their respective enabling statutes that there is no room for the consumer protection statute to govern. In this regard, one should look for a provision or regulation that directly conflicts with the consumer protection statute, as this will present the most compelling argument.

3. Failure to Plead Fraud with Particularity

Another possible argument lies with Fed. R. Civ. P. 9(b), which requires that actions alleging fraud be pled with particularity. Statutory fraud claims, like their common law counterparts, must be so pled. Most states have a corollary to Fed. R. Civ. P. 9(b), which requires that a complaint alleging fraud be pled with specificity “in so far as practicable.” Any claim for statutory fraud that does not plead all elements of the statute backed up by specific facts is subject to attack.

CONCLUSION

Consumer fraud class actions are a concern for any commercial entity that sells or markets merchandise to the general public. Such suits may be warded off by knowledge of the particular consumer protection statute in a given jurisdiction, the use of exculpatory waivers or arbitration clauses where possible and petitioning the state legislature for reform. If forced to litigate, a defendant, a definite and comprehensive defense strategy should be developed and the lawsuit met aggressively, if warranted. Removal pursuant to CAFA should be considered. Predominance arguments, field preemption or failure to plead fraud with particularity are all viable avenues of defense and, if the facts of the particular case are right, present strong arguments for dismissal. Of course, the particular allegations contained in the complaint and the facts revealed by any investigation will best inform counsel’s strategy when determining how to respond to the putative consumer fraud class action.

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COMPLIANCE WITH FEDERAL SAFETY STANDARDS DOES NOT BAR STATE TORT CLAIMS

WILLIAMSON & PRE-EMPTION DEFENSE

Joseph C. Balestrieri and Helen H. Chen  
Robinson & Wood, Inc.

Compliance with federal safety regulations no longer ensures that manufacturers are immune from state tort claims. We may expect to see an increase of state tort suits in light of a February 2011 United States Supreme Court decision that permits plaintiffs to sue an automobile manufacturer for state tort claims even though the manufacturer has complied with federal safety standards. Williamson v. Mazda Motor of America, 131 S.Ct. 1131 (2011).
I. THE WILLIAMSON CASE

In 2002, the Williamson family was struck head on by another vehicle while in their 1995 Mazda minivan. Thanh Williamson, sitting in a rear aisle seat and wearing a lap belt, died in the accident. Delbert and Alexa Williamson, who wore lap-and-shoulder belts, survived. The Williamson family and Thanh Williamson’s estate subsequently filed suit against Mazda, claiming that Mazda should have installed lap-and-shoulder belts on rear aisle seats, and that Thanh died as a result of Mazda having equipped her seat with a lap-only belt.

The Orange County Superior Court sustained Mazda’s demurrer without leave to amend as to the wrongful death claim. Following a stipulation to dismiss the remaining personal injury claims, plaintiffs appealed. The California Court of Appeal affirmed, relying on Geier v. American Honda Motor Co., 529 U.S. 861 (2000), in which the United States Supreme Court held that a 1984 version of Federal Motor Vehicle Safety Standard No. 208 requiring installation of passive restraint devices pre-empted a state tort action against an automobile manufacturer for failure to install airbags.

In an unanimous decision, the United States Supreme Court reversed. The Court held that Federal Motor Vehicle Safety Standard No. 208, which gives automobile manufacturers the choice of installing either lap belts or lap-and-shoulder belts on rear inner seats, did not pre-empt state tort suits claiming that manufacturers should have installed lap-and-shoulder belts on rear inner seats.

The Court noted that in both Geier and the instant case, federal regulations leave the manufacturers with a choice. In Geier, manufacturers are assured to retain a choice installing any of several different passive restraint devices. The federal regulation at issue in Williamson allows manufacturers a choice of two different kinds of seatbelts for rear inner seats.

The Court distinguished Geier on the ground that in the airbag case, the choice is a significant regulatory objective, and the federal regulators were concerned with consumer choice. Based on review of the federal regulation’s history, Department of Transportation (DOT)’s contemporaneous explanation, and its interpretive views, the Court found that providing manufacturers with the seatbelt choice was, however, not a significant objective of the federal regulation. Rather, the regulators encouraged the installation of shoulder-and-lap belts even if they were not required at the time. The fact that DOT thought that the requirement would not be cost effective does not prove that DOT sought to forbid common-law tort suits, because DOT did not believe that costs would remain frozen, and many federal safety requirements embody a cost-effectiveness judgment. The Court thus refused to infer pre-emptive intent from the cost-effectiveness judgment.

Under this ruling, where federal regulations give automobile manufacturers a choice of safety options, compliance with federal safety standards alone does not automatically immunize automobile manufacturers from tort claims. Rather, the options under the federal regulation is seen as a safety-minimum standard, which does not bar states from imposing stricter standards, and does not bar state tort suits.

II. THE IMPACT OF WILLIAMSON ON PREEMPTION DEFENSE

In the context of product liability litigation, the impact of Williamson on preemption defense is immediate, as can be seen in how courts rule on the issue of whether federal safety standard FMVSS 205 (“Standard 205”) pre-empts state tort claims.

Prior to Williamson, several jurisdictions such as West Virginia Supreme Court and Tennessee Court of Appeals found that Standard 205, which allows multiple options of vehicle glass, preempted claims under their respective state laws.

Only days after the issuance of Williamson, the United States Supreme Court vacated and remanded a South Carolina Supreme Court decision, which held that Standard 205 regarding glazing materials preempted South Carolina’s state law product liability claim. Priester v. Ford Motor Co., 131 S.Ct. 1570 (2011).

Recently, an Arizona district court followed Williamson and ruled against automobile manufacturer Daewoo Co. on the preemption defense. Bernal v. Daewoo Motor America, Inc., 2011 WL 2174890 (D.Ariz. 2011). The issue in Bernal is whether a tort claim under Arizona law for the use of tempered glass in side windows of automobiles is preempted by Standard 205, which permits the use of both laminated glass and its cost-effective version tempered glass. Failing to find preemption there could result in different states separately finding each of the alternative materials in Standard 205 to be insufficient, thereby eviscerating the federal regulation.

Relying on Williamson, the court found that where there was an implied conflict between Arizona state law and the requirements of Standard 205, Standard 205 may only be deemed to preempt state tort claims if the history, the agency’s contemporaneous explanation, and the agency’s current views of the standard indicated an additional regulatory objective to which state tort claims would be an obstacle. In other words, the court interpreted federal regulation as a minimum-threshold material standard absent clear and strong preemption language in the federal regulation.

III. CONCLUSION

In light of Williamson and recent case developments, we may expect to see an increase in state tort claims against automobile manufacturers who have complied with federal regulations but chose to install less expensive, allegedly “unsafe” devices. Indeed, in state tort cases, automobile manufacturers are deprived of safety choices guaranteed by federal regulations.
HOME FIELD ADVANTAGE
...IN THE CLOUD
Enterprise Risk and Best Practices in the Cyber World

An Executive Summary
Prepared by Richard P. Magrath
From the Work Done by Many USLAW Attorneys

While the concept of Home Field Advantage may seem like an oxymoron when discussing issues in the Cloud, it is because of the nature of the Cloud itself that the local/jurisdictional issues become even more compelling.

It is often said that a rising tide raises all ships. Unfortunately it also sinks any that are not seaworthy. Such is the case in today’s environment of constantly increasing and ever more valuable information. Organizations thrive off of the current ease of data acquisition, storage, interpretation, and transmission-both locally and in the Cloud. However, the sheer volume of sensitive information many organizations hold means that a single mismanagement, data-breach, or cyber-attack could spell disaster.

According to the 2010 U.S. Cost of a Data Breach study sponsored by Symantec Corporation and presented by the Ponemon Institute, the average organizational cost of a data breach was $7.2 million, or $214 per compromised record. Failure to comply with the Byzantine and location-specific legal requirements pertaining to data management can make the damage even more costly through shareholder lawsuits, reputation damage and customer defection. As commerce conducted in the Cloud expands, these risks and potential costs also continue to grow.

From a business perspective, unauthorized access to information, non-compliance with legal requirements, misuse of social media by stakeholders, or other issues as above could compromise an organization’s business strategy, revealing trade secrets or essential processes to competitors. A data breach may harm an organization’s reputation, impose costly notification requirements, or expose an organization to shareholder suits, class action or major vendor claims. Loss of access or control could impact an organization’s ability to do business or to deal with common access and control requests, such as litigation holds.

Bottom line, from a business perspective, you can’t afford to get it wrong.

With no sign of this waxing tide of data risk abating, what is an organization and Board of Directors to do?

The simple answer is to address data risk from an enterprise perspective by bringing together the key stakeholders (e.g., the Chief Risk Officer or equivalent, Information, and legal officers) to develop a plan.

But as the seasoned businessperson knows, it’s all about what you do along the way that distinguishes quality. And even more important than the quality of the plan is how it is implemented. A mediocre plan executed thoroughly will always defeat an excellent plan left uncompleted.

Unfortunately, many organizations find themselves frozen in uncertainty. The remoteness and loss of control associated with Cloud computing and the complexity of securely managing data across cyberspace often engender a paralyzing sense of confusion in unprepared enterprises. With danger facing them head on they stand still, afraid to make the wrong move, only to become more grist for the data risk mill.

Often the reason organizations don’t act is the fear that by doing so they may in fact make themselves even more vulnerable, whether it be to attack by criminals or to shareholder lawsuits. Such fears are legitimate and need to be addressed.

One of the best practices is to work with your attorney to analyze the practical, technological, and legal and implementation considerations pertaining to data risk management. They can help determine the best business solutions for you. With your attorney as your guide, providing their legal opinion, jurisdictional knowledge, and the potential benefit of privilege, your enterprise is much more likely to successfully navigate the data risk waters.

The most valuable asset an attorney can bring to the table is their local legal and jurisdictional knowledge. This is your “Home Field Advantage”. While the concept of Home Field Advantage may seem like an oxymoron when discussing issues in the Cloud, it is because of the nature of the Cloud itself that the local/jurisdictional issues become even more compelling.

Since the Cloud pools resources and infrastructure without a “physical” location, it increases the risk of unauthorized data access without specific definition as to where the data resides. That means privacy, data security, and other issues can pop up anywhere at any time and may be subject to a multi-
tude of jurisdictions, regardless of where the data is physically stored. From the legal perspective, a variety of privacy and data security laws may be implicated in the Cloud. In the United States, these laws are typically based on the type of information stored.

In many ways, the risks we address are compounded by the facts that the cyber world continually reinvents itself, with the pace of change accelerating every day. The organization will need to address and possibly revise information security policies and adopt protective measures to reflect the terms and restrictions on Cloud usage taking into account the technological, practical, and legal considerations. We recommend a four-step process:

- **LEGAL**: Engaging appropriate outside legal counsel at the beginning of and throughout the review, revision, and implementation of a data risk management approach is vital to the success of the operation. Attorneys take on two key roles in this regard - assessing compliance and providing privilege.

  Sensitive Data comes in dozens of varieties, each subject to its own particular regulations that change depending on use and jurisdiction. Hence, an attorney can provide “Home field Advantage” through their knowledge of the relevant, local legal concerns. Furthermore, sensitive data is increasingly passed to third-party providers, adding another dimension to the problem. The liability associated with a third-party data breach may still fall on your organization depending on the terms of the contract and due diligence conducted. An attorney can navigate this confusion, providing concrete answers regarding compliance and liability. They can also examine provider contracts for terms regarding control of data, data access, monitoring, updates, remedies and indemnification. Provisions for conducting due diligence, monitoring service levels, getting out of the relationship and getting your data back also should be addressed up front.

  One risk associated with conducting data risk assessments is that the written reports may provide a roadmap for an adversary, an advantage for a competitor or be produced as evidence of negligence or willful disregard in a tort action. It is important for organizations to seek to protect such reports from unwanted discovery. The only realistic method to create such protection is to establish privilege through external legal counsel. Outside counsel can then engage independent data security experts to help in the process while maintaining attorney-client privilege over the resulting reports.

- **TECHNOLOGICAL**: the organization needs to create a Written Information Security Plan (“WISP”) to detail a high level approach to the following key areas: Identification, inventory, and destruction of information, threat assessment, internal security access and control, external security access and control, employee training, supplier/3rd party servicer data risk management practices, security assessment and audit, and data incident and breach response. The WISP will be the standard against which the company measures its data risk management capabilities going forward. Therefore it should be developed using the expertise of all relevant departments as well as in conjunction with outside counsel. If needed, a third party organization can provide the needed expertise to develop an appropriate WISP. Next, the company must conduct a controls gap assessment to determine how current information security policies and technologies conform to the WISP.

- **PRACTICAL**: the organization needs to address practical considerations and engage in a cost-benefit analysis to compare/contrast their data risk situation and tolerances against changes they are considering. Upgrading technology, services, or training can be slow and expensive, but so can a data breach with a great deal of legal exposure. Determining your risk appetite and making informed business decisions based on the best legal and technological information available helps make the process easier. Understanding how a potential solution aligns with the strategic business plan and WISP is key. From a practical perspective, at a minimum, the company should determine the scope of Cloud usage, implement disaster and business continuity plans, and arrange for backup of data with a party other than the Cloud provider.

