How To Stop Competitors From Stealing Your Customers

How Chinese Anti-Monopoly Law and Practice May Affect Multinational Business

FOLLOWING BUSINESS TRENDS

BUSINESS INTERRUPTION CLAIMS SURGE AHEAD

UNPRECEDEDENT LOSSES ANTICIPATED FOR SUPERSTORM SANDY

DIGITAL SLEIGHT OF HAND

Westerners in China

THE CLAIMS FILE

Friend or Foe?
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Most industry associations, organizations, or networks, are member-focused. Meaning that if you are an electrician who joins the American Electrical Association, you should expect to learn about new wiring codes, new products that you can sell and new ways to grow your electrical contracting business. By becoming a member, you expect certain things, primarily a better, more prosperous life as an electrician.

That’s where USLAW NETWORK is different. At USLAW we are most concerned about the “electrician’s customers” to speak. And because we are not member-focused, but rather client-focused, we put the needs of the client first. We are focused on how we as a Network can best provide the legal services our members’ clients need most. In the end, we believe we will all prosper with this approach. We “back into” our success, by first making sure the clients we serve succeed.

When bigger is better...and when it is not. USLAW NETWORK is truly the best of both worlds. As individual firms, we are agile and quick to respond, unencumbered by the bureaucracy that often slows a mega-firm from quickly responding. We know our clients’ businesses inside and out. We have built longstanding, close-knit relationships. Relationships that we guard closely. Conversely, as a NETWORK of member firms, we possess the resources and wide-ranging expertise to cover the country and the world. Together, we offer everything the larger, mega-firms can offer, while still maintaining our advantage to respond quickly while providing quality legal services. As a Network, we are experts in nearly every jurisdiction in the United States. A claim the larger firms simply cannot make. We are exactly what our Member Clients need: small enough to respond, but large enough and resourceful enough to provide the far-reaching services today’s legal environment demands.

We talk the talk, and walk the walk. Some might say talk is cheap. And they’d be right. That’s why USLAW NETWORK does so much to make sure what we “say” is what we “do.” For example, in February, contact partners from all USLAW NETWORK member firms arrived in Dallas for an annual retreat to ensure that every firm is not only on the “same page,” but the right page. A show of solidarity of sorts to make sure that each partner remains dedicated to client service and to also strengthen the bonds that make us a single entity with a single mission of client service. Up on the agenda? – working as one for the good of member firms, we possess the resources and wide-ranging expertise to name a few. It’s these Contact Partner Retreats, that have been the “birthplace” of such USLAW client service innovations as TEAM services – to name a few. It’s these Contact Partner Retreats, that have been the “birthplace” of such USLAW client service innovations as TEAM services, the Client Leadership Council, and most recently our Client SourceBook.

It really is a great time to be a USLAW NETWORK member client. Visit our website. Give me a call. But make sure you know all that we can do for you.

Sincerely,

Edward G. Hochuli
Chair, USLAW NETWORK, Inc.
What was heralded by the media as the “Frankenstorm” lived up to its monstrous name when it pummeled the East Coast from North Carolina to Maine in late October of 2012. Hurricane Sandy, which was downgraded to Post-Tropical Cyclone Sandy and is now referred to as “Superstorm Sandy,” was one of the most economically damaging storms in U.S. history. The storm first made landfall on October 29, 2012, and months later the scale of the damage is still being assessed. Whereas the physical destruction of property was immediate, businesses in the storm’s path sustained a second wave of economic losses which are likely to reach historic levels. The states affected by Superstorm Sandy account for about 23 percent of the U.S. gross domestic product. As a result, the impact of the disaster is certain to stretch beyond the East Coast. In that vein, insurers can expect not only business interruption (BI) claims from businesses on the East coast, but also contingent business interruption (CBI) claims from suppliers and customers worldwide. The ripples of Superstorm Sandy’s economic impact are mounting by the day and insurers are bracing for unprecedented losses. Facing economic devastation that may threaten their own viability, business will look to their insurers to cover those losses under business interruption or time element coverage.

Although most policies limit coverage for property damage to losses to the insured’s property resulting from a covered peril, many claims are not confined to damages resulting from a single, indivisible cause of loss. Instead insurers are often presented with a claim which stems from both a covered cause of loss and a non-covered cause of loss. The quintessential example of
this scenario is a claim arising out of both wind and flood damage, where the subject policy covers damage caused by wind but precludes coverage for damage resulting from flood. In that context, the preliminary issues to address are each state’s posture regarding concurrent causation and the enforceability of anti-concurrent causation (ACC) clauses. A majority of states employ the “efficient proximate cause” doctrine in determining causation for insurance coverage purposes. Under this theory, as long as a covered peril is the predominant cause of damage or sets into motion a chain of events leading to the loss, coverage is extended to the insured. In an effort to avoid liability in states that find in favor of coverage where multiple causes exist, insurers introduced ACC clauses into property policy forms. Generally these clauses include language that excludes coverage when any portion of a loss was caused by an uncovered peril. The vast majority of states that have ruled on ACC clauses have upheld their validity.1

Superstorm Sandy claims will undoubtedly move beyond the already complex case law regarding ACC clauses and into the arena of business interruption (BI) claims. In past catastrophes, BI losses have accounted for as much as half of the total insured losses. Given the economic vibrancy of the impacted area, BI losses are certain to be a significant portion of the total insured losses from Superstorm Sandy. The most interesting and complex BI claims are those flowing from physical damage caused by covered and uncovered claims, often in the context of property damaged by both wind and flood. In that scenario, insurers may invoke ACC clauses to deny coverage for BI losses resulting from the indivisible combination of wind and flood damage, while insureds may contend that the covered wind loss alone was enough to result in a suspension of operations. Unsurprisingly, policyholders and insurers often disagree as to whether loss arises from concurrent or divisible perils, leaving courts to make these determinations in light of ACC clauses and battling expert opinions.

The most straightforward application of BI coverage occurs when the damage that actually causes the business to suspend operations is attributable only to one source, either covered or excluded. In disaster scenarios such as Superstorm Sandy, damage is often difficult to separate into covered and non-covered categories. When the distinction can be made, though, and a trier of fact finds that all of the damage to an insured property was caused by a covered peril, then BI coverage will likely be available.

A more problematic scenario occurs where some excluded and covered damage is intermingled. In these instances, expert opinions are crucial in determining coverage. In *Buffman Inc. v. Lafayette Ins. Co.* 36 So. 3d 1004, 1019 (La.App. 4 Cir. 2010), a Hurricane Katrina case, the insured suffered both covered wind damage to its roof and excluded concurrent flood-wind damage to the rest of the building. An ACC clause applied and coverage was denied for the concurrent wind and flood damage to the majority of the building. Damage to the roof, however, was found to be exclusively caused by wind and the court held that BI coverage applied in relation to the roof damage. A battle of the experts ensued but both experts had to limit their opinions exclusively to damage and repair costs related to the roof.

Where circumstances like those in *Buffman* exist, the difficult task of calculating the period of restoration is apparent. Insurers and ultimately courts must determine the period of restoration for only the covered damage. Experts will be called upon to isolate the covered damage despite the existence of potentially extensive excluded damage to the rest of the property. If damage can be apportioned to two different causes, one covered and one excluded, then courts may turn to expert testimony to calculate the period of restoration based on repair of the covered peril alone. Moreover, the definition of “period of restoration” may be scrutinized to determine what scope of coverage is warranted under the policy’s language. The calculation of the period of restoration will rely on highly scrutinized and hotly contested expert testimony as to what “reasonable speed” and “similar quality” mean in each case.

The courts’ willingness to parse out covered and excluded damage is apparent in cases where an ACC clause does not apply, as was the case in another Hurricane Katrina case, *Yount v. Lafayette Ins. Co.* In *Yount* the court held that a doctor’s office “did sustain direct physical loss and damage as a result of the wind and rain, and not due to direct contact with the floodwaters. Further, we find these losses and damages, alone, would have and did cause a suspension in the operation of Dr. Yount’s medical practice.” 4 So. 3d 162, 171 (La.App. 4 Cir. 2009). Correspondingly, given that a covered loss would have caused an interruption to the insured’s business regardless of the excluded damage, BI coverage was triggered. Although an ACC clause would likely have prevented coverage, the court’s determination that BI coverage is applied exclusively in relation to the covered loss lends support to the notion that the period of restoration calculation should disregard uncovered damage. This issue will undoubtedly arise in post-Sandy claims as the actual cause of damage is assessed for each claim.

In scenarios where there is concurrent causation for a single loss and an ACC clause applies, some courts have found BI coverage to be unavailable. Given that a general requirement of a BI claim is that it involves a covered peril, it is intuitive that where ACC clauses apply to preclude coverage to the underlying property, BI coverage for damage will likewise be barred. Indeed, the jurisdictions that enforce ACC clauses have found that loss must be solely caused by a covered peril in order to trigger property coverage and, therefore, BI coverage.

Many issues regarding business interruption coverage and ACC clauses remain unanswered. As insurers assess their liability in relation to BI claims it will be important to analyze the specific language in their policies as court rulings often hinge upon the specific terms of a policy. Insurers must be vigilant in their investigations and consistent in their policy interpretation to avoid bad faith claims from policyholders. Differentiating between BI losses that arise out of covered perils, excluded perils, or a combination of covered and uncovered events will be crucial. This task is likely to be further complicated in the wake of the relaxed proof of loss standards and heightened deadlines for investigation issued by government officials.2 Superstorm Sandy may have dissipated, but her effects will surely linger for some time to come.

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1 Only California, Mississippi, West Virginia, and Washington have rejected or limited the application of ACC clauses.

2 Delaware, Maryland, New Jersey, and New York have specifically altered insurance regulations in regards to Sandy claims.
Here’s an experiment: type your company’s name or product name into Google. Do you see a competitor’s name, product, or service instead of your company’s? You may be confused, but you’re not alone.

Businesses are increasingly purchasing AdWords from Google that correspond to competitors’ names, trademarks, or other protected and identifiable words. The result: confused customers and lost business for the victim company, and legal consequences for the company that bought the AdWords.

Fortunately, courts have concluded that the use of competitor’s name or trademarks in a way that is deceptive and misleading is an actionable offense — namely, quietly purchasing AdWords to misdirect customers and steal business. If you know the warning signs that another company has purchased AdWords to steal your business, you can quickly stop the problem before the company makes off with your customers.

And if you understand the serious and costly legal implications associated with buying and using a competitor’s AdWords, you can prevent your own company from taking actions that will land it in legal hot water.

**HOW ADWORDS WORK**

Computer users make sense of the Internet largely through search engines like Google, Yahoo, and Bing. Google, the most popular search engine, provides links to websites based on a user’s search terms in two different ways. First, Google provides links related to search terms based on Google’s proprietary search algorithm. These links often appear with larger font and some explanatory text.

It is the second form of links — context-based advertising — that is the source of competitive mischief. When a user enters search terms into Google, the search engine generates regular links and related advertising near those links. Google auctions keywords, such as “fireplace,” “hot tub,” and “cross-country skis,” to the highest bidders. Google then agrees to place the winning bidder’s advertising link in related searches. For example, if Company X buys “cross-country skis” from Google, and a user searches for cross-country skis, Company X’s link will appear as an ad on the same page as other unsponsored links.

In recent years, courts have increasingly dealt with circumstances in which a company purchased Google AdWords related to a competitor’s distinctive products or services, in an effort to surreptitiously divert customers and, ultimately, business. In *CJ Products LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127 (E.D.N.Y. 2011), a toymaker sued a competitor for buying AdWords related to trademarks involving the popular Pillow Pet toy and misdirecting customers who searched Google for the toy. In *Rosetta Stone Ltd v. Google Inc.*, 676 F.3d 144 (4th Cir. 2012), the creator of foreign-language education software sued Google for selling AdWords related to the software to a company that was misdirecting customers and then selling them counterfeit software.
LANHAM ACT AND STATE LAW CLAIMS

Although the problem of a competitor secretly buying your company’s AdWords is a thoroughly twenty-first century problem, several traditional legal causes of action are commonly employed. In most cases, the plaintiff seeks relief through the federal Lanham Act and state laws related to unfair business practices, including false advertising.

Businesses have stopped competitors from misdirecting customers through AdWords under the Lanham Act, 15 U.S.C. § 1051 et seq., which is the primary federal statute to enforce trademarks. Trademark infringement and false advertising are two Lanham-related claims that companies have successfully used to stop AdWord schemes.

To prove a claim for trademark infringement under the Lanham Act, a party must show they own the trademark and that there is a likelihood that the infringement has caused confusion. A Lanham Act false advertising claim requires a party to establish that an infringing party has used the party’s trademark in advertising in a false or misleading manner that is likely to cause confusion, mistake, or deception. Binder v. Disability Group, Inc., 772 F. Supp. 2d 1172 (C.D. Cal. 2011) involved attorneys that successfully sued under the Lanham Act to stop an entity from using AdWords to misdirect its customers. The claimants generally include unfair competition, false advertising, or trademark infringement. Every state has causes of action available to businesses that want to stop a competitor’s bad behavior, such as an AdWords scheme.

PREVENT AND STOP DAMAGE TO YOUR BUSINESS

To avoiding falling victim to a competitor’s AdWords scheme — and to prevent your own company from using AdWords in a way that creates legal consequences — companies and their counsel should consider these measures:

Establish a program to monitor trademarks and other intellectual property

Companies should set up an internal program to ensure that its trademarks and other intellectual property are not being misused. If a company allows a trademark to be misused long enough, some courts will not allow the company to sue to enforce the trademark. See, e.g., What-A-Burger Of Virginia, Inc. v. Whataburger, Inc. of Corpus Christi, Tex., 357 F.3d 441, 452 (4th Cir. 2004) (explaining acquiescence and laches in trademark context).

Ensure communication between legal and marketing departments

Counsel should lead communications between legal, sales, and marketing departments to discuss the legal consequences of an AdWords campaign. As Binder illustrates, a victim company that prevails in an AdWords lawsuit may be awarded significant lost profits ($300,000), and the Lanham Act also allows a court to award attorney fees where the culpable party knowingly violated the Act through an AdWords scheme. See, e.g., World Entm’t Inc. v. Brown, 487 Fed. App’x 758, 2012 WL 3065349, **2 n.2, 4 (3rd Cir. 2012) (ordering party to pay almost $185,000 in attorneys’ fees).

Write AdWords descriptions results to be clear

Ensure that the text of your company’s AdWords clearly and unambiguously advertises your company’s products and does not name your competitor’s products. Such clear drafting may avoid allegations that your company’s AdWord results confused or are likely to confuse Internet users.

Ask your customers if they have been misdirected by AdWords

A company’s customers or suppliers are an important source to determine whether another company is using your trademarks or protected words and phrases in AdWords. Salespersons and other employees with customer contact should be encouraged to ask customers if they have seen AdWords that look related to your business but direct Internet users elsewhere.

CONCLUSION

The Lanham Act and related state law claims can provide relief for companies caught off-guard by a competitor’s use of AdWords containing its trademarks to divert customers and business. Counsel must remain vigilant by monitoring to ensure that competitors are not using a company’s trademarks against itself. And, because carrying out such an AdWords scheme can carry serious, costly legal consequences, counsel must regularly and clearly communicate the real risks of exposure with marketing and sales employees.
Title VII laws protect employees from discrimination on the basis of gender. However, a recent high-profile case in Iowa tested the boundaries of this protection, specifically for employees fired for being too physically attractive to their employers.

The case is *Melissa Nelson v. James H. Knight DDS, P.C. and James Knight*, 2012 Iowa Sup. LEXIS 111. Melissa Nelson is an attractive young woman who worked as an assistant to Dr. Knight, a dentist, for more than ten years. The record established she was a highly competent employee. During the last year and a half of Ms. Nelson’s employment with Dr. Knight, he frequently made comments to her about her clothes accentuating her figure. Dr. Knight testified he told Ms. Nelson if she saw his “pants bulging” she would know her clothes were too revealing. On another occasion, he texted her to say her shirt was too tight, and that it was a “good thing” she did not also wear tight pants, because then he “would get it coming and going.” Dr. Knight and Ms. Nelson also began texting about personal matters outside the workplace, even discussing their sex lives. On one occasion, when Ms. Nelson complained about infrequent sexual encounters with her husband, Dr. Knight responded, “[T]hat’s like having a Lamborghini in the garage and never driving it.” Dr. Knight once asked Ms. Nelson by text how often she experienced an orgasm. Ms. Nelson did not object to these types of comments, nor did she ask Dr. Knight to discontinue the comments or texts.

Interestingly, Dr. Knight’s wife was also an employee at the dental practice. She became aware of the suggestive texting, confronted Dr. Knight, and demanded he terminate Ms. Nelson, calling her a “big threat” to the marriage. Dr. Knight terminated Ms. Nelson’s employment in the presence of his church pastor. He stated their relationship had become a detriment to his family and provided her one month’s severance pay. Dr. Knight later explained to Ms. Nelson’s husband that while Ms. Nelson was “the best dental assistant” he ever had, he feared he would try to have an affair with her if she remained his employee. Dr. Knight replaced Ms. Nelson with another female. Ms. Nelson sued for sex discrimination in Iowa State Court under the Iowa Code.
The district court granted summary judgment to Dr. Knight, holding “Ms. Nelson was fired not because of her gender but because she was a threat to the marriage of Dr. Knight.” Ms. Nelson appealed, arguing she clearly would not have been terminated “but for” her gender. Dr. Knight responded he does not discriminate against women — in fact, all his employees are women. Rather, the potentially destructive nature of their individual relationship is what prompted his decision to terminate her employment. Ms. Nelson responded that neither the relationship nor the threat would exist but for her gender, making this a clear case of discrimination against her on the basis of her gender.

The all-male Iowa Supreme Court upheld the ruling, relying almost entirely on federal precedent interpreting Title VII of the United States Civil Rights Act. The Court acknowledged Ms. Nelson would not have been fired if she were a man. However, she was not fired because she is a woman. This, according to the Court, was the ultimate dispositive fact. The Court noted, “[T]he civil rights laws seek to insure that employees are treated the same regardless of their sex or other protected status… Dr. Knight’s unfair decision to terminate Nelson… does not jeopardize that goal. This is illustrated by the fact that Dr. Knight hired a female replacement for Nelson.” The Court ultimately held Ms. Nelson’s termination was “basically blameless” in the Court’s eyes. The employee’s conduct was “extremely jealous” of her. The employee’s conduct was “basically blameless” in the Court’s estimation, but the Court still held her termination was lawful.