- **IMPLEMENTATION**: If the organization determines it to be practical from a cost/benefit perspective, it needs to translate the results of its attorney-guided data risk management assessment into actionable steps to move towards the standards set out in the WISP. This can be accomplished in ways such as increasing security in employee/employment practices, general processes, technology, 3rd party relationships, and sensitive data disposal.

**CYBER BREACH AND EVENT RAPID RESPONSE**: Unfortunately, even the best-prepared organizations may be compromised. In such cases, the nature and timeliness of the response will determine the impact on the organization’s future reputation. Some best practices to build your response plan around include internal representatives who would be responsible to:

- Contact your attorney to establish privilege and brief them on the situation.
- Agree and coordinate with your attorney how to proceed going forward.
- Report the breach/event to your breach response vendor, if any.
- Report the breach/event to your insurance agent, broker and company in accordance with insurance policy requirements.
- Take immediate action to minimize the loss.
- Implement measures to protect from further loss or damage.
- Implement means of capturing all expenses.
- Consult contractors for an initial estimate of the scope and cost to remediate.
- Define conditions and plans to resume operations.
- Identify temporary measures needed to resume operations and the associated extraordinary expenses that are incurred.
- Document to the extent possible and practicable.
- Appoint one person to represent your company in internal and external communications.
- Set up clear lines of communication with and ensure that all personnel understand the functions of the external parties involved.

Remember: A byte of prevention is worth more than an Exabyte of cure.

Like any good business decision, implementing these policies isn’t easy. The temptation to remain wishfully blind and unresponsive remains strong. But the tide of data risk advances unceasingly, surging lockstep with the increase of Cloud computing and cyber activity. Inaction will inevitably result in a foundering future. However, by taking into account these best practices and working in concert with your internal team and external counsel, you stand a much better chance of sailing in a sea of opportunity rather than scuttling due to shoddy preparation.

For further information regarding Enterprise Risk and Best Practices in the Cyber World, consult the white paper written jointly by RMS, Identity Theft 911, AON, and USLAW available at [www.uslaw.org/cyberrisk](http://www.uslaw.org/cyberrisk).
The drive toward business efficiencies is something that has long been standard in other service industries. Yet, the legal services industry has been slow to adopt similar best practices. Because of factors like recessionary pressures, the legal services industry is finally seeing meaningful trending in this area.

We can all see and feel the changes occurring in the business of legal services. As the landscape shifts, firms have an opportunity to share in the success of the business of the law as it evolves. In order to do this, firms can participate in developing meaningful metrics and seeking more creative and better solutions for clients.

The billable hour has been dominating the discussion, and frankly, taking quite a beating. This billing methodology has been debated at length against the movement toward alternative fee arrangements. It seems as if every conference that I have attended over the last couple of years has a roundtable session or panel dedicated to the topic.

**HITTING TO ALL FIELDS – EXPANDING THE FOCUS**

With the home stretch of the baseball season upon us, we can’t help but frame the focus on the billable hour in relation to my unrealistic hopes for my Los Angeles Dodgers being able to jump back into the race for a pennant this year (it’s been a tough season). Attacking the billable hour is a bit like me saying that if the Dodgers change ownership they will start winning and game attendance will go up. A change in ownership is a start, but the Dodgers need to add the right talent at multiple positions and improve the fan experience to achieve these results.

A panel session at the USLAW client conference in April touched on this popular issue, but had a refreshingly broader focus. Instead of only concentrating on how services are billed, the panel expanded the discussion to include cutting-edge techniques for client partnering, legal services outsourcing and law firm management. In a buyers’ market for legal services, law firms that offer creative solutions in more areas than simply the way that they bill services stand to distinguish themselves as better partners.

So, why does the attention remain on the debate between the billable hour and AFAs, when other creative options exist, like shifting legal services work to outside companies? The discussion about billable hour versus AFAs is prevalent because the billable hour is a metric that is easily measured by law firm clients, absent other available metrics.

**SCORING RUNS AND WINNING – WHO, WHAT AND WHY MATTER MORE THAN HOW**

Sabermetrics, developed in the 1970s, is the analysis of baseball through objective, empirical evidence. The introduction and use of Sabermetrics questioned historic measures of baseball skill like scouting players based on physical tools and traditional statistics. For example, batting average is thought to be an important statistic, but Sabermetricians argue that it provides a relatively poor indicator for team runs scored. Because scoring runs is what wins games, Sabermetricians put more stock in metrics that measure a player’s ability to help his team score more runs than the opposing team.

Coming up with new ways and methods to monitor and measure categories of legal spend is not easy. Until recently, clients were only measuring the one metric they have: how they are being billed. Changing billing structures places the burden for finding cost effective litigation service alternatives on law firms, as sourcing experts. However, as Ron Gruner, President of the Vallex Fund observed in David Galbenski’s book, Unbound: How Entrepreneurship is Dramatically Transforming Legal Services Today, “...[I]nvariably the lawsuit’s lead attorney, rather than a separate manager, is managing the entire lawsuit. It’s like having the brain surgeon manage the nursing staff and stock the operating room...projects need two bosses, a creative expert and a project manager.”

Identifying who is performing certain tasks, what those tasks are and the costs for those tasks is becoming more important. Evaluating the who, what and why are tasks, what those tasks are and the costs for those tasks is becoming more important.

Outsourced litigation service providers like Med Legal benefit from these trends, but so can our clients. Med Legal is partnering with those that understand our value proposition as an alternative resource to realign business efficiencies and better results, whether law firms, corporations or insurers.

**DESIGNATED HITTERS – LEVERAGING SPECIFIC TALENTS AND EXPERTISE**

Unbound explores trends emerging in the delivery of legal services against the backdrop of interviews with various law firm leaders, legal entrepreneurs, and in-house counsel for large clients of law firms.
Along with other outside litigation services providers, Med Legal is experiencing tremendous growth because insurance companies, corporations, government entities and law firms are beginning to realize that our services represent areas of legal spend that can be achieved with better results, faster and more cost efficiently. Med Legal delivers better expertise than non-medically experienced in-house personnel and at a lower cost than highly paid experts. The tools provided reduce redundancies, increase communication, provide a more thorough understanding of critical issues in medical records and better identify opportunities for mitigating damages in the areas of past medical billing and future care costs.

Legal process outsourcing (LPO) was a $400 million revenue industry in 2010 according to a June 2nd article in the New York Times written by Heather Timmons. Still, this number represents only a fraction of what is estimated to be a $200-billion-ayear legal market, Timmons wrote. The LPO industry share of the legal market is predicted by The Datamonitor Group to grow to $2.4 billion by 2012.

Outsourcing carries a negative connotation for some, because there is a perception that it means “off-shoring” and represents a potential for losing control over quality. But outsourcing is only a subset of other options (e.g. downsourcing and in-sourcing) for transferring work to other modalities. Outsourcing does not necessarily mean “off-shoring.” In particular, in the area of knowledge process outsourcing (KPO), where services are dependent on workers with greater skill, it may be a better idea to on-shore to prevent omitting critical details that can sometimes be lost in translation, like the language of medical records.

**GENERAL MANAGERS – EVALUATING YOUR MEASUREMENT METHODS**

A study published in March 2011 that was commissioned by The Council on Litigation Management and conducted by Revere Advisory last year identified specific External Initiatives that are on the rise among Litigation Managers and Executives. The study participants were 47 senior litigation executives from a broad cross-section of the litigation industry. The group surveyed was diverse by organization type, legal spend, line of business and litigation type.

The findings of the study reveal that 74% of study participants rated the quality of their litigation metrics as “Fair,” “Poor” or “Very Poor.” While this is a representation of the study group, the study further indicated that these same individuals will be dedicating more time to strengthening these metrics. The efforts to better measure and quantify litigation spend represent a significant trend toward more client controlled litigation spend.

The study makes it clear that litigation management effectiveness has high-level attention and decision makers within organizations are pushing for metrics and analytics that allow for clearer measurement of effectiveness and success. Specifically, the study identified five most penetrated external initiatives along with 10 emerging external initiatives. The list of emerging initiatives included services like E-Discovery, Copy Services and even (gasp) Medical Records Review!

The findings of the study reflect what I hear more and more from clients about the trend toward more client control. Our law firm clients are those that already understand the benefits of seeking better and more cost effective solutions for their clients. They have changed the conversation away from how they are billing. Instead, they introduce alternative ways of doing business that result in mutual benefit. Clients appreciate the effort to find better ways of doing business and having a clearer understanding of what they are getting for their dollar.

**THERE’S NO “A-ROD” IN TEAM – ASSEMBLING THE RIGHT BLEND OF RESOURCES**

Assembling teams with the perfect blend of specialized expertise in the most cost effective way is what every ball club in MLB strives for (maybe not the Yankees!). Even in baseball, the evolution toward more specialization didn’t occur overnight. In the early days of the sport, the best all-around athletes dominated the sport and played multiple positions. Babe Ruth, one of the greatest hitters of all-time, was also one of the game’s greatest pitchers.

Now, baseball teams are assembled with specialized needs in mind: lead-off hitters, balanced left/righty lineups, closers, etc. Each position is sourced and paid accordingly. Occasionally, we see a Texas-sized deal for a player like Alex Rodriguez, but it always becomes clear that allocating too much spend to one superstar is not the most efficient way to produce wins. The only measurements that matter in tracking a team’s success are wins, losses and World Series titles.

Until recently, the return on investment for utilizing outsourced litigation services has revolved around financial evidence and case studies. For Med Legal, it’s because the metrics are lacking for who is reviewing medical records for a client at their firms – is it a generalist like paralegals and attorneys, a highly paid specialist like in-house medical personnel or someone else?

Great attorneys are the All-Stars of litigation and compensating them appropriately is important. They are best suited hitting in the clean-up spot in the lineup, hitting home runs by attacking high level tasks that justify their billable hour rate. The trouble occurs when you are counting on them to score from first on a double in the late innings to tie or win a game. This task is better suited for a pinch runner, one that specializes in speed and happens to also not carry the same price tag as your slugger. As corporate and insurance carrier clients drive the momentum and efforts continue to develop better metrics around external initiatives we know what they will reveal – Med Legal and other litigation services partners, like a pinch runner in the late innings, can offer a better level of specialized expertise and for less – resulting in the only thing that really matters, better case outcomes.

**THE DIVISION IS UP FOR GRABS – WHO WILL PUT TOGETHER A RUN?**

Law firms currently have the opportunity to assist in creating these metrics, bringing solutions forward and sharing in the resulting profits from enhanced relationships with clients. But it may not be long before they lose more and more of an opportunity to do so.

Firms and organizations like USLAW are distinguishing themselves as World Series material by adopting new methodologies and sourcing the best players at each position. Doing so ensures an inside track to maintaining better relationships with clients and in return, prospects for profitability. Yet, focusing the conversation on the billable hour versus alternative fee arrangements ignores the most important task at hand – defining metrics and uncovering inefficiencies. The winners of this race will be best poised to grab the lion share of the litigation spend – whether law firms or outsourced companies.

*Kyle Mason is Med Legal’s Director of Business Development and has experience establishing and growing business relationships with well-known corporate brands in various industries. Kyle holds a J.D. from George Washington University. Med Legal’s work includes legal research, bill analysis and future care cost evaluations reveal opportunities for mitigation in BI liability cases.*
Few attorneys are familiar with alcoholic beverage law. The fundamental rules governing the relationships between and among the parties who produce, distribute, and sell alcoholic beverages are highly-nuanced, and frequently counter-intuitive. A basic understanding of these rules is important, not only to alcoholic beverage companies, but also to suppliers of goods and services, associations, charities, advertisers, promoters, event planners, insurers and others. This article provides an overview of the regulatory environment in which alcoholic beverages are manufactured, distributed, and sold in the United States. It also explores one example of a prohibited relationship, the “tied house,” and the most fundamental and often litigated evidence of that relationship, a “thing of value” provided to or accepted by a retailer from a manufacturer or distributor.

**PROHIBITION**

“Modern” alcoholic beverage laws arose after Prohibition under the 18th Amendment in 1920 (“The Noble Experiment”) and the Repeal of Prohibition under the 21st Amendment in 1932. (“The Failed Experiment”) While Prohibition was in effect the three-tier market structure (manufacturer to distributor to retailer) became vertically integrated. Certain infamous “Families” of gangsters owned manufacturers and distributors, but also owned retail stores or forced other retailers to stock certain products, kickback profits, and even set prices. Such relationships were referred to as a “tied house.”

**REPEAL**

Following the Repeal of Prohibition, the Federal Alcohol Administration Act (“FAAA”) was passed in 1935. The Amendment also permitted each state to fashion its own alcoholic beverage control laws and regulations regarding the transportation, importation, and possession of “intoxicating liquors.” Most Federal and State laws survive as they were initially promulgated in response to the Repeal.

**FEDERAL AND STATES’ LAWS REGARDING TRADE PRACTICES**

Post-Prohibition Federal law governs licensing, labeling, advertising, standards of fill and identity, prohibition of unfair competition and unlawful practices, commercial bribery, and consignment sales. Federal law, however, does not preempt State regulation of such activities, and states are free to impose more stringent laws than the Federal law (unless the State law conflicts directly with applicable Federal law).

Federal law is enforced by the Tax and Trade Bureau (“TTB”) of the Department of the Treasury. (Federal law was formerly enforced by the Bureau of Alcohol, Tobacco and Firearms (“ATF”). State laws are enforced by agents of the Alcoholic Beverage Control Agency in each individual State. States’ laws allow, but do not require, the States to be “Control States” - meaning that only “State Stores” may sell alcoholic beverages under a state government monopoly. The majority of States, however, are “Open States.” States or other governmental units of states, such as counties, may elect to be “dry” (no alcohol sales) when other counties are “wet.” Most states are “wet.”

State laws regulate licensing, transportation, distribution, storage and Trade Practices, including terms of purchase, costs, credit, returns, charitable events, donations of alcohol, hours of operation, delivery, and sales and marketing. The standard purpose of these laws is usually “to maintain an orderly market place,” “to keep retail independence free from risk,” and “to define acceptable marketing practices.” This purpose is also described as an effort to avoid the “Tied House Evils.”

**TRADE PRACTICE LAWS AND INTERPRETATIONS; THE TIED HOUSE; “THINGS OF VALUE”**

Federal and virtually all States’ laws include a broad prohibition of persons in the first and second tiers from providing to a third tier retailer any thing of value. Most states’ laws state the prohibition in similar words such as:

- No licensee shall, directly or indirectly, give or lend any money, premium, gift, free goods or other thing of value to any retailer. It is also illegal for a retailer to ask for or accept such items.

The critical difference between Federal and States’ laws is that Federal law includes a requirement that prohibited practices “induce” a retailer to carry products to the exclusion of others offering such products (the “Exclusionary Rule”), whereas many States’ laws regulate conduct toward retailers whether or not it results in an inducement or exclusion of others.
A vertically integrated structure, by ownership or control of all three tiers is called a “Tied House.” Certain items and programs are exempted from the “Tied House” rule, but only if those activities are specifically permitted in the law. In some states, marketing activities that are not specifically exempted are considered illegal. In other states, any practice not prohibited is presumed to be legal.

States’ laws differ regarding “tangible” things. For example, Illinois allows a manufacturer or distributor to provide a “courtesy wagon” or coil boxes and pumps, free of charge, one time per year, for a one day period, for picnics held by a retailer. Other states prohibit giving anything of value to a retailer. California specifically prohibits a manufacturer or distributor from giving glassware to a retailer. In the District of Columbia, a manufacturer, but not a distributor, may sell, give, rent or loan to a retailer “any service or article” costing the manufacturer not more than $500. In Indiana, cents-off coupons redeemable by manufacturer not more than $500. In Kentucky, a manufacturer, but not a distributor, may sell, give, rent or loan to a retailer free of charge.

In other states, any practice not prohibited is specifically exempted are considered illegal. Innumerable state laws also differ regarding “intangible” things. There is no precise definition or quantification of “things of value” with respect to intangible things. Innumerable modern developments in communication, and electronic applications, incapable of being paid. State laws vary in their definitions of “de minimis” when specialties worth “de minimis” amounts may be furnished to retailers: such amounts vary from $.25 to $500.00. State laws vary in their definitions of “de minimis” when specialties worth “de minimis” amounts may be furnished to retailers: such amounts vary from $.25 to $500.00.

FOLLOW THE MONEY
As in many fields of law and life, the slogan, “Follow the Money” is the direction. Despite many legal developments regarding intangible “things of value,” the most recent federal enforcement action involved tangible payments of cool, hard cash to a retailer. In May, 2011, the TTB proved that “what happens in Vegas does not stay in Vegas.”

Six well-known companies in the upper tiers of the industry collectively paid nearly $2 million in inducements with the purpose, in TTB’s words, “to obtain preferential product display and shelf space.” Payments were made to a Harrah’s through its Harrah’s Nationwide Beverage Program, which used that money to purchase luxury items, such as sound systems, huge-screen televisions, furniture and electronics for placement in Harrah’s properties. The parties settled the case (called an “offer in compromise”) by TTB accepting fines in payments by the six companies of $1.9 million, the largest set of offers in compromise ever accepted by TTB for trade practice violations. Each of the six companies denied violating any laws or regulations. Query: should not the companies have known better? No matter the price of the settlement, the companies got a bargain and Harrah’s walked away from its bet-the company risks. But at what risk? It is difficult to imagine the cost to Harrah’s and to the six companies if their licenses to purchase and sell alcoholic beverages in Las Vegas were revoked.

Litigation regarding the application or designation of prohibited “things of value,” through both administrative and state court jurisdiction, is a subject for another day.

The parties involved in bringing alcoholic beverages to the marketplace are:

TIER I
MANUFACTURER
(Brewery, Winery, Distillery) aka “Supplier”

TIER II
WHOLESALER
(Distributor) aka “Supplier”

TIER III
RETAILER
(“on-sale” for bars, restaurants where consumption is allowed; “off-sale” for liquor stores, grocery stores, other retail establishments where alcoholic beverages may be sold but not consumed on the premises.)

FINAL TIP
Through it all, industry members and counsel must constantly have in mind whether the product in issue is beer, wine or spirits. Among the hundreds of laws and regulations that one is presumed to know in the Trade Practice field, there are different laws controlling the purchase and sale of beer, wine or spirits. For example, Federal Laws prohibiting unlawful practices, commercial bribery, and consignment sales do not apply to beer; most States’ Trade Practice laws do. State laws vary in their definitions of “de minimis” when specialties worth “de minimis” amounts may be furnished to retailers: such amounts vary from $.25 to $500.00.

Alcoholic beverage regulatory practice is a demanding but fascinating practice. One thing is certain: the careful lawyer should wait until after providing advice to enjoy the client’s product!

Sell responsibly.

Susan M. Lowe is a partner at Dillingham & Murphy in the firm’s General Business Group and in the specialized practice of alcoholic beverage law. She has served as in-house counsel to nationwide companies including a retail grocery and the foremost distributor of alcoholic beverages.

1 A good factual account of Prohibition is presented in an engaging new book, “Last Call” by Daniel Okrent (2010).
The below is an interview between Roger Yaffe, Executive Director of USLAW, and Thomas Thornton, attorney with the Alabama USLAW Member firm Carr Allison. Thomas is the former chair of USLAW’s Retail Practice Group, and also serves as National CMS Coordinating Counsel for many of his clients regarding the effect of Medicare laws on the liability industry.

**QUESTION:** Tom, what is the current time table for the implementation of the Medicare Secondary Payer Act (MSP) and Section 111 as pertains to the liability industry; and do you anticipate any further delays with the reporting process?

**ANSWER:** The industry’s obligations to ensure Medicare’s interests are protected in the liability context, where payments are being made to a Medicare beneficiary, have actually been in effect since 1980 with the passage of the MSP Act. However, for purposes of Section 111 reporting, all entities classified as a responsible reporting entity (RRE) must be prepared to report all judgments, settlements, or payments to a Medicare beneficiary in excess of $5,000.00 during their assigned reporting window in the first quarter of 2012. Also, the reporting requirement is retroactive for those cases in which a judgment, settlement or payment occurred with a Medicare beneficiary in excess of $5,000.00 on or after October 1, 2011.

**QUESTION:** For our clients who are an RRE, other than having registered to submit reports pursuant to Section 111, when you say "prepared," what are you referring to?

**ANSWER:** I have always strongly encouraged my clients to address and establish internal initiatives and protocols to ensure that they are prepared to address the contingent liability under the MSP when handling liability claims in general. Too many companies are simply waiting for a situation to arise with a Medicare beneficiary and only then address how to respond and deal with Medicare in their specific situations; or relying upon their TPA or a vendor’s recommendations to address Medicare exposure. The problem is, this may be too little, too late, and the parties will find themselves in a bind with potential adverse repercussions. The other problem I see is that there is no one single “best practices” approach to handling liability claims when considering potential MSP concerns which can generically be applied to the liability industry across the board. The reason is that you will rarely find two companies whose claims, claim handling goals, or risk tolerance are identical. Every company or carrier who either has a substantial volume of claims, or handles potentially catastrophic high exposure cases, should have a plan in place which is tailored to them specifically based upon these general concerns. I believe that by being proactive, as opposed to reactive, you will avoid unnecessary claim-handling expenses, losing a settlement, or opening yourself up to unnecessary exposure from Medicare.

**QUESTION:** Can you share with our readers some general concerns they should be addressing which they may not have considered?

**ANSWER:** Three come to mind immediately. The first concerns situations wherein multiple parties are being identified within a release and/or named in a lawsuit which is being defended by one firm. For each business classified as a Responsible Reporting Entity which is named on a release, or potentially included in a judgment, an obligation arises for that entity to report the settlement or judgment under Section 111, whether or not they contributed to, or were even aware of, it. Section 111 is clear that every party named on a release, whether they made an actual contribution to the settlement amount or not and where any payment is for an amount above the applicable threshold, must submit a Section 111 report regarding that payment. Failure of a party to do such can result in the $1,000.00-a-day fine.

The second issue concerns situations wherein a business is resolving a case for
which there is no specific personal injury claimed, or even allowed under the statute giving rise to the claim, but language is included in the release effectively or specifically resolving an individual’s potential personal injury claim/addressing medical expenses. The utilization of “form” releases including this general language can again trigger Section 111 reporting obligations for an RRE, even where one was not intended. I see this more on the employment side litigation though.

Finally, businesses need to ensure with the implementation or acceptance of claim handling protocols and procedures that they are addressing their contingent risks, and ensuring that those risks are acceptable with their various carriers; especially those cases approaching or exceeding their SIR or various policy limits. With your more catastrophic personal injury cases, the concern for how parties will protect Medicare’s existing interest, and as well as the contingent and potential future interest, is an issue to be determined prior to settlement negotiations with all impacted parties; not after the settlement is reached.

**QUESTION:** Where is the industry now with regard to gift card programs and handling nominal settlements?

**ANSWER:** In my capacity as National CMS Compliance Counsel for my clients, I must advise them that with any payment to a Medicare beneficiary, no matter how small, an obligation arises and potential exposure exists if Medicare’s past and potentially future interest are not protected.

However, the client then must weigh the potential cost of ensuring that Medicare’s interest is protected in 100% of the cases dealing with a Medicare beneficiary against their general claim handling goals and potential associated risk. It is possible to ensure that one’s interest is protected in 100% of your liability cases, but that would come at a potentially significant claim handling cost, and I question whether this is realistic for any client. This decision must again be made on an individual client basis, from a risk assessment perspective. I have suggested that many of my clients involve their brokers to assist with this endeavor, and have seen many have success with a particular broker in the retail field at least with AON. Particularly in the retail and hospitality field, the utilization of nominal settlements and gift cards is an important tool within the risk management field; and is one which does not have to be discarded.

**QUESTION:** What developments have you seen over the past eighteen (18) months which were unexpected?

**ANSWER:** What has taken me by surprise is the increased number of reported state and federal court cases addressing the impact of the Medicare Secondary Payer Act on liability cases. When the Medicare Set-Aside process in the workers’ compensation industry began in around 2001, there was little judicial push back from the workers compensation industry. However, as the passing of Section 111 has refocused the liability industry on Medicare concerns, parties are more willing to bring issues to the Court’s attention looking for assistance. As an example, a recent Pennsylvania State Court entered an Order allowing a Plaintiff’s attorney to take a legal fee based upon his contingency fee arrangement thereby reducing the amount which had been allocated by a jury toward future medical expenses (a pseudo MSA). This practice is not followed in the workers compensation context. In addition, an Arizona federal district court judge entered an Order which effectively caused a Medicare contractor to rewrite its recovery demand letters, changing its policy and approach to seeking recovery of its conditional payment claims. The Order also suggests that the Plaintiff’s bar is “immune” from recovery efforts by Medicare should they and/or their clients not protect Medicare’s interest as relates to existing conditional payment claims after a judgment or settlement.

However, we must remember the limited authority which many of these decisions have across the board based upon the jurisdiction or court from which the Orders are entered. I do believe this phenomenon will continue and issues will eventually be addressed by higher federal courts which carry greater weight and potential impact on the industry. This will eventually reshape how we address MSP concerns.