In her most compelling argument, Ms. Nelson contended that failing to extend legal protection to women like her in the workplace would run counter to the spirit and intent of civil rights laws. The result would be to allow employers to repeatedly justify adverse employment actions against persons of a particular gender by claiming their spouses perceived an attraction, or that they feared they may be tempted to make an advance on an employee. The Court acknowledged this is a “legitimate concern,” but noted such cases could be distinguished. Evidence of repeated episodes of these types of terminations could lead a Court to infer that gender, not a personal relationship, is the motivating factor in a termination.

In Nelson, the Iowa Supreme Court explained its reasoning and cited the established law upon which the holding was based. Nevertheless, the ruling garnered attention from national news outlets and prompted widespread outrage. Ms. Nelson’s firing struck a chord with many as unfair treatment of a woman in a situation familiar to many women — being the target of unsolicited sexual interest from an older, married boss. After all, the record showed an affair did not take place. Ms. Nelson, while certainly aware of Dr. Knight’s attraction to her, did nothing overt to encourage Dr. Knight’s attraction, yet she was fired because his attraction persisted. The Iowa Supreme Court seemingly anticipated this reaction and pointed out, “the issue before us is not whether a jury could find that Dr. Knight treated Nelson badly. We are asked to decide only if a genuine fact issue exists as to whether Dr. Knight engaged in unlawful gender discrimination when he fired Nelson at the request of his wife.” In so holding, the Court emphasized the legal principle that attractiveness is not a legally protected trait.

Initially, one might question why Ms. Nelson did not proceed under a cause of action for sexual harassment. Certainly, texts and comments of this nature are common allegations in sexual harassment cases, particularly in hostile work environment claims. Communications as explicit as those in this case are usually quite sufficient to create a question of fact as to whether harassment occurred. However, a hostile work environment sexual harassment claim requires a showing that the employee actually perceived the behavior as hostile or abusive — that simply does not appear to be the case here. Ms. Nelson never objected to Dr. Knight’s comments or texts or asked him to stop.

Similarly, Ms. Nelson did not make a claim for quid pro quo harassment or retaliatory discharge, presumably because she was never asked to actually participate in an affair, and she never refused. The facts were not present to sustain either cause of action. Therefore, the case was brought merely as a sex discrimination claim. The Court acknowledged Ms. Nelson’s predicament, and conceded Ms. Nelson would not have been fired had she been a man. However, the Court declined to extend legal protection under civil rights laws on that basis.

Nelson clarifies that an employee who is terminated simply because she (or he) is the object of an employer’s romantic affection enjoys no protection under today’s civil rights laws. Until Congress or individual state legislatures pass new laws, future Courts are unlikely to hold differently. Practitioners should take note of this line of cases and the distinction drawn between actual discrimination and adverse employment actions based upon purely personal relationships. However, the limitations to this defense should also be noted. Nelson made it clear an employer may fire an employee to appease a spouse or avoid sexual harassment, but also pointed out that repeated episodes of such terminations could comprise evidence of gender discrimination. Before asserting this defense, defense counsel should conduct a thorough investigation into previous terminations by an employer. Historical information is certain to be sought in discovery by a Plaintiff in an effort to get the case before a jury. As the overall reaction to the Nelson ruling demonstrates, the Court of public opinion may not be a favorable venue for the employer.

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

Elizabeth “Betsy” Burgess is an associate at Carr Allison in Tallahassee, Florida. She primarily defends employment, personal injury, wrongful death, and homeowners’ association cases. She graduated from Auburn University and Florida State University College of Law, and is licensed to practice in all State and Federal Courts in Florida.
The below is an interview between Roger Yaffe, of USLAW Chief Executive Officer, 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, you were last interviewed for the USLAW Magazine regarding the Medicare Secondary Payer Act in the summer of 2011, can you update our membership on the recent statutory changes and their impact?

**ANSWER:** Roger, as you recall, during our Fall 2012 Conference in Washington D.C., USLAW coordinated for our members more than twenty-five meetings with both the Senate and Congress to lobby on behalf of the SMART Act. I am proud to share that in January 2013 President Obama signed into law the SMART Act. However, until CMS issues regulations addressing the operational perspectives of the statute, its impact can not fully be analyzed.

That said, from a claim and litigation standpoint, the primary benefits of the SMART Act for our members appear to be as follows:

- **A** Provides a three-year statute of limitation for Medicare to pursue collection of liens from the date of notice of a TPOC;
- **B** A primary payer now has the ability to appeal causation issues relating to Medicare’s lien total without having to obtain a consent to release form from the claimant;
- **C** Removal of the requirement that a RRE obtain a “claimant’s” full social security number to investigate and confirm that individual’s Medicare status;
- **D** Makes the $1,000.00 a day fine under Section 111 discretionary as opposed to mandatory;
- **E** The ability of the parties to obtain a final demand at mediation; with certain caveats.

The caveats relate to the necessary cooperation and coordination between the parties to avail themselves to this process within a set time frame. The SMART Act requires Medicare to create and implement an on-line computer system with internet access (which system already exist) that allows parties to download a conditional payment amount. This amount is deemed Medicare’s final demand if a release is signed within three days of its printing from the website. However, for parties to utilize this process they will be required to settle a case within either a 55 or 25 day period within a 120 day window which begins on the date Medicare is notified that the parties reasonably anticipate a settlement will occur during this time frame. This is not always practical for the smaller value settlements given the logistical issues with scheduling, discovery, negotiating tactics, and conflicts which routinely arise, delaying mediation or the settlement of a case. I also anticipate that the forthcoming regulations will limit the number of times which the parties can avail themselves of this process per claim.

These changes could prove beneficial by providing finality, though likely mostly affecting larger exposure cases. However, a strong claims handling program which addresses Medicare concerns at the front end should assist with mitigating these issues.

**QUESTION:** During the summer of 2012, USLAW provided a response to Medicare’s Advance Notice of Rule Making relating to the protection of Medicare’s future interest. What is the status of these proposed regulatory amendments and what do you anticipate occurring in the future?

**ANSWER:** Medicare’s Advance Notice was fairly broad and encompassing in scope, es-
especially in relation to the obligations of a party, which is most often the Medicare beneficiary, to protect Medicare’s future interest. USLAW provided a strong response to the proposed regulations and volunteered to provide Medicare with assistance in determining a solution.

Not surprisingly, I have not heard of any progress by Medicare in implementing the proposed regulatory amendments. Now, with the passing of the SMART Act, Medicare is under increased scrutiny and time constraints to implement regulatory amendments relating to the operational and statutory changes from the SMART Act. I believe Medicare’s focus will be in that arena for at least the next 12 to 18 months.

What is important to remember is that the only regulatory language which currently exists relating to the issue of protecting Medicare’s future interest in a settlement is in the realm of workers’ compensation.

**QUESTION:** Speaking of litigation and the issue of “Medicare Set Asides,” where do you see the industry’s stance today?

**ANSWER:** I believe this remains a very frustrating issue, primarily as it relates to the liability industry, as opposed to workers’ compensation. I am beginning to see more self-insured entities, and some carriers, start to appreciate that they are unnecessarily incurring vendor cost and increased indemnity exposure on their claims while attempting to meet a mythical level of compliance. Those organizations are now taking the time to understand what is truly required from a statutory and regulatory perspective and performing a risk analysis in conjunction with the goals of their overall claim program. With this knowledge and assessment, they are able to level the playing field, address the concerns of Medicare, and avoid unnecessarily increased costs and exposure with settling claims.

I continue to see published opinions where parties are seeking redress of these issues from both state and federal courts. Their decisions are unfortunately utilizing undefined “industry” terms, namely “MSA,” to address whether and how to protect Medicare’s future interest in a liability settlement. I believe a dangerous and misleading precedent is being established which will simply be used to inflate our exposure in liability cases. I have even seen one particular defendant take opposite positions in two different published cases as to whether a MSA is required in a liability case. It is honestly disheartening to see the phrase “Medicare Set Aside” from my perspective in any published decision.

The parties attention in a liability case should at most be directed toward “protecting Medicare’s future interest; not a “Medicare Set Aside.”

**QUESTION:** What about from the practitioner’s standpoint; what changes have you seen relating to claim and litigation handling?

**ANSWER:** From a practitioner’s perspective, I believe we are just now beginning to see the light at the end of the tunnel. I believe the Bar in general is finally able to weed through some of the misinformation which has been disseminated in the industry. They know it is now an issue on all cases, and are looking more and more for guidance from their clients on how to address this risk. When the client is prepared to respond, as they should be, it provides the organization with continuity within their own program.

The plaintiff’s bar also is becoming increasingly cooperative when the issue of “Medicare compliance” is addressed early in a case, on issues relating to both Medicare’s existing lien and future interest. In my experience it is only when a defendant does not raise the issue of Medicare and protection concerns until after the case is settled when I see problems from the bar plaintiff’s bar.

Unfortunately, I still see confusion with terms and requirements bleeding over from the workers’ compensation side to the liability side of the equation. But the industry as a whole is beginning to see that we are attempting to equate apples and oranges, which is progress.

**QUESTION:** When asked previously what one change you would like to see with regard to MSP legislation and regulatory requirements, you referenced the implementation of a permanent threshold when addressing Medicare concerns. What changes would you like to see now?

**ANSWER:** Fortunately Roger, soon after our last article was published CMS in fact did implement an across the board $300.00 threshold. This had a significant impact on the industry, particularly within the retail and hospitality industry where gift cards and other “write-offs” are being utilized as a risk management tool. The SMART Act also now requires CMS to address on an annual basis the average cost to collect a lien to ensure that the ultimate implemented threshold does not create a situation where Medicare is spending more to collect a lien than they may recover. However, I do not believe the $300.00 threshold will be increased anytime soon.

The one change I would still like to see is for CMS to make the current $5,000.00 Reporting Threshold under Section 111 permanent; as opposed to lowering it to $2,000.00 on October 1, 2013. Given the existing options CMS has provided for addressing Medicare’s lien for the claims valued at below $5,000.00; namely the 25% reimbursement option, I am optimistic that we will see this amendment.

**QUESTION:** What are the primary messages which you would generally convey to our client and attorney members of USLAW?

**ANSWER:** For the client members I would convey the following: First, remember that as relates to Medicare’s future interest, we are seeking a somewhat mystical level of compliance in the liability industry, including voluntarily complying with suggested protocols in workers’ compensation. Therefore, understand the ramifications of the decisions being made in your cases. Second, that life is a matter of perspective. The recommended protocols relating to Medicare compliance from a TPA or carrier will more than likely be different from that of a self-insured organization that has performed an educated risk analysis.

As relates to the attorneys, they need to always be mindful of when a claimant will become a Medicare beneficiary, and look to their clients for instructions on how to address concerns with this risk. It is obviously important that this process begins before entertaining settlement negotiations, not afterward.
INTRODUCTION

Electronic discovery (e-discovery) can be crippling in terms of burden and cost. Traditionally, litigation lawyers reviewed electronically stored information (ESI) one document at a time in a “linear” fashion. Later, parties used search terms to identify responsive documents for review, with mixed success. Recently, sophisticated algorithms packaged as e-discovery software applications have exploded onto the scene as a more efficient and cost-effective identification method, especially in cases involving large quantities of ESI. These software programs known as “technology assisted review” or “predictive coding” (TAR/PC) are provocative and hold much promise, but is it right for you? Is the science understandable and defensible? Is the cost worth the reward? How do the courts view Predictive Coding? This article will address all of these questions and more.

The authors’ conclusions are three-fold: First, we believe the Predictive Coding approach of Technology Assisted Review is more effective than keyword search methods alone; second, we believe that the money spent on Predictive Coding is more than offset by substantial savings in review costs; and third, we believe that “defensibility” flows from the workflow and process that is wrapped around the technology, and not from the technology itself.

BASICS OF PREDICTIVE CODING

Computerized technology has greatly affected the efficiencies of document review over the years. Keyword searching—in which only those documents that “hit” on certain key words are reviewed—was a breakthrough technique. Yet, despite studies such as the Blair-Maron study which concluded that keyword searching only yields from 20% to 40% of the relevant documents, keyword search remains today as the most common approach used for identifying documents to be reviewed. Keyword search was advanced through Boolean searches which allowed search terms to be combined through terms such as “W/10” words. Studies have shown that these combinations can improve retrieval of relevant documents to a range of 65% to 80%. However, this approach required the engagement of skilled linguists to develop productive combinations, which was expensive and time consuming.

Predictive Coding changes all that by automating this labor-intensive approach.

The science that underlies Predictive Coding is not new; it has been used in other industries such as energy distribution, air traffic control, and insurance coverage, among others, for decades. We encounter this science, known as “predictive analytics,” every time we order a book on line and receive suggestions for other books we might like. Thus, although we hear lawyers worry that the underlying science of Predictive Coding is a “black box” that may not achieve accurate results, the underlying algorithms are well-established, documented, and are rock solid.

The Predictive Coding process begins with a subject matter expert or “SME” reviewing an initial set of documents for relevance. Additional review is performed until the system “stabilizes” (meaning the system has learned all it can and subsequent training would not improve the results). The entire data set is then run through the system and documents are ranked in priority order of relevance.

How can Predictive Coding be used?

Predictive Coding applications can be used with success at several stages of a case.

Early Case Assessment: Predictive Coding can be used on ESI collected from a few key custodians early in the process as part of a settlement risk analysis.

Zone 1 consists of 23% of the document population and contains 80% of the relevant documents. Counsel would likely conduct a linear review of all of these documents.

Zone 2 consists of the middle 16% of the population and contains 15% of the relevant documents. Counsel could sample these documents and determine whether they require a linear review, and would document the results to share during a meet-and-confer session with the opposing party to support cost-sharing in the event the opposing party seeks production.

Zone 3 consists of the bottom 61% of the document population, but only yields 5% of the relevant documents. Upon review of a random sample, counsel would expect to find few relevant documents. They would document their results and likely conclude that further review will not be necessary.

The firm would focus its initial review effort on just 23% of the population, and in so doing, identify and produce 80% of the relevant documents.
Stratified Review: When counsel faces a tight time frame and a very large document set, Predictive Coding can be used to make decisions about review priority. Consider the graph on the previous page. Using the relevance scores, a review team can divide the collection into three zones.

Review & Production QC: Consider the table below from an actual case study. Documents were manually reviewed by humans as well as Predictive Coding was applied to the document set. The team compared the designations of the human review to the Predictive Coding system’s relevance scores.

<table>
<thead>
<tr>
<th>HUMAN REVIEW</th>
<th>Responsive</th>
<th>Not Responsive</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Predictive Coding algorithm says responsive</td>
<td>3,048</td>
<td>2,531</td>
<td>5,579</td>
</tr>
<tr>
<td>Predictive Coding algorithm says not responsive</td>
<td>1,576</td>
<td>40,495</td>
<td>42,071</td>
</tr>
</tbody>
</table>

There were 3,048 documents that the review team and the Predictive Coding application agreed were relevant and would be produced. There were 40,495 documents the review team and the Predictive Coding application agreed were not relevant and would not be produced. A senior attorney with domain expertise then reviewed the 2,531 and 1,576 documents (highlighted above) that the human review had disagreed upon with the Predictive Coding system, and made a final designation for production. The legal team used this approach to confirm results as well as justify that a reasonable effort has been made to quality check the production of responsive documents.

WHAT ARE THE JUDGES AND CASE LAW SAYING?

The cases that address Predictive Coding are typically – but not always – federal cases decided by United States magistrate judges, and the cases discussed below were decided in 2012. The key questions addressed by courts are (1) will courts allow parties to use TAR; (2) will courts require the parties to use TAR; and (3) where the parties have agreed to use TAR, what are the rules of engagement?

A court first allowed the use of Predictive Coding in Global Aerospace, Inc. v. Landow Aviation, L.P., et al, a complex dispute in Virginia state court. The plaintiffs opposed defendants’ plan to use Predictive Coding because they believed it would limit the production to a percentage of relevant documents. Defendants’ motion was granted in a short order which allowed the use of Predictive Coding but also allowed the receiving party to raise issues of completeness with the court.

The court in FORHB, Inc. v. HOA Holdings, LLC compelled the use of Predictive Coding in a sua sponte show cause order requiring the parties to use Predictive Coding or demonstrate why they should not be required to use it. The court instructed the parties to choose a single vendor to handle both sides’ Predictive Coding project. It will be interesting to see how the parties respond to the order.

A party sought to compel its adversary to use Predictive Coding in Kleen Products LLC, et al. v. Packaging Corp. of America. After a protracted struggle and several hearings, the plaintiffs withdrew their demand regarding Predictive Coding as to existing document requests and completed productions, but left open the possibility that they might renew their demands for the use of Predictive Coding in the future.

The best known case addressing Predictive Coding is DaSilva Moore v. Publicis Groupe and MSL Group (SDNY), which commanded considerable attention in early 2012. In that case, the parties agreed the defendant would use Predictive Coding but argued about the Predictive Coding rules of engagement. In a February 24, 2012 opinion, the court assured the parties that Predictive Coding is not appropriate for all cases or even all large cases; that parties intending to use Predictive Coding must choose a reliable vendor and program, and must design an “appropriate process” that includes “appropriate quality control testing.” Specifically, the parties should:

1. Bring both vendor experts to a court hearing to respond to questions.
2. Allow the requesting party to view the documents used to train the Predictive Coding system.
3. Not adhere to an arbitrary number of documents to be produced, without reference to the statistical results.
4. Not arbitrarily limit the number of iterative reviews used to “train” the system, but continue to assess system stabilization along the way.

Cooperation and transparency are taken to an unusual level in In re Actos Products Liability Litigation. The In re Actos parties entered into a detailed protocol wherein three experts from each side met and collaboratively reviewed the training set of defendants’ documents together to agree upon relevance determinations. Robust protections were included to guard documents subject to privilege and confidentiality. The In re Actos protocol is not for everyone, but it is a good resource for parties considering the use of Predictive Coding.

CONCLUSION

Technology Assisted Review/Predictive Coding is a provocative, exciting, and for some, an intimidating technology. Predictive Coding is not an “easy button” that will enable a party to magically find all of the relevant documents in a large dataset. Like all technology tools, it must be used in conjunction with expert help and a sound workflow, frequent sampling, documentation of results, and at least some degree of transparency. Most importantly, Predictive Coding can dramatically reduce the time and cost of document review, enabling a party to concentrate its efforts on the most important documents earlier in a case. We therefore urge every litigant to at least consider making Predictive Coding a part of his or her technology tool kit.