**QUESTION:** Do you see any specific legislative changes coming in the near future?

**ANSWER:** I am hopeful! The Medicare Advocacy Recovery Coalition (MARC) in 2011 introduced what is now named the SMART Act. Amendments were made to the Act compared to how it was originally introduced in 2010. There was recently a congressional hearing at which representatives of the MARC Coalition and Medicare testified. During the hearing congressional representatives continuously questioned Medicare on their policies and procedures; specifically as relates to their collection efforts with regard to nominal settlements. A conditional payment recovery letter which they had issued demanding reimbursement of $1.76 was introduced as evidence. I believe it was recognized that efforts to recover such amounts were an inefficient use of Medicare’s resources and time, as well as put an unnecessary burden upon the business and insurance industry. With this public hearing, and MARC’s continued lobbying efforts, I am optimistic that the SMART Act will be introduced, if not in 2011 then in 2012. If passed, the SMART Act would make the recovery system more tolerable as well as require Medicare to, in addition to the reporting thresholds under Section 111, implement recovery thresholds under the Medicare Secondary Payer Act.

**QUESTION:** If you could change one aspect of the Medicare Secondary Payer process and system, what would that be?

**ANSWER:** I would create a permanent threshold whereby neither party would be required to either report under Section 111, or be concerned with reimbursing Medicare’s conditional payment claims for those judgments, settlements, or payments below $5,000.00. This would substantially decrease the number of cases which are being reported to Medicare and for which they are initiating the recovery process, but which would have a minimum impact upon Medicare’s total recovery efforts. This would be a more efficient utilization of Medicare’s resources, as well as eliminate unnecessary risks and concerns with both Medicare beneficiaries and the business and insurance industries.

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**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 compensation claims. Mr. Thornton also serves as National CMS Coordinating Compliance Counsel for his national business and insurance clients.
In the past, factual evidence appeared only on paper. Today, facts surrounding a matter are found in cell phone text messages and voicemail, iPads, onboard transportation computers in vehicles, time management systems, email, office documents, corporate databases—the list goes on and on.

This article explores two areas where counsel can save themselves from potential headaches with the court as well as keep more money in their clients’ pockets. The first has to do with preservation timing and the second deals with a cost efficient review plan.

**PRESERVATION TIMING**

How long can you wait to preserve for eDiscovery? Not very long. You’d be surprised how many times we hear some of these statements.

“What’s the harm in waiting to see if I can make this go away.”

“They’ve threatened to sue but probably won’t.”

“I’m not going to ask for theirs so they probably won’t ask for mine.”

“I’ve got this demand letter but I’m certainly not going to agree to all their preservation requests, so I’m going to do nothing until we get some reasonable agreement.”

“I’d rather not impose on the client right now if we don’t have to.”

“Let’s see if we can’t whittle it down before we go bother IT and the business clients.”

These are all practical day-to-day decisions yet they can come back to haunt us if we aren’t careful.

Statistics in the Duke study show that “[i]n the 230 cases in which sanctions were awarded, the most common misconduct was failure to preserve ESI, which was the sole basis for sanctions in ninety cases. It was also cited as one of the types of misconduct in forty-six cases involving multiple misconduct.”

Why isn’t counsel “getting it” early enough? Part of the answer appears to be with counsel awareness.

Changes and additions to the FRCP Rule 26 (b) with respect to preservation were considered in the May 2011 report of the Civil Rules Advisory Committee. Among several scenarios is one which enumerates preservation triggers, under the perception that attorneys need more guidance.

(1) Service of a pleading or other document asserting a claim; or
(2) Receipt of a notice of claim or other communication—whether formal or informal—indicating an intention to assert a claim; or
(3) Service of a subpoena or similar demand for information; or
(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action in anticipation of litigation; or
(5) Receipt by the person of a notice or demand to preserve discoverable information; or
(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or knowledge of an event that calls for preservation under the person’s own retention program.
Any other [extraordinary] circumstance that would make a reasonable person aware of the need to preserve information.5

Do we really need this kind of list? Is there anything here that the existing case law does not clearly cover? Emphatically, the Subcommittee has reached no conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. But clearly, the issue of early preservation is prevalent enough in the courts today to get the committee revved up. Why else would they have commissioned this report?

The Seventh Circuit Pilot Project goes about it a little differently and seeks to incentivize (and tactically penalize) parties that do not “get it” early and cooperate throughout.

“The goal of the Principles is to provide incentives for the early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Federal Rule of Civil Procedure 26(f)(2). The Principles provide guidance on how to streamline the discovery process (e.g., suggesting formats of electronic discovery which are generally not required to be preserved, thus requiring a party to discuss the need for such formats early in the pretrial litigation process) and how to resolve disputes regarding electronic discovery.

“The Principles also contain novel ideas, such as the use of e-discovery liaisons, to assist parties in efficiently managing discovery, particularly discovery involving complex electronically stored information. The Principles have generated a tremendous amount of interest in the legal community nationally.” 7

The Seventh Circuit Pilot Project Principles and the local rules that have developed around them are considered a success by judges in those courts and by practitioners who appear before them. The Principles are attracting attention nationally as a guideline for conduct in electronic discovery. If you practice within the Circuit, they are mandatory reading. If you practice elsewhere, they are very much worth taking the time to study.

MANAGING THE COSTS FOR REVIEW

OK, so you have your data preserved early only to realize the volume of ESI has grown much more than you anticipated. Fortunately there are answers in dealing with large quantities of data, including sophisticated technology and alternative staffing models for attorney review. Each requires attention in supervision, project management, metrics, and quality control.

All of these gains are most critical to managing the size and cost of attorney review. Here, the stakes are highest when it comes to the overall cost of litigation and to whether a party can afford to litigate or negotiate on the merits.

A sane approach is that if you have a good plan, stick to it. If not, seek guidance to develop a review protocol and start tracking the effectiveness. It will save money and help get your job done better and faster. Think carefully not just about the technology, but about the workflow, supervision, quality control, training and documentation. Here are some reminders:

Manage your records. In the absence of a litigation hold, make sure you are getting rid of data you don’t need. That includes data from desktops, laptops, servers, mobile devices, and especially backup tapes.

Have a litigation response plan. There is a return on investment here. Document the roles, procedures and workflow. If you quantify early what’s “in”, what’s “out” and why, you have the metrics to negotiate a defensible, cost-effective, favorable and “proportionate” scope of discovery.

Every phase needs experienced and dedicated project management. “Dedicated” means not to dilute or distract from workflow, supervision and quality control. The best combination is good PM in the firm, with the vendor and in-house coordinated and supervised by experienced counsel who has both the assignment and the time to supervise.

Understand your technology. You can use advanced search algorithms, conceptual based search tools, predictive coding, or just plain old processing and search terms. You don’t need to be a linguist or a mathematician, but make sure you understand how they work for you. Can you explain how you are selecting what you choose to review and defend what you choose not to review?

Understand your quality control. If your quality control typically means, “first you review it, then I’ll review it”, you are missing some fundamentals. You need testing and metrics. How good are your search terms? How good is your first-pass review? Do you have metrics and testing to trap for errors? Are your QC procedures documented and approved by supervising attorneys? Are they routinely enforced and not compromised by a crashed schedule?

Dedicate time to training and supervision. You can’t dip into a review for a day and expect it to run on autopilot. No one person can supervise all aspects of a complex eDiscovery project. If the senior attorney is preoccupied with strategy, tactics, clients and opposing counsel, then another senior attorney must know intimately what is going on with the review.

Don’t pander to the fear. Use the right technology and staffing models to build your programs and stick to them. Document the procedures, the workflow, and the quality control measures to track your progress. The outcome is a discovery that is proportionate, defensible, and cost-effective.

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1 2011 WL 2600756 (N.D. Ind. June 28, 2011)
5 Committee Report at 32.
6 Committee Report at 28.
7 http://www.discoverypilot.com/
The ADA Amendments Act of 2008 ("ADAAA") was enacted on September 25, 2008, and became effective on January 1, 2009. The law made a number of significant changes to the definition of "disability." It also directed the U.S. Equal Employment Opportunity Commission ("EEOC") to promulgate amended regulations reflecting the ADAAA's changes. In response to this directive, the EEOC issued its final regulations on March 24, 2011, and the regulations became effective on May 24, 2011.

What do the new regulations mean for businesses covered under the ADAAA – that is, businesses with fifteen or more employees? The short answer is that many more individuals are covered by the law and will be able to claim a disability. Highlights of these new regulations are set forth below.

Most employers are familiar with the definition of "disability" under the ADA. Congress did not change the definition of the first two prongs of coverage, the so-called "actual disability" and "record of" prongs. Instead, Congress provided interpretive tools designed to expand coverage of who is "disabled" under the Act and shift the focus of the analysis to whether covered employers have complied with their obligations and discrimination has occurred. The regulations implement this goal.

Accordingly, the "actual disability" prong of the ADAAA still defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities." Similarly, the "record of" prong...
is still defined as an individual with a record of such an impairment. The changes lie in the interpretation of the terms “substantially limits” and “major life activities.”

First, there are now nine rules of construction that apply in determining whether a "substantial limitation" exists. The rules of construction direct that the term “substantially limits” should be construed broadly and in favor of expansive coverage. The regulations expressly state that the term is not meant to be a demanding standard.

Three of the nine rules of construction merit detailed examination, because they legislatively overrule Supreme Court cases that held otherwise. First, the determination of whether an impairment substantially limits a major life activity should be made without regard to the ameliorative effects of mitigating measures. This means that if an individual has a medical condition, such as Epilepsy, that is completely controlled by medication, the determination of whether the individual is disabled must not take the medication into account. Other examples of ameliorative measures include medical equipment, prosthetics and other types of assistive technology. The one exception to this rule is with respect to ordinary eyeglasses or contact lenses, which shall be considered in determining whether an individual is disabled.

While ameliorative or mitigating measures are not to be considered when determining if an individual is disabled, the regulations also make clear that the non-ameliorative side effects of a mitigating measure may be taken into account to determine if a substantial limitation exists. For example, if the medication an individual takes to control a medical condition has a negative side effect, this may be taken into account in assessing whether the individual is substantially limited.

Second, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. This rule is particularly applicable to certain mental impairments, such as Depression, which tend to be episodic and which were often determined not to be "substantially limiting" prior to the enactment of the ADAAA.

Third, and somewhat related to the rule stated above, an impairment that is temporary – for example, one that will last or is expected to last fewer than six months – can be substantially limiting.

On the other hand, a temporary or chronic impairment of a short duration, such as the flu or a broken bone, will not normally be considered as limiting a major life activity. Moreover, episodic conditions that impose only minor limitations will also not normally meet the definition of disability.

The regulations also provide for a “condition, manner or duration” framework for evaluating whether an individual is substantially limited. The interpretive Guidance makes clear, however, that the “duration” analysis focuses on the time it may take the individual to perform a major life activity or the length of time the individual can perform a major life activity, as compared to most people in the general population. The analysis should not focus on whether the impairment itself is permanent or long term.

The ADAAA and the final regulations also expand the definition of “major life activities.” In particular, the regulations stipulate that the term “major” shall not be interpreted strictly to create a demanding standard of disability. Whether an activity is a major life activity is not determined by whether it is of “central importance to daily life.” Examples of major life activities include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, sitting, reaching and interacting with others.

Further, “major bodily functions” has been added to the definition of major life activities. The operation of a major bodily function also includes the operation of an individual organ within a body system.

The “record of” prong of ADAAA coverage applies to individuals who were previously substantially limited in a major life activity, but are no longer so, as well as individuals who have been misclassified as substantially limited by either their health care providers or employers. All of the interpretive rules set forth above apply to the “record of” prong as well as the “actual disability” prong of the ADAAA.

In addition, once an individual has established coverage under either the “actual disability” or “record of” prongs, which as set forth above is not a difficult task and should not require extensive analysis, the focus should shift to the “interactive process” of determining whether a reasonable accommodation is needed, and if so, what the reasonable accommodation consists of. (Note that even under the “record of” prong, an individual may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to a past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a job modification to permit her to attend follow-up or “monitoring” appointments with a health care provider.)

Another key change contained in the ADAAA and captured in the implementing regulations relates to the third prong of coverage, the so-called “regarded as” prong. The standard for coverage under this prong has been greatly relaxed and is now defined as an instance where an individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”

When determining if an individual is covered under this third prong of the ADAAA, the terms “substantially limited” and “major life activity” are not relevant. Moreover, a reasonable accommodation is not required for an individual who is covered solely under the “regarded as” prong. The key issue for “regarded as” claims will be whether the employer took an adverse employment action against an individual because of the individual’s physical or mental impairment, keeping in mind that the impairment need not be “substantially limiting,” it need only not be both “transitory and minor.”

The major take-away of the final regulations is that many more individuals will be entitled to reasonable accommodations for their physical or mental conditions. To that end, the revised and expanded definition of “disability” under the ADAAA and its implementing regulations should result in employers engaging in the interactive process more frequently and earlier on, by focusing less on whether an employee meets the statutory definition of ‘disabled’ and more on whether a reasonable accommodation is needed and what the accommodation should consist of.