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Cynthia Courtney, a VP at D4 LLC, has over ten years of e-discovery experience as both an in-house lawyer and as e-discovery counsel for a law firm, providing e-discovery advice and support on existing matters, representing clients at discovery conferences, and creating document retention and litigation readiness programs. She has written widely and presented at major e-discovery conferences.
TRIBAL EMPLOYMENT LAWS: LEGAL AND CULTURAL CONSIDERATIONS

There are numerous unique challenges that law firms face when approached by businesses seeking to do projects on tribal lands, or when working with a tribal entity. Whether working with financial service providers, energy companies, technology consultants, healthcare providers, or others, it is important to understand complexities involved in tribal law throughout all phases of a tribal project. Outlined here are typical employment issues that businesses should consider before proceeding with a project, employment practices commonly implemented during a project, and if an employer is sued in tribal court.

1. BEFORE THE PROJECT – REVIEW THE TERO

Many, perhaps most tribal nations have employment laws, usually called “Tribal Employment Rights Ordinances” or TEROs. Your business should inquire about such a law and have it reviewed. TEROs usually apply to employers which, variously, have a contract with the tribal nation, are doing business within the tribe’s reservation, or employs tribal members.

Generally, these laws are within the sovereign authority of a tribal nation, but your business should obtain a legal review for your project. More important, there may be ways to structure your project to regulate application of a TERO. The most effective way is to negotiate an agreement with the sovereign to avoid litigation. We have negotiated limits on the application of TEROs to businesses, and we believe such agreements can be enforced in court if the agreement is carefully crafted.

The content of TEROs varies considerably, but typical provisions include:
- A preference for hiring, training and advancement for Native Americans;
- Required accommodation of traditional practices or required training for non-Natives regarding traditional practices (which is a good idea);
- Hiring halls and wage scales; and,
- Protection against at will employment and retaliation.

Some TEROs address unions. Historically, there was some conflict between unions, asserting a preference for seniority, and tribal nations, asserting a preference for Native Americans. More recently, we have seen TEROs that recognize the right to unionize, provided native preference is recognized. If your project will include union labor, you should try to reach an agreement acceptable to both the union and tribe. We have found that to be achievable. We have also dealt with tribes which have enacted right to work ordinances. At least in the research we have completed, these are likely enforceable.

Several TEROs also require a preference in contracting. Typically, the contract must be above a certain amount, the tribal nation provides a list of contractors which qualify for preference, and a preference-eligible contractor must have an opportunity to meet a lower bid. Our experience is that preference-eligible contractors often lack expertise or sophistication to meet the requirements of a complex project. We have found
that a firm commitment in writing to retain preference eligible contractors for simpler tasks, earth moving for instance, can achieve relaxation of other requirements. We caution that care has to be taken in negotiating exceptions to TEROs. Tribal nations are as jealous of their sovereign authority and jurisdiction as other governments. By care, we mean sensible proposals on the front end that provide concrete benefits for the tribal nation, and careful crafting of enforcement provisions in case the tribal nation attempts to enforce terms that were waived. Litigation about whether waivers are enforceable is complex and expensive.

TEROs are enforced in two ways – regulatory and adjudicatory. Usually one or the other is emphasized. For instance, a tribal nation may provide a hiring hall, and an employer would be required to hire qualified personnel from that hall before hiring others, or perhaps even before bringing regular employees from other locations to the tribal project. Most TEROs have some adjudicatory enforcement mechanism with a right to some discovery, a trial and appeal. We have found these forums to be informal. We have also found the cost of adjudication of an alleged TERO violation to be lower than in state or federal forums, and generally rely more on equity and common sense.

2. EMPLOYMENT PRACTICES – LEARN SOME HISTORY & CULTURE

When your business starts a project, you will likely believe you have a “clean slate” with the tribal nation. Our experience is that the tribal nation and members will see it otherwise. As you know, most tribal nations have a painful history and many tribal members will view your business and project with suspicion. In all candor, some tribal members may appear to you to be paranoid, on the watch for conspiracies, and unwilling to understand the benefits of your project.

The good news is you have an opportunity to address this through understanding the tribal nation and constructing good employment practices. Your employees can be your ambassadors to the rest of the tribal members, advocating the advantages of your project and the propriety of your business. If you can achieve this, your project has considerably advanced the chances of success.

We have found the following to be useful practices:

- Providing reasonable accommodation for tradition, for instance, leave for traditional holidays and for the traditional period for bereavement.
- Reimburse employees, to a reasonable amount, for the cost of traditional practices, particularly healing practices.
- Provide a location and structure, perhaps on your project, for traditional practices and consider sponsoring practices in an appropriate manner.
- When your employees achieve significant performance indicators, preferably measured as a group, consider taking a step that would benefit the tribal nation. You might contribute to a charity in the employees’ name, assist in a project, even purchase land that the tribe views as part of its indigenous base.
- Educate your supervisors about the tradition, history, and culture of the tribe.
- A wellness program that addresses the issues faced by your host nation may be appropriate.

Training is very important. Your business should strive to evaluate which employees, and contractors, might be developed and advanced. Your business might consider scholarships and apprenticeships for education. You might provide education to employees about the finances.

The employment practices you develop can be a creative part of your project, and some businesses have come to view these practices as the most rewarding part of the project because they create a vehicle for satisfaction and enrichment. One note of caution that may not be necessary, your practices should not sacrifice the necessities of your workplace. An example may assist in peyote ceremonies. We believe general work rules, such as a “fit for duty” requirement and prohibitions on possession and use of drugs at work, are the most effective way to address the possibility that peyote use could compromise the workplace. A policy directly prohibiting (or endorsing) peyote use is not recommended.

Finally, you will need to be patient, and flexible, as you learn tribal traditions. This will be a process. Much of what you learn, you will wish you learned before. For instance, a recent Navajo Supreme Court case explained that, traditionally, an elder would “direct” someone “through oblique methods of speaking that emphasizes voluntariness.” For instance, should someone say that there is not enough firewood, the listener should understand she or he is being asked to take action to address the situation. That is good information for an employer, and its supervisors, to know. Regardless of whether the supervisor is native or non-native, this way of communicating would have workplace implications.

3. LITIGATION – STAY SENSIBLE

Litigation in tribal forums is different. We find that the rules do not provide clear and complete guidance. People are very likely to know one another. The pace of proceedings is generally faster (with regard to getting to trial and the absence of motion practice and discovery) and slower (with regard to actual proceedings).

Tribal law is different. The law is often a confusing accumulation of both traditional law and Anglo or European law. Typically, across time different legislative bodies enact inconsistent, even contradictory, laws, due to internal politics, the “stance” of the tribal nation to the “outside” world at various times, and advice given to tribal nations by “outside allies.”

Here are some thoughts about relatively unique issues you may encounter in tribal forums:

- You may need an expert to explain how your employment action is consistent with traditional law
- Your witnesses may testify in the tribal language
- Your witnesses may be hesitant to testify before elders or superiors
- You may be perceived as aggressive simply for questioning a witness who is older or in a position of regard

Although every tribal nation and tribal forum is different, generally, we advise that your argument and evidence take into account tribal law and tradition, but also emphasize equity, fairness, and common sense.

4. CONCLUSION – MORE TO LEARN

Whatever phase of a tribal project your business is in, you will find challenges. As one example, we have not considered treaty rights your host nation may have. We recommend you obtain experienced counsel, stay patient, stay flexible, and focus on goals with mutual benefits for your business, your employees, and your host nation.

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More information may be found at Modrall’s Native American Law Watch, Fall 2012 at www.modrall.com/NativeAmericanLawWatchFall2012
Parallel and competing criminal and civil cases are a fact of life in my practice areas but never fail to cause consternation to risk management. The trucking and transportation industry must constantly contend with the possibility of criminal charges against drivers, especially in highly publicized fatality cases. In the professional liability world, a negligent act, such as a lawyer failing to file suit within the statute of limitations, may also be connected to an act giving rise to criminal charges, such as stealing the same client’s settlement obtained from another defendant. In Las Vegas, parallel criminal and civil proceedings also occur where gamblers fail to pay certain forms of debt to a casino. The district attorney may pursue criminal charges while the casino pursues its civil remedies.

When these competing, parallel proceedings occur, they create tension arising from the interaction of a criminal defendant’s Fifth Amendment rights against self-incrimination versus the comparably minimal restrictions of civil discovery. If the criminal defendant participates in civil discovery before the criminal charges are resolved, the information gathered could be used against him in the criminal case. Most often, the criminal defendant wants to stay the civil matter pending the outcome of the criminal matter. The civil plaintiffs, and sometimes other civil parties, typically resist this request. Yet if the criminal defendant does not participate in civil discovery, he risks an adverse judgment that may, in some circumstances, flow to an employer. If a criminal defendant invokes his Fifth Amendment rights during the course of parallel civil discovery, what happens?

I. THE FRAMEWORK: WEIGHING OPTIONS AND RISKS

In my home state of Nevada, there was no guidance on this issue until Aspen Fin. Servs. v. Dist. Ct., 128 Nev. Adv. Op. 57, 289 P.3d 201 (2012) issued. The case arose from certain real estate investments which failed. During the civil lawsuit

[1]he Aspen defendants filed a motion with the district court to stay any depositions and written discovery that would require their employees and officers or Guinn to make testimonial statements. The Aspen defendants asserted that the Federal Bureau of Investigation
(F.B.I.) had initiated a criminal investigation into their activities at the behest of the Gragson plaintiffs. They further asserted that they had been served with a federal grand jury subpoena seeking information about various subjects, including the loans for the Milano property. In addition, the Aspen defendants argued that the Gragson plaintiffs had been, and would continue, funneling discovery obtained in the civil proceeding to the F.B.I. After an extensive hearing, the district court issued a written order summarily denying the motion without prejudice.

Id. The court noted the difficult choice confronting a party to both civil and criminal proceedings.

Here, if discovery is not stayed, Guinn, in particular, will face a difficult choice when the Gragson plaintiffs depose him. He can either waive his Fifth Amendment privilege and risk revealing incriminating information to criminal investigators, or he can assert his privilege and forego the opportunity to deny the allegations against him under oath, thereby effectively forfeiting the civil suit.


The Supreme Court of Nevada chose to adopt a framework used by the Ninth Circuit to address this predicament.

[C]ourts should analyze the extent to which the defendant’s Fifth Amendment rights are implicated as well as the following nonexhaustive factors: (1) the interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Id. (quoting Keating v. Office of Thrift Supervision, 45 F.3d 322 (9th Cir. 1995). It appears other states and federal circuits have considered similar standards. Applying these criteria to the facts, the court ultimately concluded a stay was not appropriate.

II. PRACTICAL CONSIDERATIONS FOR HANDLING THE TENSION

For practical purposes, what can clients do when this problem arises? As the courts have noted, the answer is case specific. For instance, Nevada is like many jurisdictions in that misdemeanor traffic convictions are typically inadmissible. Pursuing a stay of civil discovery pending resolution of a misdemeanor traffic charge may cost more to obtain than it is worth. To explore other factors to consider, assume a trucking accident has occurred with multiple fatalities and the truck driver has been charged with at least one felony.

Step One: What is the driver going to do? Do not necessarily assume the driver will invoke his Fifth Amendment rights during the civil aspect of the case. He may have reasons to actively and vocally defend himself. However, if the driver has been charged and will invoke his Fifth Amendment rights, then it seems the proper procedure is to file a motion in the civil case seeking a stay of discovery pending the resolution of the criminal charges.

Step Two: Will the plaintiffs oppose the motion to stay? This is a significant question. Opposing this motion is the more active and expensive path for plaintiffs, but also seems more common. If the court denies the motion for stay, the plaintiffs must then go through the normal discovery process, which may force the driver to assert his Fifth Amendment rights. Should he do so, it could result in summary judgment against him unless other, sufficient evidence can be presented. Nevada explicitly contemplated this result in Francis v. Wynn Las Vegas, LLC, 27 Nev. Adv. Op. 60, 262 P.3d 705 (2011) where Girls Gone Wild founder Joe Francis invoked Fifth Amendment rights during deposition. Francis concluded Fifth Amendment rights may be invoked in civil litigation, however “a claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation.” Id. at 711 (citation and quotation omitted).

Not opposing the motion for stay seems the more cost-effective route, especially for plaintiffs’ counsel retained pursuant to a contingency fee. In doing so, the State effectively prosecutes the plaintiffs’ liability case at no cost to him. If the driver is convicted, Nevada’s NRS 41.133 establishes a judgment of conviction will impose civil liability, leaving only damages for trial. Even if the State does not obtain a conviction, it performs much of the work required to prosecute a civil claim. Plaintiffs’ counsel also gets a free mock trial experience to see how the case plays to a jury. For this reason, some transportation clients have elected to hire separate criminal counsel to defend the driver so long as the civil case remains pending. My office has erected partial firewalls in the past to enable an independent criminal defense while coordinating, where possible, the criminal and civil defenses.

Assuming the motion for stay is opposed, know the motion faces an uphill battle. Aspen noted a stay is not constitutionally required and is an extraordinary remedy only proper in extraordinary circumstances. It cited to case law from around the country concluding similarly.

Step Three: Will the court grant the motion to stay civil discovery? A preliminary concern of courts considering these motions is the degree of overlap between the civil and criminal cases. If a driver is criminally charged for the same accident that is the subject of the civil case, the degree of overlap is very high. However the driver’s pending charges for tax evasion would result in very little overlap and would not favor a stay of civil discovery.

If the cases sufficiently overlap, the courts then consider the status of the criminal matter. Generally, if criminal charges have not been filed civil courts will be reluctant to grant a stay absent special circumstances demonstrating an indictment is inevitable. Assuming these factors are satisfied, the courts then proceed to apply the five factors discussed above.

In summary, competing criminal and civil claims present difficult risk management scenarios. They can complicate defense efforts and increase the cost of defense by necessitating civil and criminal counsel. Clients who proactively address the problems these competing interests present have the best chance to minimize potential adverse results.

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“Don’t Mess With Texas” may be the unofficial state motto. If an employer in Texas, maybe the motto should be “Don’t Mess With My Employee Injury Claims.” Reason being, it is no secret in the lone star state that tens of millions of dollars are being saved by employers, who manage their own employee injury claims. In 2012, the world’s largest retailer, Wal-Mart, threw its hat into the ring of this Texas tradition. Texas employers, like Wal-Mart, who manage their own employee injury claims, are called “nonsubscribers.” So the question may be, can employers in your state be nonsubscribers and should it be part of the discussion in your state legislature?

As some history, since enacting its first workers’ compensation system laws in 1913, the Texas system has always been voluntary for employers.¹ There is no requirement that a Texas employer subscribe to the state workers’ compensation system. Until the 1980s, Texas employers typically chose to subscribe. However, when workers’ compensation rates astronomically increased, so dawned the age of “nonsubscription.”² Texas nonsubscription offers employers an option to manage their own employee injury claims. Today, most Texas employers either subscribe to the state workers’ compensation system or elect to “opt-out” as nonsubscribers.³ Although estimates vary, approximately 44% of employers have opted out of the Texas workers’ compensation system.⁴ Recent data indicates about 114,000 Texas employers operate as nonsubscribers.⁵ Texas is the only state in the union where businesses can elect to nonsubscribe.⁶ As a result,
Texas employers have more than one option, when it comes to providing benefits to employees for workplace injuries, and are saving millions of dollars in the process.\(^7\)

Who are the nonsubscribers in Texas? The Texas Department of Insurance (TDI) completed an Executive Summary of a study of nonsubscription employers to determine their characteristics.\(^8\) The study found 53% of manufacturers, 49% of wholesalers/retailers, 38% of transportation, 37% of construction and 30% of the health service employers are nonsubscribers.\(^9\) As an interesting comparison, the U.S. Bureau of Labor Statistics (BLS) published a November 2012 “Economic News Release” providing findings from a study showing that 20% of nonfatal occupational injuries and illnesses, requiring days away from work, came from five occupations: laborers, nursing aides/ orderly/patient attendants and orderlies, janitors and cleaners, truck drivers and police officers.\(^10\) A quick comparison of these TDI and BLS findings may suggest that employers in Texas, whom most often are responding to employee injury claims, are taking the option to nonsubscribe. These employers, choosing such option, are not fly-by-night enterprises. Texas nonsubscribers are a who’s who list of Fortune 500 companies, including Wal-Mart, Best Buy, Tyson Foods, Hobby Lobby, Swift Transportation – and the list continues.

How does an employer nonsubscribe? Texas nonsubscription is not the wild, wild west. There are specific requirements of employers electing to nonsubscribe and substantial case law has developed, which further clarifies such requirements. Generally, an employer must make certain filings with the Texas Department of Insurance, Division of Workers’ Compensation, complying with various notice provisions.\(^11\) The Texas Labor Code provides specific monetary penalties for noncompliance.\(^12\) Typically, after a decision is made to nonsubscribe, an employer will simply tender written notice to all employees that traditional workers’ compensation is not a provided benefit. Thereafter, any employee injury claim will be managed through a company sponsored employee benefit plan. This plan is presented to the new or current employee for their review and signature. The employee’s benefit plan, written in strict compliance with federal employee benefit law, will detail the handling of work-related injury or illness claims. The plan often includes, among other provisions, mandatory employee injury reporting periods, employee treatment management requirements and an arbitration provision. In conjunction with intentions to nonsubscribe, employers will most often obtain supplemental insurance coverage for the fees and indemnity, or settlement payments, associated with resolving the employee injury claims. Most importantly, because nonsubscription employee injury claims costs are better managed, by these employers and not a governmental entity, tens of millions of dollars are being saved by Texas nonsubscribers.

Can employers in your state be nonsubscribers and should nonsubscription be part of the conversation in your state legislature? The short answer is yes, to both questions. We certainly know workers’ compensation systems have been used in all states for decades. As with any governmental bureaucracy, these systems are plagued with increasing costs and delay, some of which have been recently overhauled. California is an example of an overhaul, in recent years having passed a comprehensive workers’ compensation reform measure. The bigger question is probably whether the reform saves money and improves California’s system. Nevertheless, although all states may have workers’ compensation systems in place, many of these systems do not maximize the efficiencies available in the nonsubscription model used by Texas employers. This is a fact starting to be recognized by other states. Most recently, in Oklahoma, where workers’ compensation reform was only recently enacted, the legislature has now taken up a piece of legislation designed to create an “opt out” provision in the state workers’ compensation laws. This provision would allow Oklahoma employers to elect for a system that is, in some ways, similar to Texas nonsubscription. Even though the Oklahoma legislature has not passed the new law, it is part of the conversation. It is also understood a similar measure may be pending before the legislatures of Tennessee, South Carolina, as well as other states.