A second important consideration is that the ADAAA and the implementing regulations apply to job applicants as well as employees. As such, employers must be cognizant of the requirements of the Act both during the hiring process as well as during the course of the employment relationship.

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A homeowner installs a water purification system in his home. After several months of use, the homeowner develops a mysterious rash that he attributes to the new system. He retains counsel to sue the manufacturer, which notifies its liability insurer of the suit. The insurer sends the claim to its coverage counsel to opine as to whether there is a duty to defend the manufacturer in the suit. Coverage counsel says yes and issues a reservation of rights. The insurer appoints counsel to defend the manufacturer.

So far the geometric relationship among insurer, defense counsel, and the insured sounds pretty typical for those practicing in the fields of personal injury, insurance coverage, or insurance defense. Habitués of these practice areas are familiar with the ethical obligations posed by the so-called tripartite relationship. Specifically, defense counsel, although paid and controlled by the insurer, owes duties of loyalty and zealous representation to the insured.

This geometry, and the concomitant ethical obligations, may take on a different cast, however, where the manufacturer’s liability policy is a “wasting” policy, also known as a policy with “burning limits” or “defense within limits.”

The standard general liability policy provides that the insurer has a duty to defend claims or suits against the insured, where such claim or suit is one to which the insurance applies. The insurer also has the right to control the defense, at least where there is no conflict of interest with the insured. In a provision typically entitled “supplementary payments,” such policy states that payment for the defense is in addition to the limits of liability set forth in the policy declarations. There is also a contractual requirement that the insured cooperate with the insurer in the defense.

Generally, the insurer’s duty to defend lasts only until the applicable limit of liability is exhausted by the payment of loss. Where defense costs are in addition to the limits of liability, this allows the insurer to withdraw the defense after paying its limit.

In recent years, liability insurance policies have increasingly included costs of defense within the limits of liability. This feature, once found primarily in professional errors and omissions and directors...
and officers policies, is now finding its way into a more expansive range of liability coverages, particularly those written on a “claims made” basis. The “defense within limits” nature of a policy may be marked by the absence of a “supplementary payments” provision as well as specific language that expenses are “part of and not in addition to” the limits of liability.

In some states, insurance regulators have restricted the use of “defense within limits” policies in a variety of ways. In New York, for instance, state regulation prohibits “defense within limits” in general liability policies except those issued to “large commercial insureds.” In such states, “defense within limits” is deemed a significant limitation on coverage not to be countenanced where the insured has limited leverage to negotiate the terms of coverage.

Such regulations also contain standards for communicating the “defense within limits” nature of the policy to the insured and third parties. In New York, the “defense within limits” feature must be stated conspicuously on both the application and the face of the policy.

Why all the fuss about a cost-paying provision in a private contract? One consideration is protecting the rights of the injured claimant (the homeowner, in our hypothetical). In many states, the injured claimant has direct rights against the policy where such claimant becomes a judgment creditor of the insured. Such rights may be compromised or lost where a “defense within limits” policy is involved.

This possibility colors the ethical dilemmas faced by attorneys and insurers when the costs of defense are within the limits of liability. For instance, the insured’s primary interest may be in preserving the limits of liability so as to avoid excess exposure for any eventual recovery by the injured claimant. By contrast, the insurer may view an aggressive defense as the best means to avoid or reduce loss payments. A number of courts have observed that such a situation presents an inherent conflict of interest between insurer and insured, with defense counsel caught in the middle.

Moreover, the insurer’s contractual right to control the defense exists in tension with state ethical rules governing the conduct of defense counsel. Rule 5.4 of the Model Rules of Professional Conduct specifically states that “a lawyer shall not permit a person who...pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” However, this is not necessarily realistic in the realm of insurance defense, as some states’ ethical rules recognize.

The tension may come to a head where the applicable limit of liability is exhausted by defense costs. Courts and commentators have considered whether counsel providing a defense under a “defense within limits” policy may be estopped from withdrawing the defense where the limit is used up in defending the claim. The linchpin of estoppel is prejudice to the insured, which in this scenario may arise from pursuit of an aggressive or costly defense strategy that depletes the available limit, making it impossible to settle the underlying claim within the available limit.

A defense attorney in this situation may find herself in the unenviable position of being unable to withdraw from the defense although there is no further coverage (i.e., no money left in the policy) for the attorney’s services. It has been suggested that the attorney may insulate herself from this eventuality by negotiating a fee agreement with the insured, either at the outset of the case or upon exhaustion of the policy limit. This entails ethical issues of its own.

Coverage counsel also has special obligations when acting for a “defense within limits” insurer. Traditionally, courts have treated an insurer’s duty to defend and duty to indemnify as two separate inquiries governed by different standards. At least one commentator has suggested that “defense within limits” collapses the dual inquiry into one, and it may be inevitable that, in some circumstances at least, assumption of the defense will be tantamount to an admission of coverage.

Insurers and their counsel should carefully consider the increased possibility of “bad faith” claims where the insurer controls the defense under such policy, and should make informed decisions about having independent rather than appointed defense counsel represent the insured.

In coverage correspondence issued by or on behalf of the insurer, the “defense within limits” nature of the policy should be clearly stated so there is no misunderstanding later. This should also be communicated in any direct communications with plaintiff’s counsel (for instance, in response to a demand that the insurer pay policy limits to settle the claim). It has been suggested that failure accurately to communicate this aspect of the policy may expose coverage counsel to liability.

Primary insurers and counsel should also consider the interests of excess insurers. In many jurisdictions, a defending primary insurer owes a “good faith” obligation to excess insurers to maintain coverage to exhaustion. The obligation to excess insurers is triggered upon exhaustion of the primary policy. A “defense within limits” insurer controlling the defense of the insured may run afoul of this obligation where an aggressive defense strategy burns through the limit, leaving only the excess insurance to pay the claim. Questions about the defending insurer’s handling of the claim may fuel the “good faith” inquiry.

Plaintiff’s counsel, too, has special ethical considerations where the defendant’s defense is within the limits of coverage. Once plaintiff’s counsel becomes aware of the nature of the defending policy, he must carefully weigh the litigation strategy. An aggressive attorney may find himself and his client caught short at the end of the day.

Pursuing an accelerated judgment against the insured may not be an effective path to avert this eventuality. Although a default judgment may appear to be a shortcut to direct recovery against a “burning limits” policy with limits largely intact, it has been held that the insurer’s costs of defending the direct action are properly charged against the “wasting” policy limit.

Communication is the best tool for navigating these pitfalls. In our hypothetical, coverage counsel will prepare a reservation of rights that clearly advises the manufacturer of the “wasting” nature of the policy and, if appropriate, of the manufacturer’s right to independent counsel. Insurer-appointed defense counsel will provide reports and budgets to both the manufacturer and the insurer and will be responsive to feedback from the manufacturer.

Defense counsel should respond to inquiries about the manufacturer’s coverage with information that accurately conveys the policy’s “burning” nature, so the homeowner’s counsel can evaluate the risks of protracted litigation. Defense counsel should also advise excess insurers early where it appears the limit may be significantly eroded by the defense.

“Defense within limits” policies can help reduce the costs of various types of coverage. They best serve this purpose when all parties maintain awareness of their special obligations where such coverage is in issue.

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Your underlying general liability insurance policy will defend you in a suit, but your excess policy will not, right? Contrary to common understanding, there are instances where an excess policy will be required to provide a defense to the insured. Understanding how courts may interpret certain language in your excess policy (or in your opponent’s policy) can be critical information for your risk transfer database.

Oftentimes, a party will purchase several layers of insurance coverage, in order to protect itself from both foreseeable and unforeseeable liability. This coverage is then stacked into layers of primary and excess coverage. Once the insured is aware of a claim and makes the proper notifications, its primary, or underlying, layer of coverage responds to the claim. From the underlying insurer’s standpoint, control over the defense makes sense, because it is that insurer’s policy limits that are at risk in the first place. Thus, the underlying policy typically provides that the underlying insurer has both the right and duty to defend the insured.

Excess policies usually make no promise to pay defense costs. These policies are reached less often and are relatively less expensive to purchase in comparison to underlying policies. Further, excess policies require the insured to maintain at least one layer of primary coverage that will pay before the excess policy, and normally contain a schedule of all the underlying policies that must pay first. Likewise, excess policies may tell you that they are excess; their “other insurance” clauses provide that when the insured has “other” insurance, that the excess policy is, naturally, excess over the other policies.

Accordingly, the general principle observed by the courts is that the underlying policies have the duty to defend the insured, while the excess policies do not. This is true even where the underlying carrier is insolvent or has denied coverage – the excess carrier did not bargain for such an obligation. Distinguished from a duty to defend, it is also generally accepted that once the in-
sured’s potential liability reaches the excess carrier’s coverage, the excess carrier has the right to protect its interest by participating in the defense.

However, as you can tell by the title of this article, there are circumstances where the underlying carrier refuses to defend or becomes insolvent, and a duty to defend may be imposed on the excess carrier. At times, certain excess policy language can mix with the law of particular jurisdictions, with the result that an excess carrier will find itself faced with a duty to defend an insured, where that carrier probably never expected to do so. Several of those scenarios are presented here, and they often fall into two general categories: first, where the court finds the excess policy language is ambiguous or overly broad, and second, where the excess policy incorporates just enough of the language of the underlying policy for the court to find a duty to defend.

USE OF AMBIGUOUS TERMS VIS-À-VIS OTHER INSURANCE

First and foremost, the drafter of an excess policy must use clear language that states the excess carrier will not drop down and defend the insured. Otherwise, that old ambiguity problem rears its ugly head: ambiguous terms are interpreted in favor of coverage. Some excess policies state that liability would attach only after the primary carriers “have paid or have been held liable to pay.” Being “held liable to pay” can certainly be viewed differently than “have paid.” The latter means having actually paid, while the former imposes only the legal requirement to pay. There are several instances where the primary carrier had the legal obligation to pay but subsequently became insolvent, and the excess carrier was required to drop down.

In several other cases, the word “recoverable” caused similar problems. Where an excess policy stated that it would pay “in excess of…the amount recoverable under underlying insurance,” insureds have sought judgment, maintaining that this language was ambiguous when nothing is recoverable from the underlying policy, and thus the excess insurer was obligated to cover the loss because the “amount recoverable” from the insolvent underlying insurer was zero. The courts have agreed, even in situations where the insured breached its duty to maintain underlying insurance, because, as one court wrote, “the term ‘amount recoverable’ can be interpreted as a variable amount which depends on the actual amount recoverable from the primary insurer, not the fixed policy limits.” For similar reasons, the word “collectible” also has been problematic for excess carriers, and at least one court has written that when an excess insurer uses the term “collectible” or “recoverable” it is automatically agreeing to drop down in the event the primary coverage becomes uncollectible or unrecoverable.

Thus, it makes a good deal of sense, from an underwriting perspective, to avoid stating that your policy is excess over other available, recoverable, collectible, or liable policies, assuming you want the policy to be a true excess policy. Conversely, from the perspective of the insured without a paying underlying policy, or an additional excess carrier on the same risk, the exposition of such terms can be the basis for a drop-down argument, and thus a windfall.

NOTICE WHICH TERMS ARE INCORPORATED BY REFERENCE INTO THE EXCESS POLICY

It is common for an excess policy to adopt the terms and conditions of the underlying policy. In this manner, the excess coverage provided follows the form of the underlying coverage, and the exclusions may be incorporated as well. When a commercial insured transitions from job to job, and additional insureds are added and removed from the underlying policy, there is no need to modify the excess policy—additional insureds are simply identified as those additional insureds on the underlying policy. This streamlines the coverage and presumably removes any conflicts between primary and excess policies.

That said, such incorporation by reference can also become a trap for the excess carrier. Some courts reason that once an excess policy adopts the “warranties and terms” from the underlying policy, that the excess policy is also adopting the duty to defend from the underlying policy.

In more than one jurisdiction, because the language of the excess policies read that “This contract is subject to the same warranties, terms, conditions, exclusions and definitions…as are contained in…the policy/ies of the primary insurers,” the courts will impose a defense duty onto the excess carrier. Interpreting the policies very strictly against the insurer, the courts note that this policy language “does not expressly declare with certainty and clarity that there is no obligation to defend.” Thus, an excess policy that is silent as to a duty to defend—as many are—may have a duty to defend read into it, even where the policy clearly states that it is an excess policy. Note that this interpretation is not the controlling law in the majority of states, but can be an issue in certain states. Of course, the court of the current precedent in your jurisdiction, depending on your posture in the case you may be in a position where it is in your best interest to advance this argument.

WHAT WORDS SHOULD PLACE THE EXCESS POLICY WHERE IT IS SUPPOSED TO BE?

Obviously, from an underwriting perspective, underwriters, risk managers, and anyone involved in the purchase or monitoring of insurance should remove references in their excess policies that would render coverage excess over coverage that is “available,” “collectible,” “valid and collectible,” “recoverable,” or “held liable to pay.” So what words could be used to put the excess policy where it is supposed to be?