Should more states be evaluating nonsubscription? Yes, although there are detractors. Some opponents to the nonsubscription system claim employers abuse the option by various self-serving measures. The AFL-CIO and some unions/labor organizations are often on the side of mandatory workers’ compensation, and they, along with other interests, allege nonsubscription is often too employer friendly. Such allegations include employer wrong doing by enacting unreasonably short injury notice reporting requirements, often resulting in employee waiver of benefits. Additionally, there are claims of too restrictive medical care/recovery treatment networks/timelines, as well as claim conflict resolution through mandatory arbitration, rather than a “jury of your peers.”

Irrespective of these claims, many Texas employers have responsibly and successfully managed nonsubscription programs for over 30 years – and kept long-term, happy employees. Employee surveys of benefits obtained, within the context of nonsubscription programs, have returned positive feedback and good outcomes. The Executive Director of the Texas Association of Responsible Nonsubscribers (TXANS), Steve Bent, recently stated, “We are happy to help those in other states, who contact TXANS, seeking more information about our experiences. We hope that they will build upon our programs to create new and even better solutions to meet the needs of the ever changing work environment.”

Whatever your thoughts, after further looking into the Texas nonsubscription system, and seeing the costs these Texas employers are saving, you might just admit that your unofficial state motto needs to be changed too, along with your state’s workers’ compensation laws. Feel free to send this on to your state legislators.

\(^{11}\) http://www.txans.org/questions.htm; see also http://www.txans.org/overview.htm
\(^{12}\) Id.
\(^{8}\) http://www.nonsubscriberalliance.org/nonsubscription.php
\(^{9}\) http://www.tdi.texas.gov/reports/wcreg/nonsub93.html
\(^{10}\) http://www.txans.org/questions.htm
\(^{11}\) Id.
\(^{12}\) http://www.bls.gov/news.release/osh2.nr0.htm; see also http://www.nonsubscriberalliance.org/downloads/DWC57.pdf; see also http://www.txans.org/laws.php
\(^{13}\) Id.
Since late last year, the National Labor Relations Board (the “Board”) has drastically changed federal labor law in ways that will impact both union and non-union businesses. Beginning in late 2012, the Board issued a flood of decisions that changed businesses’ obligations concerning employment policies, disciplinary procedures, union avoidance strategies, and several other practices. A federal court then added to the confusion by voiding President Obama’s recent “recess” appointments to the Board, thus casting doubt on whether its decisions are valid. As businesses attempt to navigate these changes to this already arcane body of law, there are four key steps they should take.

1. **UNDERSTAND WHAT CONSTITUTES “PROTECTED CONCERTED ACTIVITY”**

   The change that may impact non-union businesses the most is the expansion of the rights federal labor law provides. The National Labor Relations Act (Act) protects employees’ right to engage in “protected concerted activity,” i.e., to act to improve working conditions for themselves and co-workers. Both union and non-union employees possess this right. Before 2012, however, the Board primarily applied this doctrine to protect traditional labor activities, such as picketing or advocating for a union. Also, because most non-union employees did not know about these rights, they rarely filed actions. But the Board has worked hard recently to inform non-union employees of these rights and expand the rights to encompass new types of activities, including social media conduct.

   To ensure they do not unlawfully retaliate against employees, businesses must understand what activities are protected. The key question is whether the employee is doing something lawful that reasonably could improve working conditions for both her and her co-workers. The Board applies this standard liberally in favor of employees. For example, in one recent case, the Board reinstated five employees who had complained about a co-worker on Facebook after the co-worker criticized their performance. The Board reached this conclusion because it believed they were attempting to defend themselves against the co-worker’s criticisms. Conversely, when an employee posted comments about her co-workers on Facebook only to vent and advance her own interests, she was not protected.

   It also is critical for individuals who prepare or enforce employment policies to understand this concept, because the Act largely prohibits businesses from discouraging employees from engaging in protected concerted activities. Thus, if a policy prohibits an employee from doing something lawful that could improve working conditions for

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**FOUR TAKEAWAYS FOR BUSINESSES FROM RECENT CHANGES IN FEDERAL LABOR LAW**

*William J. Kishman*  
Bingham Greenebaum Doll LLP
her and her co-workers, the policy will violate the Act. Under recent Board guidance, the policies most likely to offend this requirement are social media policies and confidentiality policies because they often bar employees from discussing working conditions. Due to this new law, businesses may find it prudent to reassess old policies with an eye toward eliminating language that reasonably could coerce employees against engaging in protected concerted activity.

2. REASSESS YOUR INVESTIGATORY AND DISCIPLINARY PROCEDURES

The Board also has changed the rules for investigating employee misconduct and issuing discipline. In one notable decision, the Board rescinded its decades-old rule protecting employee witness statements. Previously, if an employee witnessed misconduct and then described it to her employer in a confidential witness statement, a union could not compel the employer to disclose the statement. The Board now requires union employers to disclose such statements unless they prove, under a high evidentiary standard, that disclosing them will cause harm. To mitigate the problems that can arise from disclosing witness statements, union businesses should obtain as many forms of evidence to support employee discipline as possible, because individual witness statements will now be more vulnerable to challenge. Businesses also should consider other options for potentially shielding confidential investigatory information, such as taking steps to utilize the attorney-client privilege.

In another surprising decision, the Board generally prohibited union and non-union businesses from instructing employees not to discuss ongoing investigations. This ruling should make it more difficult for companies to protect the integrity of their investigations and minimize resulting distractions. As a result, businesses should re-vamp their investigatory procedures to ensure they are conducted and concluded as quickly as possible, without impairing their efficacy. It also will be prudent, in many cases, to more significantly limit the number of employees who are apprised of, or questioned about, sensitive misconduct.

Finally, when investigating employee misconduct, businesses should understand that the Board has subtly expanded the scope of “Weingarten rights.” This doctrine gives union-represented employees the right to have union representatives attend any meetings with employers that the employees reasonably believe to be “investigatory.” The Board recently made it far easier for union-represented employees to invoke these rights, such as by permitting one employee to invoke his rights with a vague statement about union representation, and by deferring even more to employees’ opinions about whether or not such meetings may be investigatory. Accordingly, in many cases, union businesses may want to simply err on the side of providing union representation if they are uncertain whether it is required. Companies can significantly minimize the disruptions union representatives can create at these meetings if they know what the representatives can and cannot do.

3. PREPARE FOR MORE UNION ACTIVITY

After the November elections ended, unions largely shifted their focus to lobbying and organizing new businesses. One recent decision will significantly expand the resources they have available for this, by increasing the dues they can recover from non-members. In most states (i.e., those without “right to work” laws), if an employee declines to join an elected union, she still must pay the union for expenses it incurs on her behalf. Under prior law, unions generally could charge these non-member objectors only for actions that directly benefited them, such as negotiating contracts and processing grievances, but not for actions with more attenuated benefits, such as lobbying. The Board recently overturned this rule. Although many believe the decision violates established Supreme Court precedent, it will effectively permit unions to charge non-member objectors for virtually everything, at least for the time being.

As a result, unions should have significantly more revenue available for lobbying and organizing. This means that controversial state laws on unionization, such as the measures that recently passed in Indiana, Michigan, and Wisconsin, will be more vulnerable to challenge. It also means that businesses can expect more and better funded union organizing campaigns. The problems this creates for companies are compounded by the fact that the Board’s “quICKie election rules” may become effective in the near future, which would significantly decrease the time a union needs to organize a workplace. Accordingly, it will be particularly important for non-union businesses to prepare anti-union campaigns in advance. Once an organizing campaign begins, it may be too late to prepare an effective response.

4. CONSIDER APPEALING ANY RECENT ADVERSE BOARD RULINGS

When businesses consider how to respond to these decisions, they should also note that the decisions, and others, may be invalid. In late January, a federal court of appeals voided President Obama’s recent “recess” appointments to the Board, holding that they were not appointed during a true recess. Because the Board needs at least three members to Act, this could void every decision the Board has issued since these members were appointed in January 2012. This court is not likely to have the last word on the matter; the Obama administration almost certainly will ask the Supreme Court for review. If the decision stands, however, it will have major consequences. First, the decisions above, and many others, will be void. Second, it will become far more difficult for President Obama and future presidents to utilize recess appointments to circumvent a filibuster for controversial appointees. As a result, this decision could lead to a more moderate Board.

Despite this uncertainty, businesses should not sit on their hands. Any business that has received an adverse ruling from the Board since January 2012 should strongly consider appealing soon. Due to the Board’s unique procedural rules, businesses can appeal most Board decisions to the court that issued this decision, which should reverse the Board’s rulings. If the Board first moves for enforcement, however, it could bring the matter before a less favorable court, and potentially deprive the business of the benefit of this decision.

CONCLUSION

Many businesses find federal labor law easy to overlook, given its complexity and the tendency to believe it covers only union companies. Doing so becomes increasingly perilous, however, as the Board continues to expand the law, including in ways that more significantly implicate non-union businesses. By taking the time to understand federal labor law, and by keeping in mind the concepts above, businesses can significantly reduce the obstacles that this expanding body of law creates.

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“The cobbler’s children go without shoes.”
“Physician, cure yourself.”

Can we add to these vocational ironies that some lawyers and senior management among us may not be very efficient at planning in our own lives? We all know someone who is very good at his/her profession, but is completely unable to use this ability to help him/herself or his/her own family.

Perhaps we do not rise to the level described by Charles Dickens in *Bleak House* (1852) where Mrs. Jellyby is heavily involved in charitable work for poor African children but criminally neglects her own family and home. But how many of us have updated estate plans which clearly define for our loved ones and colleagues how our estate is to be administered and distributed? What if you became disabled and unable to work, either temporarily or permanently? Have you appointed someone under a power of attorney to handle financial, business and health matters?

**CONSIDER THE FOLLOWING SITUATIONS:**

- Your company has purchase, sale and valuation provisions for your equity interest in the event of death, disability or divorce. Who handles that as your representative?
- You are separated from your spouse for years, but never completed the actual divorce. Nor did you change the designation for your (now) estranged spouse to act on your behalf as executor, successor trustee or attorney-in-fact.
- You are temporarily disabled in an accident or by an illness. Who has the power to vote your interest in your company or firm?
- You have a significant other either of the opposite sex or the same gender. Does that person have inheritance rights and decision-making authority during your lifetime without written documents in place?

The answers to these questions vary as each state has its own laws about intestate succession: what happens when you die without a Will; who has rights as next of kin; and, what happens if spouses are separated but not divorced. If you are the person charged with administering the payouts, perhaps you will wish that you had the conversation about estate and asset planning before the triggering event occurred.

Which brings us to the ethics surrounding these seemingly personal issues: is it appropriate to ask individuals in top management and with equity interests whether an estate plan is in place and current? I submit that it is good risk management to do so and that the inquiry can be made in ways that are not intrusive, but thoughtful and designed to lead to more discussion. Certainly the firm will be impacted by death, disability or divorce (or other relationship break up) of these key people. These events can affect the continuity of the business, strategy, and day-to-day
operations. When estate and asset plans are coordinated with company documents, the process likely will go more smoothly.

Who should be the person to make the inquiry and suggest action be taken? In a partnership, the issue can be raised at a partner’s meeting by the managing partner. In a corporation, the Chief Executive Officer can take on the task himself or herself in a small company as an agenda item at a management level meeting. In a large company, the CEO can direct that in-house legal counsel or a company vice-president with responsibilities for personnel issues does the honors. If you are counsel to a company that has not asked these questions, perhaps you offer to provide this service, or train someone within the company to do so.

One of the important lessons learned from the September 11, 2001, terrorist attacks was how seemingly simple situations can become complicated. Before returning to the practice of law, I served as a fundraiser for American Red Cross as well as a Disaster Services volunteer. I heard first-hand stories from our case-workers about the difficulties encountered by loved ones trying to sort out finances and benefits. The grief of the tragic event was often compounded by the fact that there was no, or out-dated, planning.

Various state court records and the Final Report of the Special Master for the September 11th Victim Compensation Fund (released November 22, 2004) provide insight into the issues associated with lack of planning. To make claims, each estate needed a valid personal representative. Approximately 60% of the individuals who died that day did not have an estate plan (slightly more than the average throughout the country). Families and/or friends had to apply for someone to be appointed without knowing who would have been preferred by the deceased. I believe this 60% is probably skewed lower than it would have been because almost 11% of the deceased were in the category of Uniformed Workers (Fire, Police, Port Authority, and EMTs). These individuals were more likely to have estate plans because of the dangerous nature of the work they do. Many had legal benefits through a union or other industry association which paid for all or part of the planning process.

The illuminating statistic is that 68.37% of the deceased were in the category Finance/ Banking/ Insurance/ Accounting. Of these, almost 70% did not have estate plans. They may have had life insurance and retirement benefits, but they did not have a plan coordinating these. Does this reflect some in your company or firm? Top management in large companies, such as Cantor Fitzgerald (bond traders), Marsh McLennan (insurance brokers) and Aon Corporation (risk management and insurance brokers), many of whom were in the business of planning for and advising others, did not have personal estate plans.

Here are some of the thorny issues case workers after September 11 reported:

- Documents were not updated.
- Individuals had been divorced, or married, or remarried.
- Children from prior marriage(s) not included, current spouse cared for everything.
- Children from many relationships, some unknown to the current and/or ex spouse.
- Accounts or life insurance benefiting others than family – prior or current relationships unknown to family.
- Same sex couples and unmarried heterosexual couples had not made written plans and were not awarded estate assets, which went to parents and siblings.

What can you do as a professional advisor or a member of senior management? Have the discussion in a systematic way. Some suggestions:

1. Managing partners and CEOs should set the example: “It took me years to build this company. I must have someone within the company to do so.”
2. Provide resources: Hold a “Make a Will Day” and bring in individuals trained to get people started in the process. Negotiate a discounted rate with an estate planning attorney or firm, perhaps a USLAW Network member? Employees do not have to use that attorney or firm, perhaps a USLAW Network member? Employees do not have to use that attorney or firm, perhaps a USLAW Network member?

3. Emphasize that it is important not only to talk the talk, but also walk the walk – especially if you are in a business that provides consulting and planning services!

How might the lack of individual estate planning affect your company? It could hold up a key vote, or leave a management vacuum while the details of payment are sorted out. It could disrupt operations because a representative had to be appointed by the court for lack of a designated person. Maybe the appointed representative is not the most reasonable or informed individual.

One of the benefits of planning may be inspiration to begin or rewrite the succession planning of the company. As top management and partners think about their own estates, it prompts them to think about the future with this company and their place in it. Estate planning can be a natural segue into strategic planning for management succession and retirement.

In closing, here are two tales with different outcomes: In San Francisco, a local law firm marked the sad and unexpected passing of a long time partner. It was learned that the partner did not have a signed Will. There was a draft, prepared in 1982, but no signed original or copy. The partner did not practice in the estate planning area, nor was he ill before his sudden death. It was a reminder of how fragile life is and how good intentions may not be enough. It was disconcerting for the firm, and more work for the family.

Our children were two and four years old when my husband asked patiently (yet again) what type of law did I practice? We did not have an estate plan. Nothing. No powers of attorney, no wills, no guardians appointed for the kids. Our life was a bit complicated as he had three older children. Then he mused that maybe that nice lawyer down the street could put together our plan. The thought of paying someone else for work I do every day motivated me. We had a completed plan within a month. Whatever motivates you, put it to work and get an estate plan in place.

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1 Harris Interactive® for Martindale-Hubbell® (2007 survey), 55% reported not having a Will. In the author’s experience and opinion, this number is artificially lower than it should be. There is a bias: people deliberately misreport because they do not want to appear “irresponsible.”
2 Final Report of the Special Master for the September 11th Victim Compensation Fund (US Department of Justice, November 22, 2004) Table No. 9
3 Ibid. Table No. 8
4 Harris Interactive® for Martindale-Hubbell®, supra.
5 Ibid.
A few years ago, I arranged to purchase a homeowners insurance policy from a major national insurance company. When I received the policy, I thought that the stated replacement value for the structure seemed low, particularly since I have an old house with unique architectural features. I consulted the agent, suggesting that the replacement cost limit needed to be higher. He sent me a letter stating in part, “You have all the coverage you need to completely rebuild your house.” My first thought was, “Now I do.”

The insurance industry is in the business of providing peace of mind, and insurance brokers, whether independent or affiliated with an insurer, as the people with the direct relationship with the policyholder, often try to give that peace of mind. However, when a loss occurs, which for some reason is not covered, the broker can be liable if the coverage available did not meet the insured’s expectations. This article will discuss insurance brokers’ duties, and some of the ways in which brokers can find themselves liable to insureds when the coverage turns out to be less than the insured expected.

Many times, of course, there is nothing a broker can do about the disappointed cov-
verage expectations: the loss is not insurable as a matter of law, or the claim set forth simply cannot be brought within the policy’s insuring agreement. This does not prevent the broker from being sued for negligence or misrepresentation, especially if they have been overly sanguine in their assurances of full protection. Brokers who advise their clients that they are “fully covered” or can “rest easy” in an age of increasingly complex insurance policies are inviting the disappointment of their clients and lawsuits when it turns out that there is seldom, if ever, “full coverage” for any loss or claim.

GENERAL DUTY OF INSURANCE BROKERS

The basic duty of an insurance broker is simple to state: An insurance broker has the duty to procure the insurance coverage requested by the insured. Jones v. Genone (1987) 189 Cal. App. 3d 950, 954; Business to Business Markets v. Zurich Specialties (2005) 135 Cal.App.4th 165. New York Courts have elaborated on that discussion of duty to note that the broker has the obligation to procure the coverage within a reasonable period of time, and, of course, advise if the coverage cannot be obtained. Wied v. New York Cent. Mut. Fire Ins. Co., 208 A.D.2d 1132, 1133-1134 (N.Y. App. Div. 3d Dep’t 1994)

Generally, the broker is not required to recommend additional coverage or higher limits. An insurance broker is neither a guarantor of coverage, nor a financial counselor or risk manager, and it is up to the insured to know its financial needs and condition. Murphy v. Kuhn 90 N.Y.2d 266 (1997) However, brokers have been found to have an obligation to be aware of the extent of their client’s risk and make it clear to the insured whether or not that risk was covered. Moreover, once a discussion commences between the broker and the client as to what the client’s needs and exposures might be, there is a potential risk that the broker will be considered a consultant and counselor, not merely a middleman, and will be found liable if the limits which are discussed turn out to be inadequate. Paper Savers, Inc. v. Naca, (1996) 51 Cal.App.4th 1090

A long-term relationship between the broker and the client, standing alone, is usually not enough to impose special duties on the broker. Even if the broker never advises an insured, over the years, that they might need to increase the policy limits of their policy to keep pace with inflation or their increased financial exposures, most courts have not held the broker to a heightened standard without more. Murphy V. Kuhn 90 N.Y.2d 266 (1997) Trupiano v. Cincinnati Ins. Co., 654 N.E.2d 886, 889 (Ind. Ct. App. 1995) Sandbulte v Farm Bur. Mut. Ins. Co., 343 N.W.2d 457, 464

EXCEPTIONS TO THE RULE

1. Misrepresentations:

The general rule of broker duty has been modified by many exceptions and limitations. First, of course, whatever insurance policy the broker procures for the insured must be adequately and correctly described to the client. A broker who advises the client of some, but not all of the exclusions contained in a policy of insurance can be liable when that one exclusion the broker didn’t happen to mention becomes the cause of a loss. Eddy v Sharp (1988) 199 Cal.App.3d 858 A broker who promises to make sure the policy covers a particular kind of loss, and fails to read the policy when it is issued to make sure the loss is covered, only to find out later that the actual policy excludes that cause of loss, can also be liable.

Presumably, some of the insureds who find they lack proper coverage could have corrected the coverage before the loss had they only read their policies. While normal business prudence would suggest that a policyholder would at least attempt to read their policy, and ask questions if they didn’t understand a provision or found an exclusion or limitation on policy limits, in many jurisdictions, the insured can recover even if, by reading the policy, he could have found the deficiency before there was a loss. Sometimes courts find that the necessary policy evaluation was beyond what was reasonable for a layperson, (Portella v. Sonnenberg, 74 N.J. Super. 354, 361 (App.Div. 1962), or that the normal rules of precaution are loosened in dealing with one’s own insurance broker (Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 423-424 (S.C. 1969); Moo v. Kuthe & Lane Ins. Agency, Inc., 89 S.D. 419, 430-31, 234 N.W.2d 260, 266.) If the broker has affirmatively (if incorrectly) represented the coverage and exclusions of the policy, the insured can be excused for failing to read the policy himself. (Eddy v Sharp supra 199 Cal.App.3d 858) Some courts will allow a jury to decide whether the insured was contributorily negligent for failing to read the insurance policy, or at least verifying the broker’s statements about the coverage provided. Schustrin v. Globe Indem. Co., 44 N.J. Super. 462 (App.Div. 1957)

2. Special Expertise:

If the broker holds herself out as having special expertise and purports to advise the insured about the insured’s coverage needs, the broker may be found subject to special duties. Thus, in a California case, Williams v. Hilly, Rogal & Hobbs Ins. Service (2009) 177 Cal.App. 4th 624. the plaintiffs wished to open a Rhino Linings dealership and were told that a certain broker was “the go-to person” for taking care of those needs. That broker also assured the plaintiffs that she was an expert on the product necessary to satisfy dealers’ needs. Plaintiffs placed themselves in her hands and she procured an insurance package which failed to cover plaintiffs’ workers’ compensation exposure. The court held that since the broker held herself out as an expert who would procure all the insurance they might need, they were entitled to rely on that. A South Carolina case noted that if the broker voluntarily assumes a duty to advise the insured, he may be liable for failure to use reasonable skill and care in explaining the policy or counseling the insured. (Trotter V. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 479 (S.C. Ct. App. 1989)

In addition, if the broker is compensated for consultation and advice, the broker can be held to have thereby assumed additional duties. Sandbulte v. Farm Bureau Mut. Ins. Co. 343 N.W.2d 457 (1984)

While brokers may indeed choose to develop expertise in the insurance needs of a particular industry, they may thereby subject themselves to additional liability exposure if the insurance packages they advise their clients to purchase do not cover all of the exposures which tend to arise in those industries. Third Eye Blind v. Near North Entertainment Ins. Services (2005) 127 Cal.App.4th 1311.

CONCLUSION

A reasonable policyholder should not rely completely on a broker to assure that the coverage the broker obtains is adequate, nor should a broker make representations that the coverage procured will always meet the insured’s needs. Over-promising and lack of diligence can leave an insured without needed coverage, and expose the broker to liability. As always, common sense and due care are in order.

Nancy N. Potter is an Associate Partner in Marchison & Cumming, LLP’s Professional Liability and Insurance Law practice groups, handling the defense of brokers and agents for errors and omissions, doctors, medical practitioners and lawyers; complex insurance litigation; and insurance bad faith defense. Ms. Potter also handles property coverage matters.
A PASSIONATE ALLIANCE WITH A PASSIONATE AFFILIATION

Frans Knüppe and Giancarlo Agace

TELF
Most members of international law firm alliances share a common objective: to be able, when needed, to place the affairs of a valued client safely into the hands of a lawyer in another jurisdiction confident that the client’s experience will rebound to the credit and glory of the referring lawyer.

What are the options for achieving this? If you are very big, you might try a global network of your own branches. If you are highly focussed and have a steady flow of one type of business in a particular jurisdiction, maybe a best friends approach will work. If you are mid-sized, without the resources or client need for your own overseas offices and without a consistent stream of work to pass to a particular law firm, how do you ensure that your client will receive in the foreign jurisdiction the quality of service he receives from you? One answer is to pass your client only to a lawyer you know well and trust.

TELFA, the Trans European Law Firms Alliance, developed in response to this perceived need among a certain number of independent European law firms to extend their capability beyond their domestic markets. Their clients had international ambitions and expected their local advisers to be able to assist when they took their business abroad. The service they wanted did not stop at the local frontier.

Over the years almost all lawyers build up an informal network of professional contacts abroad via their clients, participation in seminars, cooperation on international scholarly works or the strength of their golf games...

The founding members of TELFA realized that this approach was no longer enough.

All the initial member firms had international contacts but they found that that was not sufficient to ensure the sort of reliable service that their clients had come to expect. Referrals on the basis of chance contacts or third hand recommendations were more of a lottery than a professional response to what was increasingly perceived by their clients as being a required part of the service. What was needed were common standards, quality controls and a high degree of commitment to the maintenance of excellence. On the other hand, none of the firms in question had the ambition to create its own integrated international network.

Having identified the need, the solution proposed by the initial members was to create a network:

- of likeminded, independent law firms, each with the skills and resources to provide key business related legal services;
- of a size to ensure that clients received personalised service (even the biggest clients get tired of paying for an army where a platoon can do the job);
- and all federated in a legal structure with a fulltime permanent secretariat and strong board which would monitor performance and impose common standards and professional discipline. No one wanted simply to create yet another legal directory. Membership entailed not simply the payment of an annual fee but an on-going commitment, with regular structured meetings between firm members at all levels (including special professional events organised to ensure that the younger lawyers get to know each other).

How do we measure success? On a day-to-day basis, by the satisfaction expressed by clients in the large number of bi-lateral referrals which take place.

How do we maintain success? By systematically reviewing firms against our stringent membership criteria.

All of this started in 1989 and we have come a long way since then.

The Alliance has proved itself robust enough to deal with the inevitable changes that occur nationally (notably through mergers between domestic firms) and a stringent monitoring system has been put in place to follow the actual added value brought to clients.

How do we measure success? On a day-to-day basis, by the satisfaction expressed by clients in the large number of bi-lateral referrals which take place. How do we maintain success? By systematically reviewing firms against our stringent membership criteria.

Perhaps even more significant is the fact that TELFA has won major contracts on a pan-European scale from demanding international clients in the face of beauty-pa-rade competition from major integrated law firms. In other words, these clients, used to using a single brand for their international legal services, were sufficiently convinced that the component parts of the TELFA alliance would provide equally good or better cost effective services.

TELFA has grown to 26 members, covering almost all the European Union member states in addition to Norway, Russia, Switzerland and Turkey. Privileged relationships are being actively researched outside of Europe but one has been implemented for more than seven years with USLAW.

This relationship has proved to be highly successful. We have found in USLAW likeminded people sharing the passion for work, quality of service and, occasionally, fun.

It adds to TELFA’s credibility as a strong European network if it is linked up with an equally strong US network. TELFA is happy and proud to have USLAW as its US network partner. There are not many other such reliable and well organised US legal networks around. TELFA cherishes its relationship with USLAW and is ready to develop it further. A very passionate affiliation indeed...
Enforcement of compensation claims raised by employees against their employers has caused some confusion in practice in Turkey. The aim of this article is to briefly analyze the main issues to be considered in enforcing compensation claims of employees in Turkey, in order to help eliminate some of these practical problems. The focus will be on Tax and Enforcement Laws.

It is crucial to note that judgements on employment claims can be enforced before they become final and binding since it is not one of the exceptions of the general rule stated in Article 367 of the Code of Civil Procedure, which provides that as a general rule filing an appeal against a judgement does not prevent it from being enforced through enforcement offices. In practice, this means that once the first instance labour court grants the employee with compensation, the employee can initiate the enforcement proceedings without waiting for the decision to become final and binding following the appeal or the lapse of the appeal period.

While it is more settled as to when the compensation claims of employees can be enforced, the net-gross discussion has a bigger element in the discussions centered around the proceedings of this nature. This is because there is no explicit rule that places the judges under obligation to determine whether the compensation granted to the employee is net or gross. There are cases where it can be understood from the decision that the compensation is either net or gross. However, it can be seen more often that no reference is made in the decisions, though the expert report can be indicative in respect of whether the calculations and determinations have been made either on net or gross amounts.

The net-gross discussion is important as employees have the tendency to initiate enforcement proceedings on the entire amount declared in the decision without considering whether it is net or gross. The general rule is that the claimant has the right to collect the amount indicated in the decision. Naturally, it is the employee’s right to collect the amount indicated in the decision. However, there is an importance exception to the rule here as the employers are only under the obligation to pay the net compensation to the employee himself, whereas rather than employer making the
gross payment to employee, the attached tax should be deposited to the tax office by the employer on behalf of employee.

This exception is because, as per Article 94 of Income Tax Law, employers are required to deduct at source taxes from payments made as wages to their employees. Although employees are the ones who are liable to pay income taxes on their wages ("taxpayers"), their employers are required to deduct taxes from gross wages of employees ("tax witholders") and pay it to the related public institution.

Article 61 of the Income Tax Code describes wages broadly as "Wage is money, things or any other benefits which have monetary value provided to employees who work in any work based on an employment contract." Thus, any kind of payments and benefits provided to employees by their employers due to an employment relationship are defined as wages for the purpose of taxation.

Moreover, payments made to employees for compensation of any moral or material losses due to termination of their employment contracts related to severance pay, notice pay, overtime pay, annual leave pay and as such are also considered as wages under Article 61 of the said Code. On the other hand, the Income Tax Code provides some exceptions to taxation of wages or salaries in Articles 23-25.

It is important to note that only the items specified in these provisions are exempt from taxation. As per Article 25 of the Code "all severance payments required to be paid as per the Code No: 1475 and the Code No: 854" are among the exceptions to taxation on income. Moreover, "compensation paid due to unemployment (including compensation for not re-employing)" is exempt from income tax. This is why for those exceptions, the employers need not make any payment to the tax office.

In light of the explanations above, it is of great importance to note that employees should initiate enforcement proceedings against their employers for the net amount after all taxes and insurance premiums are deducted from their claims for wages. While this is the ideal, the inclination on the employees’ side is that they initiate the enforcement proceedings on the gross amounts as if they are net and as if they are deserving of the whole compensation without any tax attachment. In such a case, if an employer makes gross payment to the employee by mistake, the tax office would pursue again the employer for the tax arisen due to the court decision regardless of the fact that the employee has unfairly received the tax part of the payment too. This would mean that the employer will have to make double payment for the tax. There is no doubt that the employer has the right to re-claim the excessive payment that it made to the employee by mistake, however this would mean further legal proceedings and costs.

Therefore, to avoid such frustrations, if an employee initiates the enforcement proceedings for the gross amount on the basis of a court decision, the employer should submit to the enforcement office the receipts demonstrating that it has made the required deduction at source and paid the relevant tax to the tax office. Thus, the employers can request the enforcement office to amend the execution order accordingly and continue the proceedings with the new amounts after deductions are made. There would not be any hesitation from the enforcement office to comply with the request if the decision has made it clear that the compensation granted is gross.

However, if there is no reference made in the decision about whether the compensation is net or gross; then the employer should submit the expert report issued by the court where the calculations were made making necessary references to the net and gross figures. The enforcement office may not accept the application even if the report is clear; arguing that there is no clarity on the issue in the decision. If the enforcement office does not fulfill its duty to amend the order taking the required deductions into account, the issue can be brought before the enforcement courts by the employer in a complaint procedure.

The Court of Appeals has issued a number of important rulings on the matter and it would be useful to mention two important decisions by the Court to highlight the importance of the issue in practice.

In its decision with the merit number 2002/28839 and decision number 2005/2675 dated 18.02.2003, the 12th Chamber of the Court of Appeals stated that, "when the decision based on which enforcement proceedings are initiated declare the claims awarded in favor of the employee as gross amounts, it is imperative that taxes and insurance premiums must be deducted from wages and paid to the relevant public institution as per Article 193 of Income Tax Law No: 193; in other words, employees can initiate an enforcement proceeding with a decision for the net amount calculated after the required deductions are made from the gross amount in question."

Similarly, the General Assembly of the Civil Chambers of the Court of Appeals ruled in its decision dated 27.06.1984 and with the merit number 1982/12-280 and the decision number 1984/752 that, "Taxes are required to be deducted from wages as per Income Tax Code No: 193; if the decision is based on an expert witness report which based the calculations on gross amounts, the amounts stated in the decision will be considered as gross amounts even if it is not clear from the decision; even if there has been an opposition to the proceedings and it has become final, the deduction, an issue which has nothing to do with the merits of the procedure, should be considered and carried out.”

These judgments make it perfectly clear that deductions of taxes and premiums from gross amounts of employment claims are one of the main issues to be considered both by the courts during litigations, and by the enforcement offices during enforcement proceedings.

To conclude, judgements in favour of employees for compensation claims can be enforced before becoming final and binding. If an employment claim is to be enforced on the basis of a decision, enforcement proceedings for the claim must be initiated for the net amounts after required deductions, such as taxes and insurance premiums, are made from the gross amount. If the proceedings are initiated for the gross amounts and the enforcement office has prepared the enforcement order without making the required deductions, the employer should not make the gross payment to the employee and try to resolve the issue before the enforcement courts in a complaint procedure.
1. INTRODUCTION

The Netherlands is expected to play an important role not just within Europe, but also worldwide in international financial mass claims. In the class action against Swiss insurance company Converium, it seems as if the Amsterdam Court of Appeal has thrown the doors open to ‘foreign’ mass damage cases. Despite the fact that the large and international group of duped investors numbered only a few Dutch investors, the Court of Appeal felt it had jurisdiction to hear the dispute.1 The Amsterdam Court of Appeal subsequently applied the rules of the Class Action (Financial Settlement) Act (WCAM) and declared the settlement reached to be universally binding.2 This has made the Netherlands an attractive country for European and US shareholders to settle mass damage claims.

2. DUTCH SYSTEM FOR FINANCIAL SETTLEMENT OF MASS DAMAGE

The Netherlands has two sets of regulations, which, on paper, are separate from each other, to facilitate the financial settlement of mass damage. On the one hand there is the ‘class action’ which is provided for in Article 3:305a of the Dutch Civil Code. This is appropriate if a special interest organisation represents, both according to its articles and actually, the individual, similar interests of victims. The possibility of filing a class action against a party that has allegedly caused damage is subject to an important restriction however: the claim cannot be aimed at securing collective damages to be paid in money.3 Partly for this reason, the law provides for the possibility that a settlement agreement can be declared universally binding on grounds of the Class Action (Financial Settlement) Act (WCAM). Since 2005, this law allows for the possibility of having a (settlement) agreement on the settlement of mass damages concluded between one or more special interest organisations and the party or parties that caused the damage to be declared universally binding for the entire group of victims by the Amsterdam Court of Appeal. Individual victims can withdraw from the settlement by opting out.

Although the class action and the WCAM are separate procedures, they are not entirely separate from each other. Since claiming collective damages is prohibited in the Dutch class action and the majority of class actions are initiated in order to obtain financial compensation, the class action is often used as a stepping stone for a WCAM procedure held before the Amsterdam
Court of Appeal at a later date. This course of affairs is often called the ‘two-phase class action’. The class action (phase 1) is a preliminary step for a subsequent action to obtain damage compensation (phase 2).

3. THE CONVERIUM CASE

The decision in the Converium case was prompted by a dispute concerning the 2001 flotation of Converium, a company that was previously a 100% subsidiary of Zurich Financial Services Ltd. (hereafter: ZFS). The shares in Converium were listed on the Swiss stock market and the derived American Depositary Shares on the NYSE. Between 2002 and 2004, Converium reportedly made misleading announcements, which resulted in a fall in share prices.

Because of the suspected violation of securities law, Securities Fraud Class Actions were filed in a number of American courts against the companies involved and their directors, which cases were later consolidated before the United States District Court for the Southern District of New York (District Court). This resulted in two settlements for the US investors. However, the District Court declared itself incompetent to hear the claims of investors who bought shares in Converium on the Swiss stock market or another securities market outside the US and who were resident or based outside the US at the time of the purchase. The settlement agreements that Converium and ZFS asked the Amsterdam Court of Appeal to declare universally binding therefore pertain to the compensation for shareholders who were excluded from the US settlements. For these investors, Dutch lobby organisations reached another two collective settlements with Converium and ZFS. These are worldwide settlements involving an estimated 12,000 shareholders. Just 2% of this group holds Dutch nationality.