Rather than try to find just the right adjective for “underlying insurance,” focus on triggering excess coverage only after the exhaustion of a specified amount of underlying coverage, such as “this policy applies only in excess of the $1 million underlying insurance and only after that $1 million in underlying coverage is exhausted.” Courts have also found that an excess policy that requires exhaustion of the underlying policy, “by reason of losses paid thereunder,” clearly demonstrates that the insured is liable for lower levels of damage if no underlying coverage was in force.

By the same token, even though the excess policy may state it is “excess” over all other insurance (and only applies after such insurance is fully exhausted), the excess policy should also state that it contains no defense duty.

CONCLUSION

In sum, there is a general understanding, by insurers, the public and judicial interpretation, that an excess policy has the right, but not the duty, to defend the insured. Nevertheless, there is certain wording that can make the excess policy susceptible to a claim for defense costs. Avoiding those words, avoiding broad incorporation of the underlying policy’s coverage, and by specifically stating that the excess policy does not contain a duty to defend, you can help avoid the unintended consequence of a duty to defend in an excess policy.

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The economic downturn of the last several years has had far reaching implications for attorneys practicing in consumer debt resulting in a drastic increase in litigation under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (“FDCPA”), which regulates debt collection practices across the nation. In fact, federal litigation involving the FDCPA has almost tripled from 3,710 complaints filed nationally in 2006 to 10,914 complaints filed in 2010. See FDCPA and Other Consumer Lawsuit Statistics, available at https://www.webrecon.com. While it is not surprising that increasing consumer debt would lead to increased debt collection activity, a small but growing element of consumer’s attorneys have targeted the FDCPA as a profitable and advantageous source of litigation. This trend has not gone unnoticed by courts. See Federal Home Loan Mortgage Corp. v. Lamar, 503 F.3d 504, 514 (6th Cir. 2007) (criticizing the “cottage industry” that has developed around the FDCPA); Jacobson v. Healthcare Fin. Servs., Inc., 434 F.Supp.2d 133, 138 (E.D.N.Y. 2006) (same). This trend is all but certain to increase given the holding of the United States Supreme Court in Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich LPA, 130 S. Ct. 1605 (2010), which curtailed the bona fide error defense, the primary defense available to debt collectors under the FDCPA.

The FDCPA is a broad consumer-protection statute that is generally applied as strict liability legislation. Allen v. LaSalle Bank, 629 F.3d 364, 368 (3d Cir. 2011); see also LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1190 (11th Cir. 2010); Donohue v. Quick Collect, Inc., 592 F.3d 1027, 1030 (9th Cir. 2010); Ellis v. Solomon and Solomon, P.C., 591 F.3d 130, 135 (2d Cir. 2010); Ruth v. Triumph P'Ships, 577 F.3d 790, 805 (7th Cir. 2009). In addition to enforcement through the Federal Trade Commission, the FDCPA also contains a private attorney general provision enabling private individuals and their attorneys, armed with a generous fee shifting provision, to bring suit for violations of this broad, quasi-strict liability legislation. 15 U.S.C. § 1692k. As to damages, the FDCPA allows for an individual recovery of $1,000 per violation, court costs and reasonable attorney’s fees as determined by the Court. 15 U.S.C. § 1692k(a). More significantly, where class action relief is involved, the claimant may recover the lesser of $500,000 or one percent of the debt collector’s net worth in addition to the per violation recovery and reasonable attorney’s fees.

Attorneys are encompassed within the definition of debt collectors for purposes of the FDCPA. When Congress enacted the
FDCA in 1977, it provided that debt collectors may avoid liability by showing that their conduct was the result of a bona fide error. This defense required evidence that the debt collector had measures in place to avoid the alleged violation of the FDCA and that the unintentional violation occurred nevertheless.

Prior to April 2010, the bona fide error defense was available in many jurisdictions to both mistakes of fact and mistakes of law. However, the Supreme Court severely limited this defense in Jerman v. Carlisle, McNellie, Rini, Kramer & Utrich LPA, unambiguously holding that the bona fide error defense was only applicable to mistakes of fact, not mistakes of law. 130 S. Ct. at 1624.

There, the defendant law firm sent a communication to a debtor that included notice language required under section 1692g of the FDCA. The debtor subsequently sued, alleging a violation of the FDCA on the basis that the notice improperly required the debtor to dispute the debt in writing as opposed to orally. When the communication was issued, there was no precedential holding within the Sixth Circuit Court of Appeals speaking to the issue, and there were conflicting holdings from other circuit courts. The District Court determined that a dispute need not be made in writing, but nevertheless granted summary judgment on behalf of the law firm under the bona fide error defense. The Sixth Circuit subsequently affirmed the District Court’s decision, holding that the law firm’s actions, although a mistake of law, constituted a bona fide error defense. The debtor appealed, and the Supreme Court issued a 7-2 opinion holding that the bona fide error defense was not applicable to mistakes of law, even if the law was in a state of flux at the time of the communication. Subsequent to the Supreme Court ruling in Jerman, most federal courts have applied the bona fide error defense in a limited manner. See McCullough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 930 (2011); compare Hare v. Hosto & Buchan, PLLC, 2011 U.S. Dist. LEXIS 33614 (S.D. Tex. Mar. 30, 2011) (finding Jerman holding was limited to the misinterpretations of the FDCA, not mistakes of state law).

Given the curtailment of the bona fide error defense in Jerman, the drastic rise in claims under the FDCA and the corresponding “cottage industry” that has developed, attorneys pursuing consumer-debt related claims must be extremely vigilant relevant to their conduct to reduce the potential for exposure under the FDCA. Although cliché, client selection plays an integral role in this process. The FDCA contains numerous sections and subsections addressing specific acts that constitute a violation. A party acting to collect a debt is held to a high standard and strict compliance under the FDCA is mandated. Against this backdrop, attorneys should be cautious in accepting a debt collection matter if it isn’t a field in which they regularly practice. This is a two-fold warning from both a practical and compliance perspective. Practically speaking, a limited debt collection practice will often carry little financial gain for an attorney whereas the potential for liability and fee shifting would likely outweigh any nominal benefit. Second, protections under the bona fide error defense regarding mistakes of fact still require that the debt collector maintain a system of checks and balances designed to prevent errors. An attorney who is not familiar with the pitfalls of debt collection practice will not likely be in a position to invest in or establish and maintain a safeguard system. These factors alone suggest that debt collection should not be a field of law to be occasionally dabbled in, but rather should be a primary focus of an attorney’s practice.

Second, debt collectors must be mindful of whom they are communicating with. Violations of the FDCA are determined according to a hypothetical “least sophisticated consumer” or “unsophisticated consumer”. See Brown v. Credit Service Center, 464 F.3d 450, 453-454, 454 n. 2 (3d Cir. 2006); Evory v. RJM Acquisitions, LLC, 505 F.3d 769, 774 (7th Cir. 2007); Guerrero v. RJM Acquisitions, LLC, 499 F.3d 926, 934 (9th Cir. 2007); Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993); Peter v. GC Servs. L.P., 310 F.3d 344, 348, n. 1 (5th Cir. 2002). This standard is very forgiving and, in a practical application, requires only that a consumer read a communication. Any potential confusion involving the communication may subject a debt collector to liability under the FDCA. As such, communications should follow the FDCA mandates as closely as possible and should neither embellish nor restrict the communication. Similarly, while jurisdiction-sensitive, some Courts have held that the FDCA is either not applicable when a communication is sent to a consumer’s attorney, or at the least, that such communications are assessed by a higher, more scrutinizing standard. See Evory, 505 F.3d 769 (7th Cir. 2007); Guerrero, 499 F.3d 926 (9th Cir. 2007); Dihemson v. Nat’l Educators, Inc., 81 F.3d 949 (10th Cir. 1996). Alternatively, other circuits have held that no distinction should exist between a consumer and his attorney. In those venues, the interposition of an attorney for a debtor allows an opportunistic consumer’s attorney to create a minefield out of the FDCA for unwitting debt collectors. See Allen v. LaSalle Bank, 629 F.3d 364, 365 (3d Cir. 2011) (consumer’s attorney requested specific information from debt collector before filing class action complaint).

Ultimately, debt collection efforts increasingly have a lower margin of error and require greater attention to detail in order to reduce the potential for liability under the FDCA.

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The Collateral Source Rule is a common law doctrine that developed more than 150 years ago. The rule bars the admissibility of evidence at trial to show that a plaintiff’s losses have been paid by other sources, such as health insurance that benefits the plaintiff or workers’ compensation payments. Forty-two states have amended their laws with respect to the Collateral Source Rule as of 2009. Modifications include reducing an award for medical bills by the amount of the bills that were paid by insurance as well as the standard approach of allowing a setoff in a third-party case for workers’ compensation benefits paid to the plaintiff.

The case law that has interpreted the boundaries of the provision has made it clear that 104(a)(2) protects the personal injury plaintiff both with respect to medical bills and lost income. Punitive damages are obviously excluded and are not non-taxable. The stated rationale for not taxing personal injury awards that include reimbursement for medical expenses or lost income is the notion that the claimant has lost “human
capital” and any award is not sufficient to restore the individual to his or her pre-injury status.

Suffice it to say that the taxman has billions of dollars at stake if Section 104 of the Internal Revenue Code is amended. Not too many people are draconian enough to suggest that a plaintiff should be taxed on an award for pain and suffering or disability, but it is surprising that more attention has not been paid to the non-taxability of awards for medical bills and lost income.

Health insurance policies may contain a subrogation provision when recovery is made on behalf of an innocent plaintiff from a responsible third party. Medical liens are often discounted as part of the settlement process. Similarly, disability policies may have subrogation provisions included within the terms of the agreement. Oftentimes, these “double recovery” payments have not been reimbursed to an employer, an employer’s insurer, an employee’s insurer, or the government under Medicare or Medicaid provisions in the past. As we all know now, MMSEA and SCHIP have made it very clear that Medicare will no longer foot the bill when it can rightfully be classified as a “secondary payer.”

Consider the catastrophically injured plaintiff who was never able to return to work after a non-work related injury. Hypothetically, this worker has lost five years of income between the date of loss and the date of trial. In addition, economists predict another ten years of lost income in the future. Of course, if that income had been earned, it would have been subject to taxation.

In the case of a jury award for past and future medical bills, there may be a substantial difference between the amount of the medical bills placed on the “blackboard” by the plaintiff’s attorney and the amount the medical providers accepted from the health insurer to resolve the claims for outstanding medical bills. Assume Medicare paid $25 on the dollar on a $100,000 hospital bill. Medicare is entitled to a recovery of the amounts paid, but because of the Collateral Source Rule, the plaintiff gets the benefit of a jury awarding $75,000 more than the amount it took to settle or resolve the hospital bill. Should the $75,000 “windfall” be paid to the plaintiff without any taxation of the windfall?

Certainly, the proponents of the “human capital” approach do not want to see any component of a jury award subject to income tax. But, in these days, when the federal government is tax starved and some state governments are worse off than their federal government colleagues, it is surprising that we have not been identified with challenges to the non-taxability provision of IRS Section 104(a)(2).

Taxing awards for economic damages are logically a much easier target than taxing awards for non-economic damages like pain and suffering and disability. If plaintiffs would have paid taxes on income had it been earned, it is hard to understand why settlement proceeds or a jury award for lost income are not taxable. Presumably, awards for non-economic damages are sufficient to restore the “human capital” component in a personal injury case. Awards for future lost income are subject to the same analysis.

If Medicare officials are intent on enforcing the Secondary Payor Act, it is probable that a tax conscious federal government, not to mention their underfunded state government colleagues could soon be seeking legislative changes to IRS Section 104(a)(2) that permit taxation of net economic damages such as lost income and medical bill amounts not subject to reimbursement.

No one is suggesting the awards for economic damages should be taxed on a gross basis as opposed to a net basis. In fact, the suggestion is that only net awards or net settlement proceeds after payment of attorney’s fees should be subject to income tax provisions. Payments for pain and suffering and disability should not be subject to tax, but benefits for past and future lost income, on a net basis, should be subject to income tax and payments for “excess” medical bills (amounts in excess of “fair payment” accepted by medical providers) should be taxed.

If Medicare officials are intent on enforcing the Secondary Payor Act, it is probable that a tax conscious federal government, not to mention their underfunded state government colleagues could soon be seeking legislative changes to IRS Section 104(a)(2) that permit taxation of net economic damages such as lost income and medical bill amounts not subject to reimbursement. This predictable tax policy change is consistent with the erosion of the Collateral Source Rule.

Philosophical reasons for the non-taxability of economic damages may well give way to the needs of the taxman. If 104(a)(2) is amended, look for the collection of state sales tax on items shipped out of state to be next.

Imagine a courtroom trial arising out of an intersection collision between a semi-trailer and a sedan. Whether the trucking company and its driver are at fault is hotly disputed.