On 9 July 2010 Converium, ZFS, the Stichting Converium Compensation Foundation (the Foundation) – which had been specifically set up for this purpose, and VEB (Association of Stockholders) filed a petition with the Amsterdam Court of Appeal pursuant to Article 7:907 of the Civil Code. The petition aimed to have the two agreements (settlements) for the compensation of damage suffered by non-US shareholders declared universally binding. On 12 November 2010 the Court of Appeal passed an interim order on its jurisdiction with the provisional finding that the Court of Appeal was competent to hear the request that this ‘international collective settlement’ be declared binding. The Court of Appeal considered relevant here the fact that neither Europe nor the United States provides an

The fact that the Amsterdam Court of Appeal precisely did not take the same line in the Converium case and considered itself competent to hear international disputes shows that the Dutch mass damage regulations provide an important opportunity for complex, multijurisdiction class actions.

4. F-CUBED CLAIMS: REASONS FOR THE NETHERLANDS AS GATEWAY FOR INTERNATIONAL MASS DAMAGE CLAIMS

F-cubed claims are suits brought by foreign investors who have purchased shares of a foreign company on a foreign exchange and who then try to have their losses compensated via US courts (foreign-cubed cases). The US Supreme Court explicitly gave its view on this in the decision in Morrison versus National Australia Bank. In this case, the US Supreme Court declared the court incompetent with regard to damage claims from non-US investors in non-US companies on non-US stock markets.

The fact that the Amsterdam Court of Appeal precisely did not take the same line in the Converium case and considered itself competent to hear international disputes shows that the Dutch mass damage regulations provide an important opportunity for complex, multijurisdiction class actions.

1 Amsterdam Court of Appeal, 12 November 2010, LNJ BO3908 (Converium I).
2 Amsterdam Court of Appeal, 17 January 2012, LNJ BV 1026 (Converium II).
3 In relation to this, see for instance Parliamentary Papers II 1991/92, 22486, no. 3.
4 Amsterdam Court of Appeal, 17 January 2012, LNJ BV 1026 (Converium II).
5 The US Supreme Court had limited the extraterritoriality of the federal securities legislation earlier in the case Morrison versus National Australia Bank, 561 US, (2010).
6 Morrison v. National Australia Bank Ltd., 547 F.3d 167 (2d Cir. 2008).
THE HISTORY OF THE ANTI-MONOPOLY LAW IN CHINA
Since its accession to WTO in 2001, China has committed to the establishment and improvement of anti-monopoly law regime for a decade. The Anti-monopoly Law was finally adopted and promulgated by the National People’s Congress of China and came into effect as of August 1, 2008. Chinese authorities have since then rolled out more than 30 guidelines, supplements and directives to provide practical guidance to the public.

THE PURPOSE OF THE ANTI-MONOPOLY LAW
Like all other major jurisdictions such as the US and EU, this Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, and safeguarding the interests of consumers. In the course of drafting and deliberation, the Chinese legislators consulted with the US and EU counterpart laws to learn the most advanced and developed legal norms and practices in the anti-monopoly law sector.

THE DEFINITION OF MONOPOLISTIC CONDUCTS
First of all, the monopolistic conducts that are outlawed include:

(1) Monopoly agreements
Monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition e.g. fixing or changing commodity prices, restricting the amount of commodities manufactured or marketed, splitting the sales market or the purchasing market for raw and semi-finished materials, joint boycotting of transactions, etc.

(2) Abuse of dominant market position
Abuse of dominant market position means any single company with more than 50% market share without a fair reason (i) selling commodities at prices below cost, (ii) refusing to enter into transactions with their trading counterparts, (iii) allowing their trading counterparts to make transactions exclusively with themselves or with the companies designated by them, (iv) conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions, (v) applying differential prices and other transaction terms among their trading counterparts who are on an equal footing, etc.

(3) Concentration of business that leads to elimination or restriction of competition
Concentration of businesses means the merger of companies and control by acquisition of shares or assets. Usually this refers to merger and acquisition, and like the Sherman Act, Clayton Act and the Hart-Scott-Rodino Anti-Trust Improvement of 1976 of the US, concentration filing and approval prior to the closing of the takeover deal is required.

ENFORCEMENT OF THE ANTI-MONOPOLY LAW
(1) Three Law Enforcement Agencies
There are three separate Chinese law enforcement agencies to enforce the three main types of conducts regulated under Anti-Monopoly Law. Ministry of Commerce (MOC) is responsible for reviewing and approving concentration deals. State Administration of Industry and Commerce (SAIC) is responsible for overseeing any violations in relation to monopoly agreements and National Development and Reform Commission (NDRC) is the watchdog for price-related monopoly misconducts.
(2) Concentration Filing with MOC

Among the three conducts regulated by the Law, the concentration filing with MOC has so far become the most notable enforcement and practice of the Law. In a span of a few years, China has become the world’s number three jurisdiction in terms of the most concentration filings, after the US and EU, with many involving US multinational companies. Up to September 30, 2012, there are altogether 474 concentration filings that have been reviewed by MOC, among which, 458 cases have been approved unconditionally. Most multinationals have significant business and presence in China so their global mergers and acquisitions will have a direct impact on their respective China operations and require compliance with the Chinese anti-monopoly law.

96.6% of the total number of cases received unconditional approval from the MOC. This leads to businesses and legal experts’ questioning of the necessity of filing. The only threshold of filing is business revenue, regardless of the market shares — which is blamed for triggering the unnecessary filings that are clogging up the system which comprises of only two dozen staff at MOC lagging behind a backlog of cases.

However, MOC rejected Coca-Cola’s takeover of China’s Hui Yuan Fruit Juice deal in 2009 which is the only deal that does not pass MOC’s anti-monopoly law review so far. MOC under the Law can attach conditions to approval thus making it conditional approval. For examples, MOC demanded Pfizer divest its vaccine business in China in 2010 as a pre-requisite to approve its acquisition of Wyeth. MOC required Google to continue opening Android platform in its recent takeover of Motorola Mobile in 2012. Most of the filings can pass the MOC review, while a few will pass with conditions such as divestment of certain business, injunction of more acquisitions, carry on present business model, etc. Only one deal gets rejected. This corresponds with our experience in handling MOC concentration filings. In one case that we handled, for instance, MOC wanted initially to reject the concentration filing which involves a joint venture deal among a big Chinese enterprise and a US Fortune 500 electric giant for many reasons not concerning competition or monopoly but industrial policies and ultimately, the historic emotional discomfort among the central government agencies against the Chinese enterprise. In lieu of the rejection which requires announcement and exposes the decision to public questions imposing pressure, MOC advised the parties to voluntarily withdraw the application so that they can avoid making a rejection decision.

Many legal experts and business people are appealing for a fast track review, an express route that is available in EU which separates the viable deals from the rest and provides approval in a shorter timeframe. The fast track guidelines have been drafted and are under review by the MOC.

Though violation of the MOC filing currently carries no criminal liability and a maximum fine of 500,000 RMB yuan (US $80,000), many foreign companies cannot treat it lightly because the fines are severe enough to stain the foreign companies’ reputation and image, holding back their future operation in China.

(3) Civil litigations concerning monopoly conducts

With a view to correctly hearing cases involving civil disputes arising out of monopolistic conducts, the Provisions of the Supreme People’s Court on Certain Issues Relating to the Application of Law in Hearing Cases Involving Civil Disputes Arising out of Monopolistic Acts (“Provisions”) took effect on June 1, 2012. The Provisions serve as practical guidance for court to try and hear the civil disputes arising out of monopolistic acts which are filed by natural persons, legal persons or other organizations that suffer losses due to monopolistic acts. It requires the defendants to bear the burden of proof in some cases.

The existence of an investigation or decision by an enforcement body (like SAIC or NDRC) will not be a prerequisite to pursuing a private action in court against an individual or company. Any individual can sue a big company for monopolistic misconducts.

THE LATEST RELEVANT CASE (VERTICAL PRICE-FIXING LITIGATION OF RESALE PRICE MAINTENANCE BY J&J)

On 18 May 2012, the Shanghai No. 1 Intermediate People’s Court dismissed allegations that Johnson & Johnson Medical (China) Ltd., the US multinational’s China arm had set a minimum resale price in breach of China’s Anti-Monopoly Law and rejected the plaintiff’s claim of damages of CNY 14.4 million (US $2.3 Million). It is understood that the plaintiff has filed an appeal to the Shanghai Higher People’s Court.

The Shanghai Court found that a plaintiff must meet three criteria in order to establish an antitrust injury and claim damages, including: (1) the defendant engaged in monopoly conduct; (2) the plaintiff suffered losses; and (3) a causality link must be established between the losses and the monopoly conduct.

The Shanghai Court found that the distribution agreement between the defendants and the plaintiff did contain an RPM clause. The reason why the case is dismissed for now is that the plaintiff cannot provide enough evidence to prove its loss and there are a number of suppliers offering similar products. So an RPM arrangement, which is so popular in manufacturer/distributor agreements could cause a restricting or eliminating effect on competition if such RPM is proved to constitute a monopoly agreement according to the three criteria aforementioned.

CONCLUSION

As China becomes the world’s No. 2 economy, only after the US, it has built up the legal framework to regulate the anti-monopoly legal issues in a remarkably short timeframe. This has posed a significant challenge for businesses that are aiming at mergers and acquisitions that may include China operations by placing a requisite MOC concentration filing. For many US manufacturers who are looking at China as one of their largest markets, provisions in vertical monopoly agreements with their Chinese distributors such as resale price maintenance and horizontal monopoly agreements such as separation of markets would face serious administrative and judicial review upon complaints. Most notably, any individual or company, even those with no direct business relationship with a big company can sue the company on the ground of monopoly misconducts. Hence, the compliance with Chinese anti-monopoly law should be brought to the attention of the general counsels and attorneys of the US companies having business or presence in China.

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Warren Buffet once said, “[i]t takes 20 years to build a reputation and five minutes to ruin it.” Before the Internet, businesses relied heavily on advertising and word-of-mouth to earn their reputation in a given industry. Without a soap box or a microphone, critics had little effect on a company’s marketplace reputation.

In the digital age, marketing professionals are tasked with managing a company’s online image. Consumers have a forum to describe their experiences to a massive audience; this, in turn, has given rise to a fiercely competitive and unpredictable market. With the increasing popularity of social media and grievance sites, businesses and businessmen alike are vulnerable to attack for good reason, bad reason or no reason at all.

Sites like Ripoffreport and Scambook, for instance, urge consumers to report unscrupulous business practices such as advertising fraud and unethical doctors, lawyers or contractors. Glassdoor provides a forum to employees to anonymously evaluate internal policies, rate bosses and discuss company culture. Visitors to Yelp, Citysearch and TripAdvisor will find user reviews praising or bashing professionals in the hospitality, retail and travel industries.

ONLINE REVIEWS AND REVENUE

Consumers looking to make an informed choice routinely turn to the Internet for guidance. Oftentimes the negative reviews will appear in the first few entries following a search using just the company’s name. Because of a high rate of traffic to the site, and other search engine optimization (SEO) strategies, it is not uncommon to stumble across a scathing review before finding the link to the company itself.

According to Forbes, Yelp logs more than 84 million visitors and 33 million reviews each month. One Harvard study suggests that as little as a one-star increase in rating yields a 5 to 9% increase in revenue; a one-star decrease can lead to a 10% decline.

The Huffington Post suggests that 49% of consumers are more likely to visit a business after reading a positive review online; 69% trust online reviews as much as a personal recommendation. If the first review encountered is harshly critical, the consumer may attach undue credibility where the comment was listed high on her search results, or, on the premise that no one would devote the time to making a false complaint. That same consumer is more likely to move on to a competitor without digging deeper to see if the negative rant was an outlier or representative of what others experienced. Forbes suggests that just one scathing review could cause as much as a 70% decline in a company’s revenue if negative comments were the first encountered by consumers.

Many companies engage in the spamming of flattering reviews, as well as compensating customers to submit positive reviews to inflate ratings and bury negative ones. Companies considering these practices...
should note that false endorsements are a deceptive trade practice under Section 5 of the Federal Trade Commission Act, and getting caught can lead to substantial penalties.

**BUSINESSES FIGHT BACK**

Competitors and even disgruntled employees will hide behind false accounts to accomplish their goals – not everyone is who they say they are. That was certainly the case for Notre Dame football player, Manti Te’o, who received national attention after publicly confessing he was the victim of an elaborate online ‘catfishing’ hoax. Similarly, a federal prosecutor resigned after two of his top lawyers admitted using fake names and accounts to post sensitive information on a leading news site.

Some businesses are fighting back to recoup lost revenue. For instance, a Virginia woman was sued for $750,000 after posting a scathing review about her developer. The woman accused the company of damaging her home, charging for work they failed to do and ‘losing’ her jewelry. She warned readers: “Bottom line: do not put yourself through this nightmare of a contractor.” The defamation suit alleged the woman’s false representations resulted in lost work opportunities and irreversible harm to the company’s reputation. In December 2012, a judge granted the company a temporary restraining order and ordered the woman to remove certain references and amend others. The Virginia Supreme Court reversed the decision ruling that the reviews should not be censored, and instructed the developer to focus on proving the comments were actionable and resulted in compensable harm.

**REMEDIAL MEASURES**

To combat false publicity, business owners should be cognizant of the law and aware of a handful of remedies they can employ to preserve the reputation it took years for them to build.

First – Monitor your online reputation. A company’s marketing specialist should proactively monitor its online reputation. Companies garner the most respect from site visitors when they politely, but directly address concerns. Avoid taking a defensive stance and instead address the problem by giving the business’ point of view and the efforts it has (or will) undertake to correct the problem. Many businesses offer free coupons, meals or products to placate angry customers and persuade others to give them a second chance.

If you can demonstrate the review is in blatant violation of the host’s guidelines, a plea to their legal department may be worthwhile. Ripoffreport permits companies to rebut a review, or pay $2,000 to participate in its VIP Arbitration Program, which gives the business an opportunity to prove the report was false and the author time to reply. If the third-party determines the accusation was unfounded, the site will substitute its findings for the original posting and advise readers the false statements were redacted.

Second – Know the law. The freedom of speech is not limited to compliments; but, there are risks associated with an ordinary person’s extraordinary ability to affect a company’s bottom line with just the click of the mouse. Similarly, there can be harsh legal consequences for those who act impulsively thinking they can hide behind a screen name or the Bill of Rights. A comment that imputes criminal conduct or a lack of competence or integrity to a business, if unfounded, may be sufficient to state a claim for defamation, commercial disparagement or tortious business interference depending upon the jurisdiction. But to truly be actionable, the offending post must contain false, verifiable facts and not opinions; an opinion is never actionable. For example, a lawsuit based on a review that claims a customer was “treated poorly,” that expectations were “unfulfilled,” or that service was “less than desirable” will make little headway.

Conversely, false accusations that a business committed fraud or was otherwise involved in unethical or illegal practices may pass muster. While the right to speak freely is a paramount consideration when attacking unflattering speech in the courthouse, deliberate sabotage of one’s reputation and livelihood must be discouraged if committed on false pretenses. Courts rely on a number of factors when distinguishing fact from opinion: whether the statement is verifiable, whether it has a precise core meaning or is indefinite and ambiguous, and whether the literary context would influence an average reader to believe everything they read.

Third – Know your target. A scorned business will typically lash out at the host of the site with little success; Section 230 of the Communications Decency Act (CDA) affords them immunity. The only real target is the source of the defamatory posting who may be difficult to identify.

Fourth – Filing Suit. In most jurisdictions, a lawsuit for defamation must be filed within one year of the date the negative review is first published. If the author’s identity is unknown, courts may require a petition for discovery before issuing subpoenas to the hosting site or Internet Service Provider (ISP) for information about the author. As a prerequisite, the court may require the plaintiff to prove a ‘likelihood of success’ on the merits; in other words, that the offending statements are in fact actionable and could withstand a judgment on the pleadings.

If the petition is granted, the business might obtain the user’s name, e-mail address and IP address from the hosting site, which can aid in the pursuit. A subsequent subpoena to the ISP may determine the name and address of the account holder. Beware, a clever saboteur may post his comments from an unmonitored bank of computers or use software to scramble the IP address. Hitting a dead end can be frustrating given the time and money spent while the offending speech continues its path of reputation destruction. Even if your efforts lead to the culprit, you may find he has little in the way of assets or insurance coverage.

**CONCLUSION**

The Internet serves as both a shield and sword for businesses looking to increase exposure. A company faced with a damaging review should be proactive and address legitimate concerns. If the offending comment is blatantly false, and if it has been detrimental to the company’s reputation and revenue stream, it may be prudent to invest in a lawyer with experience in reputation management and Internet libel law. The value of a credible online presence should not be taken for granted.

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Companies in a broad range of industries face ever-increasing scrutiny from the U.S. Environmental Protection Agency (EPA) and state departments of environmental conservation—and all signs point to growth in that trend. EPA conducted approximately 20,000 inspections and evaluations in FY 2012. The agency initiated just over 3,000 civil, judicial, and administrative enforcement cases and resolved about the same number. Most notably, EPA set a new record in FY 2012 for the amount of civil penalties imposed on companies—$208 million. Companies also agreed to spend more than $44 million in “Supplemental Environmental Projects,” which are environmentally beneficial projects beyond those required by law.

On the criminal side, although it had fewer criminal enforcement agents in 2012 than in 2011, EPA still opened 320 criminal investigations, 44 percent of which resulted in charges filed against one or more defendants. Most criminal cases, 70 percent to be exact, included individual defendants, and the conviction rate was 95 percent. Criminal defendants were sentenced to a total of 79 years in prison and paid $44 million in fines.

While the civil and criminal risks may be potentially disastrous, there are both proactive and responsive steps business owners and their counsel can take to limit potential exposure in environmental enforcement actions.

**INSPECTIONS AND REPORTING REQUIREMENTS**

Those targeted by inspection requests should not refuse to comply unless they have a very compelling reason for doing so. A refusal flags the business as non-cooperative and only encourages further EPA attention. Further, a refusal to comply with EPA inspection requests can trigger enforcement penalties on its own. For example, the Resource Conservation and Recovery Act (RCRA) provides for the imposition of penalties up to $37,500 per day for failure to comply with EPA orders or requests.

Likewise, failure to comply with mandatory EPA reporting requirements—that is, either before or after a business is under investigation—can expose an entity to potential penalties. For example, one company’s failure to promptly submit accurate data about its production and use of chemical substances as required by the Toxic Substances Control Act (TSCA) resulted in its incurring a $55,901 civil penalty in 2012. Notably, this penalty was levied despite the fact that there was no evidence indicating the company’s failure to comply with the reporting requirements had caused any real harm.