The plaintiff’s attorney presents to the jury “Exhibit A,” an incident report created by the safety director of the trucking company just hours after the accident. The report states, “This accident was preventable because the driver should have been paying better attention to the road.”

There is something wrong with this scenario. The trucking company’s own safety director very well may have created a “smoking gun.” Even if the trucking company had refused to disclose the incident report to opposing counsel, the court would have ordered it to do so if the report was created under the company’s standard protocols for investigating accidents.

Yet, under certain circumstances, trucking companies can protect its investigative file from disclosure, preventing the courtroom scene described above. This article explores the protection offered by the Work Product Doctrine for investigations conducted when litigation is reasonably expected to arise out of the accident and the company initiates an investigation specifically because of the prospect of suit being filed at some point in the future. Numerous courts have protected the trucking company’s investigative file, as well as testimony of the persons who conduct the investigation, when these circumstances are present. It is imperative that the trucking company have at least two separate protocols in place prior to an accident to ensure that its investigative file and investigators stay protected under the Work Product Doctrine.

THE WORK PRODUCT DOCTRINE

During the discovery phase of a lawsuit, the parties exchange information and documents. A party can withhold information or documents that are protected by a privilege, even if they are requested by the opposing party. One basis for withholding documents is the Work Product Doctrine, which protects materials collected or prepared in anticipation of litigation. One of the primary functions of the Work Product Doctrine is to prevent a current or potential adversary in litigation from gaining access to the fruits of an attorney’s investigative and analytical effort, and strategies for developing and presenting the client’s case. The Work Product Doctrine permits attorneys and their team to investigate the facts of a case and prepare for trial knowing that the file will not be disclosed to the other side. The team is permitted to fully and candidly assess the situation.

The key to receiving protection under the Work Product Doctrine is that the document was specifically created with the subjective and reasonable belief that a lawsuit would be filed, the documents will not be protected.

CREATE A SPECIAL PROCESS OR PROTOCOL FOR MORE SERIOUS ACCIDENTS

In light of these principles, trucking companies should create specific investigative protocols to follow when litigation is expected. They must be separate and distinct from measures taken for all other accident investigations. By policy, a special team should be established and directed by an attorney to investigate the crash. The team can include an attorney, a private investigator, company employees and an accident reconstructionist to name a few. Following this special policy, the team undertakes an investigation of the accident with a specific focus on gathering information and documentation related to the defense of a future lawsuit. A separate, “Anticipation of Litigation File” is created to maintain the investigative notes, witness statements, reports from third-party experts, and other related materials.

Several courts have examined the special protocols created by transportation companies and have permitted the company to withhold its entire team’s investigatory file from production to opposing counsel based on the Work Product Doctrine. An examination of these cases reveals the key ingredients for an anticipated-litigation protocol to ensure its protection from disclosure.

First, the protocol must specifically identify the types of accidents that trigger the special protocols. Generally, only accidents involving death or serious bodily injury, such as a danger of paralysis or a severe head injury, should trigger the special measures.2 This is because litigation often ensues under these circumstances, regardless of liability.

Certainly, if “special protocols” were followed for each and every trucking accident or incident, the court would likely see the investigation for what it really is: an investigation performed in the ordinary course of business. The investigative files that courts have shown a willingness to protect are for only a small subset of accidents that a trucking company investigates. Yet, these are the larger and more serious accidents, ones in which litigation is likely to, and often does, ensue. By invoking the special protocols for only the more serious accidents, courts are more likely to protect the resulting investigative file.

Another key ingredient for protection of the team’s investigative file is the involve-
ment of outside counsel. Where outside counsel is retained within hours after an accident to direct the investigation and provide legal advice regarding the accident, courts will likely protect the team’s investigative file. This is because trucking companies generally do not hire outside counsel to participate in the investigation of a routine accident. By hiring outside counsel to direct the team’s investigation, the company acts in a way that is markedly different than during an ordinary course-of-business investigation. Moreover, it acts as a signal that a lawsuit requiring defense by outside counsel is expected at some point in the future.

Note that it is not enough that outside counsel be retained. Rather, outside counsel must direct all aspects of the investigation. In one case, the company retained defense counsel as soon as the seriousness of the accident had become known. However, the counsel did not direct the company’s claims representative to perform his accident investigation and the representative performed the same investigation that it normally performed for accidents. The court ordered the company to produce to opposing counsel the investigative file prepared by the claims representative, finding that it was not protected by the Work Product Doctrine. This is a cautionary tale that reinforces the lesson that the trucking company must ensure that its investigation must be retained. Outside counsel must direct all aspects of the investigation.

This is an extraordinary advantage to having outside counsel direct the investigation as well. When outside counsel hires the third party experts and investigators, they report directly to outside counsel rather than to the company, the entire team’s investigative file will likely be protected. With outside counsel at the helm, courts can plainly see that such an investigation is independent of any routine investigation ordinarily conducted by the company and that a file is being assembled with the expectation that a lawsuit will be forthcoming.

Another important element in protecting the investigative file is the assembly of a special investigative team. If an anticipated litigation investigation is carried out by the same people that perform all other accident investigations, the court may not consider the investigation worthy of protection. However, if a different group of people carries out the different set of protocols, a court is more likely to find that litigation was anticipated. Again, the more distinct and separate the two protocols, the better. Commissioning a different team to perform anticipation-of-litigation investigations is simply another way a trucking company can further distinguish these investigations from routine investigations so that the resulting file may be protected from discovery to the opposing party.

PROTECTING THE INVESTIGATORS FROM TESTIFYING ABOUT THE INVESTIGATION

If the plaintiff learns of the legal investigation and/or requests a copy of that file during the discovery phase of a lawsuit, he or she will probably also request the deposition of the persons on the team. The reason is that, if the plaintiff cannot obtain the investigative file, he or she hopes to at least discover the investigation with the people who conducted it. Some plaintiffs will argue that, because the Work Product Doctrine only protects “documents and tangible things,” it does not protect deposition testimony. This is inaccurate.

It is true that an investigator cannot withhold the facts that he or she has learned, the persons from whom he or she has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may be protected from discovery. However, the Work Product Doctrine does apply to testimony concerning the company’s strategies and legal theories, as well as the subjective evaluations of the investigator. If the company anticipated litigation at the time it conducted the investigation, and the investigation occurred because of anticipated litigation, the opposing party cannot depose team members and gain access to the fruits of the investigative and analytical effort to defend the expected lawsuit.

When trucking companies prepare and implement special protocols for serious accidents that are separate and distinct from investigations of routine accidents, the entire team will be protected. The company can withhold the investigative file from discovery to opposing counsel and can refuse to permit its investigators from testifying under oath regarding the investigation. The plaintiff will have to find another “Exhibit A.”
A Refresher for Boards of Directors

Bruce N. Warren
Rothgerber Johnson & Lyons LLP

When serving on a board of directors, what guidelines should you keep in mind to make sure you are serving effectively and fulfilling your fiduciary duties? You might be surprised to learn that regardless of whether you are a director of a publicly traded REIT, a privately held investment company, a Fortune 500 corporation, or a nonprofit organization, your fiduciary responsibilities to the organization you serve are the same. The two primary fiduciary duties owed by directors are commonly known as the “duty of care” and the “duty of loyalty.” The duty of care requires that a director discharge his or her duties (1) in good faith, (2) with the utmost loyalty to the entity he or she serves, and (3) in a manner the director reasonably believes to be in the best interests of the organization. The duty of loyalty requires that a director must, at all times, discharge his or her duties with the utmost loyalty to the entity he or she serves, and not for his or her personal benefit or the benefit of others.

In practice, the duty of care relates to the process a board of directors uses to make decisions and how it exercises its supervisory and monitoring obligations. In making decisions, directors are protected by the “business judgment rule,” which has been adopted in most states, including Colorado where I practice. Under the business judgment rule, directors are not liable for the outcome of their decisions and actions (or even their failure to act) so long as they have complied with the standards of care, described above. To show that this is the case, directors should make decisions in good faith, with sufficient information and after deliberating adequately about any issues of material importance to the entity. The minutes of a meeting should reflect the deliberations conducted by the directors. In their supervisory and monitoring role, directors should request, receive, and understand adequate information about issues being considered by them; they should raise appropriate questions, understand and consider risks involved; and, based on that information, they should give input and direction to management.

Of course, if a claim is made against a board of directors for failing to comply with these duties, the outcome will be highly fact dependent, and the conduct of individual directors may be examined carefully. As you undertake your responsibilities as a director, there are some practical guidelines to help you fulfill your role:

ONE You should take the job of being a director seriously—it is a job. If you don’t have adequate time to be well-informed about the organization and the issues confronting it so that you can make good decisions, you should resign from the board.

TWO You should participate actively in board meetings. You should raise questions and analyze information and proposals coming before you so that you understand them. You should insist that you receive complete, thorough, and well-thought-out information from management.

THREE You should insist that the entity hire experts when appropriate. In Colorado, the law allows a director to rely on information, opinions, reports, or statements prepared or presented by experts whom a director reasonably believes to be reliable and competent, including legal counsel, public accountants, and other experts.

FOUR Feel free to request a regular executive session, in which only directors and invited advisors or certain members of management are present, perhaps at the end of each meeting. If there are items of particular sensitivity to be discussed during a meeting, you should not hesitate to ask the board to go into executive session; these sessions can be conducted with specific members of management, so that items of particular sensitivity can be discussed openly and frankly with them. Or, if appropriate, the board can conduct an executive session without any members of management present, so that the directors can engage in frank discussion among themselves. If concerns remain after an executive session, you should ask that those concerns be directed to a board committee or to management for resolution and be placed on the agenda for subsequent board meetings, until resolved.

FIVE The organization you serve should have a conflict of interest policy that all directors acknowledge every year. You should understand its terms and consider whether you can provide independent advice and make decisions with the utmost loyalty to the entity (remember, the appearance of a conflict can be as bad as an actual one). You also should routinely assess the ethics of decisions being made by the board. Even if a course of action is legal, it may not be the right thing to do.

SIX Self-evaluations of how your board is performing, both collectively and individually, should be routinely conducted. Was everyone well prepared for the meeting? Did members actively participate at a governance level (remember, “management manages, a board governs”)? Were the agenda topics appropriate for a governing board? Was discussion open and candid, and resolution reached when appropriate? Did management respond with complete and adequate information? These are only examples. Each board itself can best decide the criteria and methods it wants to establish for evaluations and, based on those, how to measure its own effectiveness as a board.

These guidelines should help you and your fellow board members provide more effective service to the organizations you serve, and help to limit your exposure to any claims that you have not properly discharged your fiduciary duties.

Bruce N. Warren is a partner in RJ&L’s Colorado Springs office. He represents for-profit and non-profit business entities in all facets of their operations and contracts, including governance issues, and regularly attends board of directors’, shareholders’, and officers’ meetings. He also represents both buyers and sellers of real properties, including commercial and recreational property, tenant-in-common structures, and development projects. He represents public and private companies in real estate and asset-based secured transactions, including life insurance companies, banks, and other lenders. Mr. Warren can be reached at 719-386-3003 or by email at bwarren@rothgerber.com.
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.
Successful Recent
USLAW Law Firm Verdicts

Bingham McHale LLP
(Indianapolis, IN)
Andy Gruber and Carolyn Hall of Bingham McHale represented Kroger d/b/a Indianapolis Bakery in a race discrimination matter before a jury in the Southern District of Indiana, Judge Tonya Walton Pratt presiding. Agreeing with Kroger’s evidence that plaintiff’s employment was not terminated because of race, the jury returned a verdict in favor of Kroger. Mr. Gruber and Ms. Hall represent employers against all forms of employment claims, including those for discrimination and harassment.

Bingham McHale partner, Dan Fagan obtained jury verdicts in favor of physicians in two separate medical malpractice matters tried in 2011. The first involved the death of a 71-year-old man following prostate surgery. The plaintiff claimed there was a lack of informed consent due to the failure to advise the patient of his anesthesia risk classification and mortality data regarding that classification. The Chairman of the Anesthesia Department at Indiana University disagreed with the plaintiff’s theory. The jury was out for less than an hour before finding in favor of the physician. The second case involved the death of a 67-year-old man following gallbladder surgery. The allegation was that there was a delay in returning the patient to the OR once complications developed. They alleged the delay was caused by the physician leaving the facility to perform surgery at a surgery center some distance from the hospital. The defendant argued that a watchful waiting approach that included the giving of blood products was reasonable. After a four-day jury trial and 3.5 hours of deliberation, the jury found unanimously in favor of the physician.

Carr Allison
(Mobile, AL)
Carr Allison attorneys Craig Goolsby and Faith Nixon of Carr Allison’s Mobile, Alabama office received a verdict that is tantamount to a defense verdict in Mobile, Alabama Circuit Court in April of 2011. The case arose out of the death of a worker at a construction site. Although the plaintiff’s lawyers asked for $40 million in their closing argument, the jury’s actual verdict of $150,000 will be offset to 0 because of pro tanto settlement proceeds received from other defendants.