**DEFENSES FOR CIVIL ENFORCEMENTS**

Most environmental statutes come with a strict liability threshold—in other words, if you committed a violation, there’s a very slim chance you’ll get away with it upon discovery. However, there are defenses and tactics that can be used in limited circumstances to help shield a potential violator from some liability.

EPA regulations have created an affirmative defense of “upset”—i.e., that a violator’s temporary noncompliance was permissible as a result of certain uncontrollable factors. Invoking this exception, however, requires certain reporting requirements, and some factors related to facility design and maintenance may act to prevent a party from invoking an upset defense.

If your organization may not be the only one responsible for an environmental violation, Rule 14 of the Federal Rules of Civil Procedure and state procedural laws allow defendants to “implead” entities that may ultimately owe them contribution. Additionally, environmental violations can be subject to a concept known as
“over-filing” – i.e., where the federal government files an enforcement action against an entity despite the fact that the entity is already undergoing state enforcement proceedings. In the event that your business is attempting to settle an action against it, it is important to include all of the relevant stakeholders in the settlement process. Otherwise, you face the possibility of defending a second action predicated on the same violation.

CRIMINAL INVESTIGATIONS

There are 19 pollution crime laws, and 26 wildlife crime laws, that include a criminal enforcement mechanism. A criminal enforcement action pursuant to one of these laws may be triggered by a variety of events, such as a major release (e.g., from a spill, explosion, or fire), a whistleblower, or a permitting dispute or protracted civil enforcement matter. In addition, the government may find a basis for criminal prosecution beyond the substantive environmental violations that provide for the same, such as false statements, falsification of inspection reports, and obstruction of justice.

As always, the best preparation for any criminal investigation is compliance. With this principle in mind, it is advisable to engage in self-audit programs designed to uncover compliance issues “in house,” so they might be dealt with internally before an external investigation is commenced. Some law firms provide compliance audit services, which not only reduce the potential for environmental violations, but tend also to reduce penalties when violations are found.²

Of course, even the best self-audit program can not guarantee 100 percent compliance. Violations are bound to take place, and when they do it is imperative that you have a response strategy in place. Your response strategy should include preparation of response plans and notifications required by statute, such as those required under the Clean Water Act (CWA) and RCRA. In addition, it should contemplate steps intended to prevent enforcement escalation such as cooperation with the enforcement investigation with special attention to potential defenses, retaining consultants respected by the agency to prepare a remediation plan, and correction of continuing violations.

It is critical to consult with environmental legal counsel as early as possible in the process – early action can make a significant difference from the outset in the dissemination of Upjohn warnings (required notice to directors, officers, and others that counsel represents the corporation and not the individuals), formation of indemnification and joint defense agreements, preservation of evidence, voluntary disclosures, and the proper handling of whistleblowers. It is also necessary to ensure that all administrative remedies are exhausted and file declaratory judgment actions and/or seek pre-enforcement administrative review of compliance orders where necessary.

Time is an especially critical factor in developing potential defenses with respect to criminal enforcement actions. Although environmental statutes generally impose strict liability for civil violations, criminal violations still require proof of mens rea. For example, to obtain a felony conviction under the CWA, the government must prove a knowing violation, and the defendant’s knowledge must be proven with respect to each and every element of the offense. This means that a mistake of fact which negates the existence of the necessary criminal intent constitutes a viable defense.

Additionally, if defense counsel are consulted early on in the investigation, they will be in a better position to determine whether any regulatory or statutory exemptions apply. For example, the CWA contains numerous exemptions to its Section 404 permitting program that, if applicable, would prevent criminal prosecution under the act. Environmental prosecutions are often scientifically complex, thus expert assistance during the discovery process is crucial. The defendant will be in the best position to challenge the government’s scientific evidence and methodology if it consults with a competent expert from the outset and throughout the investigative process.

LIMITING PENALTIES THROUGH SELF-REPORTING

As noted above, companies can be rewarded for showing diligence in environmental risk control and honestly reporting when potential environmental violations have occurred. Any potential penalty reduction depends, of course, on a number of conditions set forth by the EPA. But the incentives are such that some entities are working with qualified counsel to perform a critical self-evaluation and disclosure to the EPA in exchange for waivers of the penalties the EPA would have assessed had it performed an inspection and discovered the violations itself. By way of example, one institution that worked with a member of our team faced over $11 million in potential penalties that were waived by the EPA.

PREVENTION: THE BEST MEDICINE

In the end, the best defense to an environmental enforcement action is an early defense. That begins with implementing an active, well-developed environmental compliance program well before any inspection or incident actually occurs. Elements of such a plan include: management accountability for compliance and a well-trained staff; clearly outlined compliance, self-inspection, monitoring, and reporting procedures; plans for investigating and addressing environmental incidents; and periodic compliance auditing with available corrective measures to correct existing problems.

With the right plan in place, and the appropriate response when an inspection or incident occurs, companies can drastically reduce the liability headache brought on by an environmental enforcement action.

Many in the debt collection area view bankruptcy as a stumbling block that interferes with their debt collection efforts because the bankruptcy court is typically a debtor-friendly forum. However, bankruptcy court is not always a debtor-friendly forum. The Bankruptcy Code contains a patchwork of debtor-friendly and creditor-friendly provisions that, in the right case, can be useful for creditors. This article will discuss some of the more important aspects of bankruptcy law for those in the debt collection area.

I. OVERVIEW

Bankruptcy is a collective proceeding meant to level the playing field so that similarly-situated creditors are all treated in a similar fashion. However, each bankruptcy case must be analyzed in order to determine what a creditor can do to maximize its recovery or to limit its exposure to potential affirmative counterclaims by the estate in a particular case.

The Bankruptcy Code’s protections are designed with the “honest, but unfortunate debtor” in mind. Therefore, if a debtor fails to comply with the requirements of the Bankruptcy Code or Rules or otherwise commits wrongful acts during a bankruptcy case, such malfeasance can constitute “cause” for a creditor to obtain relief from the automatic stay, to seek the appointment of a trustee, or to seek conversion or dismissal of a case.

II. KEEP THE END GOAL IN MIND

For creditors, payment is the overall goal in a collections case. In bankruptcy, payment should remain the creditor’s ultimate goal. The unsecured or secured nature of a claim, along with the number and amount of other similarly-situated claims in a particular class, can have a significant effect on an individual creditor’s recovery. Because secured claims have the highest priority in bankruptcy, in most cases, unsecured claims generally receive less than full payment. Therefore, at the outset, creditors should carefully weigh the time and expense of pursuing a claim against the possible percentage of recovery they can ultimately expect to receive in a given case.

III. EARLY PLANNING AND POSITIONING ARE CRITICAL

Creditors should not wait until a bankruptcy case is filed in order to start analyzing how they will react to a bankruptcy filing by a litigation target. Instead, creditors should always consider the potential effect of a possible bankruptcy filing on their collection case and consider what steps they
can take before a filing to put them in a better position. Early planning and analysis will help, for example, if a collection target threatens bankruptcy in an attempt to extract concessions during litigation.

IV. TIMING OF THE BANKRUPTCY FILING

Many times a debtor will file a bankruptcy case in reaction to a ruling, a judgment or order of a court issued in litigation or arbitration. Sometimes, a bankruptcy case will be filed before a final judgment can be entered. This timing is to keep a creditor’s claim “contingent,” “unliquidated” and/or “disputed” in the bankruptcy case, requiring the creditor to timely file a proof of claim in order to preserve its claim.

Creditors and their attorneys should be aware that settlements reached in litigation can be affected by a later bankruptcy filing. For example, payments received from a debtor pursuant to a settlement agreement may be challenged as a “preference” if the debtor files a bankruptcy case within ninety (90) days after making the payment. Steps should be taken to avoid this unfortunate result.

V. APPLICABLE LAW IN A BANKRUPTCY CASE

Although state or federal law governs a creditor’s substantive claim in a bankruptcy case, bankruptcy law has procedural requirements that, if not followed, can affect the allowability of the claim. For example, if a creditor fails to timely file a proof of claim when required, the creditor’s claim may become time-barred by bankruptcy law, even though the underlying claim was asserted within the applicable statute of limitations.

VI. THE AUTOMATIC STAY

The automatic stay goes into effect immediately upon the filing of a petition for bankruptcy relief and is enforceable whether or not a creditor (or its attorney) has actual notice of the bankruptcy filing. Actions taken in violation of the automatic stay are either void or voidable (depending on the federal circuit the case is in) and can subject creditors and their attorneys to liability for damages.

It is important for businesses to have safeguards to prevent unintentional violations of the automatic stay by issuance of computer-generated demand letters. Any accounting/collection system should allow a “bankruptcy hold” to be placed on an account to prevent the inadvertent sending out of demand letters after a bankruptcy case is instituted to avoid stay violations.

Unless otherwise ordered by the Bankruptcy Court, the automatic stay against property of the estate continues until the debtor’s property is no longer property of the estate. The automatic stay of all other actions against the debtor continues until the time the case is closed, the case is dismissed, or a discharge is granted or denied, whichever is earlier.

In a chapter 11 case, once a chapter 11 plan is confirmed, the automatic stay is no longer in effect, but is replaced by a discharge injunction under sections 524(a)(2) and 1141(d)(1)(A) of the Bankruptcy Code.

VII. OBTAINING RELIEF FROM THE AUTOMATIC STAY

Creditors can ask for relief from the automatic stay to pursue their claims in a non-bankruptcy forum. The grounds for relief from the automatic stay include “cause,” including lack of adequate protection of an interest in property and, with respect to acts against property, that the debtor does not have any equity in the property and such property is not necessary to an effective reorganization.

The automatic stay is often vacated to allow non-bankruptcy litigation, such as tort litigation, to proceed in a more appropriate non-bankruptcy forum for litigating the issues. It is common for the automatic stay to be vacated to allow a plaintiff to pursue claims solely against the proceeds of a debtor’s insurance policy only and not the debtor’s assets.

VIII. SCHEDULES OF ASSETS AND LIABILITIES AND STATEMENTS OF FINANCIAL AFFAIRS

The Bankruptcy Code requires that a debtor list all of its assets and debts on its Schedules of Assets and Liabilities (the “Schedules”) under penalty of perjury. Furthermore, debtors must fill out a detailed Statement of Financial Affairs (SOFA) under oath, that lists various historical information, including all pending lawsuits, all keepers of records, historical financial information and all potential preferential transfers. This information can be extremely helpful to collections attorneys for, among other things, determining the collectability of the creditor’s claim in a given case.

On the Schedules, the debtor is permitted to state its value of a claim. Therefore, many times debtors schedule disputed litigation claims at $0.00. As discussed above, if a creditor fails to timely file a proof of claim to controvert the scheduled amount of the claim, that creditor risks having its claim valued at $0.00 and will not receive distributions from the estate.

IX. BANKRUPTCY DISCOVERY AND TOOLS

Some of the useful tools available to creditors in a bankruptcy case include the Bankruptcy Code’s requirement that a debtor attend a meeting of creditors where the debtor must testify under oath about the assets and debts set forth on its schedules. Creditors and their attorneys are allowed to attend and ask questions.

Rule 2004 of the Federal Rules of Bankruptcy Procedure allows a creditor to examine a debtor (or any other party in interest) under oath regarding the acts, conduct, property and financial condition of the debtor or any matter affecting the administration of the estate or the debtor’s right to a discharge. Rule 2004 examinations are permissible “fishing expeditions” that are broader than the discovery permitted under state or federal procedural rules.

Creditors can challenge a debtor’s right to a discharge or can object to the dischargeability of certain debts. This can put tremendous pressure on a debtor who is seeking a discharge.

Finally, if there is sufficient “cause,” creditors can seek the appointment of a trustee or an examiner (in a chapter 11 case) to oust the debtor’s current management or seek dismissal of a case (in any chapter), particularly if it was filed in “bad faith” or solely for use as a litigation tactic.

X. CONCLUSION

As long as creditors are educated about the bankruptcy process, the bankruptcy court does not have to be feared for collection matters. In fact, as discussed above, in some instances a bankruptcy filing by a debtor can actually be helpful to creditors because it gives them the ability to use powerful bankruptcy tools to aid them in their collection efforts.
Employers are on the front line of change precipitated by the Patient Protection and Affordable Care Act (PPACA). Beginning January 1, 2014, large employers must, for the first time, offer affordable healthcare coverage to full-time employees and their qualified dependents. In addition, the “individual mandate” takes effect, and state and federal governments must offer healthcare coverage to U.S. citizens through healthcare exchanges.

The U.S. Treasury Department (Treasury Department) and U.S. Department of Health and Human Services (HHS) are in the process of drafting implementing regulations for the PPACA. Both agencies have issued notices, accepted public comment, and issued proposed regulations that address an employer’s responsibilities and obligations under the PPACA. While not final, the draft regulations are the best guidance currently available to employers. This article will discuss key provisions of the PPACA including: how to determine if an employer is subject to the PPACA, employer obligations under the PPACA, and employer penalties for non-compliance.

WHICH EMPLOYERS ARE SUBJECT TO THE PPACA?

The PPACA applies to large employers, defined as employers with at least 50 full-time employees. Large employers must offer “affordable” health care coverage to full-time employees and their qualified dependents, or pay a penalty. If the employer does not employ 50 or more full-time employees, the employer is not required to offer healthcare coverage to its employees.

Determining if an employer is a “large employer” may be difficult, especially if the employer utilizes part-time employees or seasonal workers. The draft regulations define a “large employer” with respect to a calendar year as an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees, or FTEs) on business days during the preceding calendar year. FTEs are part-time employees, each of whom individually is not treated as a full-time employee because he or she does not provide more than 30 hours of service per week. FTEs are used solely for purposes of determining whether an employer is a large employer.

The number of FTEs for each calendar month in the preceding calendar year is determined by calculating the aggregate number of hours of service for that calendar month for employees who were not full-time employees (but not more than 120 hours of service for any employee) and dividing that number by 120. Fractions are taken into account.

To determine if an employer is an “applicable large employer” for a calendar year, the employer adds the total number of full-time employees (including any seasonal workers) for each calendar month in the preceding calendar year and the total number of FTEs (including any seasonal workers) for each calendar month in the preceding calendar year. The sum total of full-time employees and FTEs are divided by 12. If the result is not a whole number, it is rounded to the next lowest whole number. If the result of this calculation is 50 or more the employer is an applicable large employer for the current calendar year, unless the seasonal worker exception in paragraph (b)(2) of section 54.4980H-2 applies.

WHICH EMPLOYEES MUST BE OFFERED HEALTHCARE COVERAGE?

A “large employer” must offer healthcare coverage only to its full-time employees and their qualified dependents. Dependents are defined as children who have not attained age 26. Spouses are not dependents. A large employer is not required to offer healthcare coverage to its part-time employees, regardless of the number of part-time employees counted as FTEs to calculate the number of full-time employees. Hypothetically, an employer of only part-time employees could be considered a “large employer” and subject to the PPACA, but have no obligation to provide healthcare coverage to its employees.

A full-time employee provides an average of at least 30 hours of service per week. “Hours of service” is defined as, “[e]ach hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness,
incapacity..., layoff, jury duty, military duty or leave of absence."

For many employers, including staffing companies, retail establishments and restaurants, it is not always clear if a current or new employee should be considered full-time or part-time. The draft regulations include an optional “Look-Back Measurement Method” to determine if ongoing and new variable hour employees qualify as full-time or part-time employees.12 Employers may adopt a standard measurement period of not less than three months but not more than 12 months to evaluate if a variable hour employee is full-time or part-time. During the subsequent stability period the employer must treat the employee as full-time or part-time based upon hours of service provided during the standard measurement period. An employer may also adopt an administrative period, not to exceed 90 days, to evaluate an employee’s status and offer healthcare coverage if applicable.13

WHAT COVERAGE MUST BE OFFERED?

Large employers must offer healthcare coverage that meets minimal value requirements, defined as covering 60% of the employee’s medical costs and providing certain specific protections.14 Section 1302(d) (2) (C) of the PPACA sets forth the rules for calculating the percentage of total allowed costs of benefits provided under a group health plan or health insurance plan.

On November 26, 2012, HHS issued proposed regulations providing guidance on methodologies for determining minimum value.15 A minimum value calculator will be forthcoming from the IRS and the HHS. Employers should be able to input certain information about the plan into the calculator to determine whether the plan provides minimum value.

Lifetime dollar limits for key health benefits are prohibited and insurance carriers may not cancel coverage solely because of an honest mistake made on the insurance application. Dependent healthcare coverage for employees’ adult children is extended to age 26 (although, until 2014, group plans grandfathered in do not have to offer dependent coverage up to age 26 if a young adult is eligible for group coverage outside their parent’s plan.)

Certain plans are grandfathered in to the new law, which allows some existing plans to remain in place. Healthcare coverage from a plan that existed on March 23, 2010 and that has covered at least one person continuously from that day forward may be considered a “grandfathered” plan and are exempt from certain requirements.

IS THE COVERAGE AFFORDABLE?

Healthcare coverage for an employee under an employer-sponsored plan is “affordable” if the employee’s required contribution for self-only coverage does not exceed 9.5% of the employee’s household income for the taxable year. Since employers generally will not know their employees’ household incomes, the proposed regulations set forth an affordability safe harbor that allows the employer to use the wages paid to the employee as reported in Box 1 of the W-2 form. As implementation of the PPACA draws near, additional tools and guidance will be forthcoming from HHS and the Treasury Department.

WHAT PENALTIES APPLY FOR NON-COMPLIANCE?

If a large employer does not offer healthcare coverage, offers healthcare coverage that does not meet the basic coverage requirements, or requires its employees to pay more than 9.5% of their total household income for healthcare coverage, employees can choose to buy individual coverage from an insurance exchange set up by the employee’s state government, or, if applicable, the federal government. Employees should receive a premium tax credit for doing so, and large employers may then be required to pay a penalty.

If a large employer does not offer the required healthcare coverage, the penalty is $2,000/year for each full-time employee, not counting the first 30 employees. The penalty increases each year by the growth in insurance premiums. If a large employer does not pay for at least 60% of covered health care expenses, or if an employee must pay more than 9.5% of their household income for the coverage, the large employer penalty is $3,000/year per employee receiving a premium tax credit, not counting the first 30 employees.16 HHS estimates that less than 2% of large employers will have to pay these penalties.