Goldberg Segalla LLP
(Buffalo, NY)
William J. Greagan and Bryan D. Richmond of Goldberg Segalla successfully defended an apartment building owner in a case before the New York Appellate Division, 3rd Department. The June 9 ruling upheld a defense verdict in a lead paint case where the plaintiff was diagnosed with attention deficit hyperactivity disorder, oppositional affiant disorder, a cognitive disorder and learning disabilities which were alleged to have been the result of an elevated blood lead level at the defendant’s apartment house. The court held in Cunningham v. Anderson, 2011 NY Slip Op 4800, that the landlord’s liability for injuries related to a defective condition including lead paint cannot be established without proof that the landlord had actual or constructive notice of the condition for sufficient period of time such that the condition should have been corrected. The jury found that the defendant had such notice and was therefore negligent—but the negligence was not a substantial factor in causing the plaintiff’s injuries. The defendant’s experts opined that ADHD is a congenital condition and that there are no scientific studies proving that it is caused by lead exposure. They further opined that the plaintiff’s disorders and disabilities were caused by other factors, mainly social and environmental circumstances in his upbringing, which were supported by scientific studies and articles showing a link between socio-economic factors and psychological development. Proof of the plaintiff’s social and family factors was presented through school and medical records as well as testimony from the plaintiff’s sister. The court also agreed that the plaintiff’s conduct when he was a preteen and teenager may have constituted a failure to mitigate damages at a time when the plaintiff could be held legally responsible for his actions.

Huddleston Bolen LLP
(Huntington, WV)
Paul Loftus a partner at Huddleston Bolen, the USLAW member firm from West Virginia, served as co-counsel in a Federal Employers Liability Act (FELA) for a Class I railroad company in March 2011. The defense team obtained a defense verdict in the action by an employee for alleged lower extremity cumulative trauma after eight days of trial.

Klinedinst PC
(San Diego, CA)
With the help of Klinedinst attorneys Greg Hensrude and Dan Agile, Defendant Tom Coverstone prevailed at trial in a breach of contract suit involving the sale of a patent portfolio. In Fleming v. Coverstone, a Boise, Idaho patent attorney named Hoyt A. Fleming, III claimed that Coverstone had created a binding contract to purchase Fleming’s radar detector patent portfolio for $1 million, based on an informal email exchange with Coverstone. After a four day trial, the jury of eight men and women found unanimously that the email exchange was not a binding contract and, therefore, there was no breach when Coverstone declined to purchase the patents after coming to the conclusion that they had little to no value.

Larson • King, LLP
(St. Paul, MN)
Employment attorney David Wilk obtained complete dismissal of claims under the Equal Pay Act, Title VII and the Minnesota Human Rights Act against a Fortune 500 client of Larson • King. The plaintiff was a former head grocery buyer who alleged that she was paid less than two male employees who performed equal work. Judge Patrick Hensrude at the 5th District Court found that the email exchange was not a binding contract and, therefore, there was no breach when Coverstone declined to purchase the patents after coming to the conclusion that they had little to no value.
showed that she had been forced to sit in her diapers, which the plaintiffs contended evidence showed that she returned from the nephrologist only. The patient was a resident of a nursing home who was transported the last two years of nonpayment. The subcontractor filed a claim for breach of contract and to foreclose on a mechanic’s lien to recover more than $190 million in damages. Following seven days of trial, the jury deliberated for less than a day before determining that the nephrologist was not negligent and completely exonerated him from all liability.

**Quattlebaum, Grooms, Tall & Burrow PLLC**

Steve Quattlebaum and Mike Shannon of Quattlebaum, Grooms, Tall & Burrow PLLC, successfully defended the Arkansas Game and Fish Commission against claims that the agency structure violated the state constitution. The suit, filed by a former commissioner of the Arkansas Game and Fish Commission, sought a declaratory judgment regarding the applicability of a number of state statutes including the Arkansas Administrative Procedures Act and the Freedom of Information Act. After cross-motions for summary judgment, the Court dismissed the plaintiff’s suit for lack of standing.

**Rothgerber Johnson & Lyons LLP**

Gregory B. Kanan, Kenneth F. Rossman, and a team of Rothgerber Johnson & Lyons LLP attorneys recently obtained a defense verdict on behalf of a large regional law firm, and a former partner of the firm, following a two-week bench trial. Plaintiffs were clients, or entities related to clients, of the firm’s Moscow office in the 1990s. Plaintiffs claimed to have lost their Russian business following a raid by the Russian tax police, and alleged the law firm failed to give them advice that would have led them to avoid the circumstances giving rise to the tax police activities. After the Colorado courts ruled that Russian law governed the dispute, Plaintiff pursued a claim for breach of contract (malpractice did not exist under the applicable Russian law), and sought approximately $190 million in damages. Following several years of discovery and depositions in the U.S., Russia, Austria and England, the case was tried in the Colorado District Court for the City and County of Denver. The trial presented unusual challenges, as it involved testimony from Russian-speaking witnesses and exhibits in four languages. In a 31-page decision, the Court ruled for defendants on every element of the claim.

**SmithAmundsen, LLC**

Mike Resis and Richard Valentino recently won an insurance coverage case for their client in the Illinois Supreme Court. In Phoenix Ins. Co. v. Rosen, Docket No. 110679, the Illinois Supreme Court held that the trial de novo clause in the underinsured motorist arbitration provisions of an automobile insurance policy was valid and enforceable. The clause is binding for underinsured motorist arbitration awards of $20,000 or less, but allows either the insurer or the insured to reject an award that exceeds $20,000. The Supreme Court upheld the insurer’s rejection of an underinsured motorist arbitration award of $382,500 in the insured’s favor, overruled four appellate decisions which had held that the clause was against Illinois public policy, and agreed with Michael and Richard that the clause was not contrary to public policy or unconscionable.

**Wicker Smith O’Hara McCoy & Ford P.A.**

Tampa, FL USLAW member firm Wicker Smith O’Hara McCoy & Ford P.A., recognizes Michael E. Reed and Erin Diaz for successfully obtaining a defense verdict in a wrongful death case tried in Tallahassee, Florida. Plaintiff sought wrongful death damages on behalf of himself and his two children stemming from his wife’s death. The children were four months and two years old at the time of their mother’s passing. Plaintiff alleged that the pharmacist of an international retail establishment was negligent in simultaneously filling three prescriptions causing death due to Fentanyl toxicity. Plaintiff claimed that the pharmacist failed to use reasonable judgment in filling a four month old prescription for a 50 microgram Fentanyl patch, in conjunction with updated prescriptions for Darvocet and Vioxx. Plaintiff focused upon the fact that the Fentanyl patch was four months old, the prescription was originally written for post-operative cesarean section pain which was no longer applicable, the dose was too high for acute pain patients, and the decedent was opioid naïve when the prescriptions were filled—all contrary to the Fentanyl package insert and black box warnings. The Florida county medical examiner who completed the post-mortem study testified that the decedent had a lethal amount of Fentanyl in her system, which in conjunction with the Darvocet, caused respiratory depression and toxicity. The defense argued that all three prescriptions were valid under Florida law and were appropriately written on their face. The defense also presented evidence via its retained forensic pathologist that the decedent actually died of sleep apnea, focusing upon the amount of blood depicted in various recut slides of the lung more commonly seen in asphyxiation related deaths. Plaintiff asked for $8 million in closing, and the jury returned a unanimous defense verdict.
Firms on the Move

Greenebaum Doll & McDonald PLLC (Louisville, KY) is pleased to announce that Michael de León Hawthorne, a Member in the firm’s Louisville office, has been elected President of the Attorneys for Family-Held Enterprises (afhe). Mr. Hawthorne is also a member of the Board of Directors of afhe. Also, Margaret E. “Maggie” Keane will assume the presidency of the Kentucky Bar Association (KBA) for a one-year term beginning Friday, July 1, 2011.

New Hampshire USLAW Firm Gallagher, Callahan & Gartrell, P.C. (Concord, NH) congratulates Shareholder-Director Marla Matthews on being accepted into the National Academy of Elder Law Attorneys. Marla represents clients in matters of preservation and transfer of wealth, gift and estate tax planning, special needs trust planning, estate and trust administration, and planning for public benefits. The Firm also congratulates Attorney Erik Newman on his recent election as a member of the New England Legislative Committee of the American Resort Development Association. Erik focuses his land use practice in the areas of condominium and timeshare law, real estate development and environmental law.

Goldberg Segalla LLP (Buffalo, NY) attorneys Daniel W. Gerber, Sarah J. Delaney and Paul D. McCormick co-authored a chapter on the emerging topic of mergers and acquisitions insurance for New Appleman on Insurance Law Library Edition, a seminal treatise on insurance law in the United States published by LexisNexis. M&A insurance encompasses several different types of highly specialized insurance policies that provide coverage for specific difficulties or risks arising out of mergers, acquisitions, finance transactions or other business transactions.

West Virginia USLAW member firm, Huddleston Bolen LLP, launched a new blog titled Transportation Law Today. The blog provides current news and information for executives, managers, and legal professionals in the inland maritime, rail, and trucking industries. A link to the blog is available at www.huddlestonbolen.com/blog. Transportation Law Today is authored and managed by Paul Lofts, a partner in the firm’s Huntington, West Virginia office.

Edmund G. Farrell, III, senior partner and Appellate Law practice group chair for Murchison & Cumming, LLP (Los Angeles, CA), was certified as a specialist in appellate law by The State Bar of California Board of Legal Specialization. Mr. Farrell is one of only 285 California attorneys certified as an appellate specialist. The extensive certification process includes passing a comprehensive written exam, demonstrating a high level of experience in the specialty field, fulfilling ongoing education requirements and being evaluated by other attorneys and judges familiar with the applicant’s work.

USLAW Minnesota member Larson • King (St. Paul, MN) is pleased to announce that Kevin DeVore has joined the firm as a partner to lead their White Collar Criminal Defense and Investigations practice. Kevin is a Certified Criminal Law Specialist and an experienced criminal litigator with over 125 jury and bench trials to date. He focuses his practice on white collar criminal defense on behalf of individuals and corporations, and brings to bear his considerable experience with federal and state regulatory and enforcement agencies involving matters arising from insurance, real estate and securities frauds, as well as Medicaid frauds, embezzlement and money laundering.

Orgain Bell & Tucker, LLP (Beaumont, TX) attorney Gilbert I. “Buddy” Low has been awarded the 2011 Jefferson County Bar Association Professionalism Award, which is sponsored by the Texas Center for Legal Ethics and Professionalism. Buddy exemplifies the traits of civility, professionalism and ethical behavior and, with his over 50 years of experience, he demonstrates tremendous character in his profession and personal life. Buddy is a nationally recognized trial lawyer who currently handles major litigation involving a wide range of issues, including personal injury, insurance coverage, antitrust, patents, trademarks, criminal RICO violations, pollution issues, class actions, contract disputes, and general business disputes.

Quattlebaum, Grooms, Tall & Burrow PLLC (Little Rock, AR), is pleased to be a participant in a recently announced partnership to provide legal services to Arkansas Children’s Hospital patients and their families at no charge. Known as a medical-legal partnership, or MLP, the pro bono corporate initiative is the first of its kind in the country. Under the partnership, legal assistance will be provided to patient families at clinics set up at Arkansas Children’s Hospital, as well as during inpatient visits. The firm’s attorneys have committed to volunteer their services for this program. Endorsed by the American Bar Association and the American Medical Association among other leading health and law organizations, medical-legal partnership is undergoing a rapid expansion in both rural and urban settings.

Roetzel & Andress, LPA (Cleveland, OH) has been recognized by clients on the 2011 “BTI Client Service A-Team” as an unparalleled leader in client service among law firms for its ability to deal with unexpected changes and for its outstanding value.

Timothy Liam Epstein, Chair of SmithAmundsen LLC’s (Chicago, IL) Sports Law Practice Group, has been been appointed to an honorary position with the Fetzer Institute, specifically as a member of the Fetzer Advisory Council on Sports, Physical Training and Exercise, and Embodied Spiritual Practices. The Fetzer Institute is a private, nonprofit operating foundation that engages with people and programs working to bring the power of love and forgiveness to the center of individual, organizational and community life. The organization creates and supports projects that serve as healing forces in a divided world, and that spread knowledge about how individuals everywhere can be more loving and forgiving in daily life. Soccer star Mia Hamm will serve as chair of Tim’s respective advisory council.
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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.

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USLAW NETWORK is founded on the relationship between its lawyers and their clients throughout the organization.
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With offices in over 75 major litigation centers in the U.S. and U.K., Ringer 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, Ringer Associates has used a partnership approach to build a team of highly-seasoned professionals. Ringer 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 Ringer Associates help settle cases faster, save money on claims administration costs, and reduce case loads and paperwork. With access to all major life insurance carriers offering the structured settlement product, Ringer 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!

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