CONCLUSION

The changes in the health care laws are complex and in many instances, still changing, as HHS and the Treasury Department grapple with drafting the regulations to implement the PPACA. For example, the Treasury Department is still considering how employers should treat employees paid on a commission basis and leased employees.

Large employers must have a strategy in place by October 2013 when enrollment periods are expected to commence for federal and state healthcare insurance exchanges. Large employers must decide if they will “play” or “pay,” that is, offer compliant healthcare coverage to full-time employees or pay the penalty. Large employers should carefully compare the cost of offering health care coverage against the cost of applicable penalties for failure to offer the mandated healthcare coverage.

Employers with questions relating to obligations under the PPACA are encouraged to consult with qualified employment counsel to discuss the specifics of their situation.

1 H.R. 3590, signed into law (P.L. 111-148) on March 23, 2010, as amended by the Health Care and Education Reconciliation Act of 2010 (H.R. 4872), signed into law (P.L. 111-152)
2 Draft Regulations 26 C.F.R §54.4980H-2
3 Draft Regulations 26 C.F.R §54.4980H-1 (4)
4 Draft Regulations 26 C.F.R §54.4980H-1 (14)
5 Draft Regulations 26 C.F.R §54.4980H-1 (2)
6 Draft Regulations 26 C.F.R §54.4980H-1 (2)
7 Draft Regulations 26 C.F.R §54.4980H-2 (b)
8 The PPACA provides a seasonal worker exception: if the sum of an employer’s full-time employees and FTEs exceeds 50 for 120 days or less during the preceding calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days are seasonal workers, the employer is not considered to employ more than 50 full-time employees (including FTEs) and the employer is not an applicable large employer for the current calendar year.
9 Proposed Regulations 26 C.F.R §54.4980H-1 (11)
10 Proposed Regulations 26 C.F.R §54.4980H-1 (18)
11 Proposed Regulations 26 C.F.R §54.4980H-1 (21)
12 Proposed Regulations 26 C.F.R §54.4980H-3
13 Proposed Regulations 26 C.F.R §54.4980H-1 (1)
14 26 USC §50(b)(2)(C)(ii)
15 Proposed Regulations 26 C.F.R §54.4980H-1 (36) and (37)
There’s nothing surprising about a claimant who targets multiple businesses with seemingly broad, flimsy claims in a civil lawsuit. An injury occurs, and the claimant predictably casts as wide a net as possible in order to maximize his odds of a favorable recovery. A personal injury that arises from a mishap at a restaurant or tavern, for example, might result in a lawsuit that alleges multiple theories of liability against multiple potential businesses and insureds. Perhaps a security guard was on duty at the time of the injury, perhaps the incident involved the service of alcohol, and perhaps the injury involved a particular product. The result may be a demand or lawsuit that brings a dram shop/liquor liability claim, a general premises liability claim, a negligent security claim, a products liability claim, and so on. The claims are often vague, wide-sweeping, and allegedly apply to most or all of the targeted businesses and insureds. Is the tact that these claimants employ proper?

The business and insureds targeted in this example are, in many jurisdictions, regulated by grand, but specific, statutory schemes. Many states’ statutes govern the private security agency industry, the liquor industry, and so on. Depending on jurisdiction, products liability exposure may also be governed by statute. Within these statutory schemes, there are often specific statutes that expressly and many times narrowly, describe the extent that civil liability is permitted within the context of the specific industry regulated.

A potential hurdle for the targeted business or insured arises when the injured
claimant, often with the use of a standard of care expert, manipulates statutory construction in an attempt to broaden the scope of allowable civil liability for a given industry associated with an implicated defendant. The claimant’s standard of care expert, armed with vast knowledge and years of experience in a particular area, argues he has adequate experience to apply all manner of statutes that govern his particular industry in order to impose broad, often novel, duties in a civil case. This happens despite existing statutes that expressly provide for civil remedies for the particular industry at issue. The expert may even claim his expertise qualifies him to use general statutes that govern his industry to impose liability on defendants outside of the expert’s area of industry expertise. These experts give their claimant-clients maximum “bang for their buck.” In the example of the personal injury claim raised at the beginning of this article, the Plaintiff might retain a single standard of care expert to issue adverse opinions against most or all of the target defendants. The typical result is a culmination of numerous negligence per se theories that, with any luck on the part of the claimant, will make their way past summary judgment and on to a jury for consideration.

I’m familiar with a recent case where a private security agency was the target of negligent security claims and, in a strange twist, was also the target of dram shop claims after the Plaintiff was injured in a bar fight. The Plaintiff retained a standard of care expert – universally regarded in the jurisdiction as exclusively a liquor industry expert – who argued that, among other things, the private security guard, who provided security services at the bar, was a statutory “employee” within the definition of the jurisdiction’s liquor statutes. The liquor statutes in the jurisdiction define an employee to mean, in part, “any person who performs any service on a licensed premises… whether or not the person is denominated an employee, independent contractor, or otherwise.” With that, argued the Plaintiff and his expert, the contracted security agency defendant and its security guard were “employees” of the bar subject to statutory civil dram shop liability – and, therefore, subject to numerous other liquor industry duties contained in the state’s substantial liquor regulatory scheme.

The Plaintiff’s novel claim, along with the expert’s broad opinions, was ultimately stricken by a judge, and a handful of key concepts from the case might prove useful in the event your business or insured is confronted with such a situation.

Initially, it’s important to keep in mind that almost universally, legal duties are not established by experts, nor are they to be decided by a jury based on expert testimony. Whether a legal duty exists is, instead, a legal question to be decided by a court. Similarly, the manner in which statutes are to be applied in a civil case is a question of law for a court. Although an adverse expert may be credentialed to the hilt and claim his breadth of expertise qualifies him to make determinations about the extent that a statute imposes a legal duty by a defendant to a claimant in a civil case, that analysis is likely beyond the expert’s allowable role. Experts, of course, are appropriately suited to provide opinions regarding the standards of care in an industry, and while statutes often provide experts with guidance, it is typically inappropriate for an expert to usurp a court’s role to determine the extent that a statute may impose a legal duty on a party in a civil case.

How a legal theory has developed in the particular jurisdiction or your business or insured may provide the best insight regarding the extent that a court may permit or prevent an adverse expert’s attempts to establish legal duties arguably beyond those intended by a legislature. In many jurisdictions, there are both common law and statutory remedies that provide authority for the same civil legal theory alleged. In the jurisdiction where the security company case example is located, the right of a dram shop cause of action by an injured third-party against a licensed liquor seller is authorized both by the common law and by statute. Both rights of action are nearly identical and are narrow in scope to the extent they provide remedies against only a seller and only in a handful of instances. Many jurisdictions also have “limiting statutes” that expressly provide that, other than a statute that specifically authorizes a civil claim within a certain industry or context, no other statutes are to be used to impose civil liability. Courts in jurisdictions with specific statutes like these, where a narrow, express civil cause of action against a specific audience (sellers of liquor in the case of dram shop liability) is on the books, have voiced doubt when it comes to the idea of expanding miscellaneous regulatory statutes to broaden civil liability.

The key takeaway from courts in jurisdictions that have tackled the issue seems to be that, absent the presence of legislative intent, the proposed use of regulatory statutes to broaden civil legal duties should be viewed with skepticism. There appears to be even less of a likelihood that a claimant will be permitted to interpret regulatory statutes to create new civil causes of action where there are statutes already in place that unambiguously authorize a civil remedy in a particular industry.

So, the next time your business or insured is faced with a barrage of statutory claims in a civil suit, think twice – the case may be smaller than you think!
By now, everyone in the commercial motor carrier/transportation industry is familiar with the Compliance Safety Accountability Act of 2010 (CSA). Unfortunately, just as the industry was coming to grips with the practicalities of the program, many safety directors and industry officials likely feel as though they are being forced to shoot at a moving target, as the CSA unveiled substantial changes to the program in December 2012. This article addresses the recent CSA revisions and the ongoing evolution of CSA in transportation litigation.

On December 1, 2012, the following changes to the CSA regulations went into effect:

1. The FMCSA changed the Fatigued Driving BASIC to the Hours-of-Service (HOS) Compliance BASIC. This category will now focus more on HOS documentation requirements that, on their own, may not correlate with a fatigued driver or a driver who’s exceeded their legal hours on the road. The CSA will also now treat paper and e-driver logs equally.

2. The FMCSA changed the Cargo-Related BASIC to the Hazardous Materials (HM) Compliance BASIC. The Administration claims that the change will allow it to better identify hazardous materials safety and compliance problems. Under the new change, whether a carrier is considered an HM carrier is now a determination made by the FMCSA. The FMCSA acknowledged, at least to some extent, that the new rules could cause carriers’ scores to spike, especially those who were not previously identified as HM carriers. Accordingly, the agency will keep the HM BASIC scores private for one year.

3. The FMCSA updated the Vehicle Maintenance BASIC. Load securement violations, which were once part of the Cargo-Related BASIC, will now be included in Vehicle Maintenance. Flatbed carriers complained that they had higher cargo-related BASIC percentile ratings, due to the visibility of their securement issues. The revision will address what was arguably an unfair comparison to closed-container carriers.

4. The FMCSA removed vehicle violations from driver-only inspections. Likewise, driver violations were removed from vehicle-only inspections. Carriers will no longer be penalized for violations that were outside the scope of an inspection. Any violations found outside the scope of a particular inspection (such as a driver violation found during the course of a vehicle inspection), will no longer be recorded in the SMS, though they will continue to appear on a carrier’s inspection report.

5. Violations of Intermodal Equipment Provider regulations will now be recorded in the SMS, and will include violations that should be detected and corrected during a drivers’ pre-trip inspection.
The Safety Measurement System (SMS) was modified to provide fact-based descriptions associated with crashes, rather than relying on coded terms such as “inconclusive” and “insufficient data.” The SMS will also separate crashes with injuries from crashes with fatalities, making it easier to decipher what types of accidents a carrier has been involved in.

Speeding violations between 1 and 5 MPH recorded within the previous 24 months have been removed from the SMS, and violations falling in that speed range will no longer be assessed from this point forward. The FMCSA also lowered the severity rating of general speeding violations to a score of 1.

The FMCSA updated the definition of passenger carrier within the SMS, so that those carriers can be more easily identified. The FMCSA intends to place a safety priority on passenger transportation companies, noting that “motor carriers subject to the passenger carrier threshold in the SMS are held to a significantly higher standard than non-passenger carriers.”

Assuming that motor carriers are able to bring themselves up to speed on these changes, and keep track of what oftentimes seems like a shifting regulatory landscape in the form of the CSA, what can carriers expect in terms of CSA metrics appearing in litigation? Perhaps the best predictor of what the future holds for the transportation industry takes the form of a lawsuit pending in the United States Court of Appeals for the District of Columbia Circuit, Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT), et al. v. FMCSA. In real terms, the ASECTT brief, filed in December of 2012, raises the following issues, which stem from an educational Power Point presentation released by the FMCSA:

1. Whether the CSA and the SMS are unlawful and/or constitute rules that were not issued in accordance with applicable law and procedure;
2. Whether the SMS uses flawed statistical methodology that misrepresents the safety performance of motor carriers;
3. Whether the implementation of the CSA represents a departure from an arguably established policy that SMS scores do not constitute safety ratings; and
4. Whether the FMCSA inappropriately allocated safety determination authority to state agencies.

According to ASECTT, its members “are concerned that while CSA’s SMS methodology is a work in progress, portions of it have been released to the public without proper vetting, including but not limited to, the most basic scientific and statistical studies necessary to justify a nexus between the compliance violations measured in each of the so-called 7 BASICs and crash predictability.”

The FMCSA filed the Respondent’s Brief in January of this year. The Brief notes that after implementing the SMS in 2010, public communications staff at FMCSA began monitoring the public’s understanding of SMS data and concluded that additional educational materials would aid the industry in understanding the purposes of SMS. It consequently developed a set of Power Point slides further explaining the SMS, which were first posted to the Agency’s web site in May of 2012. The FMCSA argues that the Power Point presentation at issue is not a legislative rule that is subject to notice and comment rulemaking, does not establish standards or procedures for making an official safety fitness determination and does not constitute binding standards the Court can review. Further, the FMCSA claims that, to the extent the Power Point does provide a basis for judicial review, it falls within the Agency’s statutory duty to promote commercial vehicle safety and set minimum safety standards.

The ASECTT petitioners filed their Reply Brief on February 11, 2013. That Brief argues that, regardless of whether the information released by the FMCSA comes from a Power Point, it has real-world legal and practical consequences and, in effect, constitutes a legislative rule. Accordingly, the petitioners claim that the Agency cannot evade a review based on technical grounds.

The issues are now fully briefed and before the Court, although the Court has not scheduled oral argument. It appears that the best argument available to the FMCSA is based on procedural grounds, meaning that if the Agency wins, the issues will likely be litigated again. Ultimately, the Agency will have to address questions regarding whether its data can be used to accurately predict unsafe and/or high-risk carriers. In that regard, Wells Fargo Securities, LLC funded a study finding no statistical relationship between a carrier’s actual accident incident rate and the scores for Unsafe Driving, Fatigued Driving (the old version) or Driver Fitness BASICs. Additional studies resulted in similar conclusions and have suggested that there are problems with the way violations are weighted (an improper lane change is a 5 point violation, while a seatbelt violation is 7 points), the variance between inspection rates from state to state, the quality of the data collected and the means available to change reported data (DataQs).

Given the problems inherent in the way the SMS collects and utilizes data, one has to believe that the CSA, as it’s currently structured, won’t remain in effect long-term. Given what’s at stake in terms of the arguable impact on the smaller carriers within the industry, and the expanding vicarious liability exposure associated with the program, the stakes are too high for the industry to cease legal challenges. Nonetheless, until the FMCSA lands on the final form of the program, the industry will continue seeing an increase in vicarious liability claims, or those claims where plaintiffs blame brokers, shippers or insurers for using and/or insuring “unfit” carriers. Courts are increasingly allowing plaintiffs to pursue vicarious liability claims under the theory that federally licensed independent motor carriers are the agents of a federally licensed broker. Thus, if a motor carrier causes an accident, the broker as well as the motor carrier are both sued for damages, even though the broker-motor carrier relationship is not one that was previously considered an employer-employee relationship. Brokers and carriers are both questioning the accuracy of the SMS and BASIC scores, yet are still being forced to weigh them prior to contracting a load. In addition, the CSA created an entirely new discovery toolbox available to the plaintiffs’ bar. The discovery that is tailored to CSA issues will continue to grow more sophisticated as the program matures and the FMCSA begins releasing more data to the public. Hopefully, the litigation environment will change with a favorable ruling in the ASECTT case. Until then, motor carriers cannot afford to let their CSA guard down.

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With most things, the average is mediocrity. With decision making, it’s often excellence. You could say it’s as if we’ve been programmed to be collectively smart.”
—James Surowiecki, The Wisdom of Crowds

Studies show that groups and crowds consistently beat experts in evaluating complex problems. Businesses are taking advantage of that knowledge. Will the trend to crowdsourcing, like other business practices affect litigation? The article reviews recent academic studies of case evaluations made by lawyers and factors that affect their accuracy. It suggests that the legal field too can benefit from wisdom of groups in the new media as it traditionally has done in the good old days.

Predicting an outcome of a legal case is notoriously difficult yet essential for legal departments driven by the need to increase certainty. So businesses have taken steps in that direction by resolving most cases through negotiations. In any business negotiation knowing your true risks, your fallback position is considered critical. A clear picture of who is likely to prevail if the settlement is not achieved is essential for being able to drive a good bargain in litigation. But with so few cases going to trial, how can we know the value? For answers corporate litigants turn to three sources: data on verdicts in similar cases in the same venue, their legal experts' evaluations and jury research.

To translate it into business terms: data mining, expert evaluations and decentralization – using the wisdom of groups rather than leaders and experts. Data mining of existing verdicts is helpful, but greatly limited since it does not include confidential settlement amounts (in excess of 90% of the cases) and it does not help you evaluate the strength of your particular case with its unique facts. How good are legal experts at predicting case outcomes? Several researchers asked nearly 500 US lawyers to predict the outcome of their next legal move (e.g., a trial, a motion) and then measured the outcome. Forty-four percent of the time lawyers were overly optimistic; 24% of the time the lawyers underestimated the potential and 32% of time, they were right. Thirty-two percent is unsatisfactory for those who want certainty.¹

But if we look at the broader research of expert evaluations, we will see that lawyers are no exception. Most of the time, most of the experts are not as accurate in their predictions as properly organized diverse groups of independent experts and non-experts. In 2005, bestseller The Wisdom of Crowds² summarized multiple studies showing that under certain conditions
groups and crowds are consistently better in solving all kinds of problems than the best of experts. The book reviews market predictions, (the market “knew” which of the contractors was responsible for the Challenger explosion within a day, while it took experts months to reach the same conclusion); precise estimates of quantities of meat or beans by crowds, a search for a missing submarine and multiple experimental studies. In all these cases, averaging crowd results was more accurately predictive and reliable than counting on the best experts. We seem to possess collective wisdom once we average our answers cancelling out each other’s mistakes.

Crowdsourcing is a good example of business taking advantage of the insight. Wikipedia, by itself the best example of crowdsourcing, defines the term coined in 2006 as “the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers.” It may sound novel, but the old “invisible hand of the market” fits the definition. It is even less novel when we look at the history of justice: for thousands of years justice relied on wisdom of ordinary citizens. From grand juries to trial juries the idea is that ordinary, non-expert citizens would deliver the best decisions if they are given the facts and the applicable law. However, with so few cases going to trial this wisdom is getting lost. The reverse tendency took hold in litigation: away from using the wisdom is getting lost. The reverse tendency took hold in litigation: away from using the wisdom of groups to relying on expert judgment.

Does having more experts improve case assessments? A group of scientists set out to evaluate exactly that.3 At first, they asked very experienced plaintiff attorneys and law students to guess what jurors awarded in non-economic damages in real cases described to them. The good news is that experienced attorneys were much better at it than law students. The bad news is that hardly anyone got them right. Then the researchers showed attorneys estimates provided by another attorney; then asked them to discuss it. The good news is that all these steps work to increase accuracy, under the right conditions and when attorneys take each other’s opinions into account. The greatest benefit and the greatest degree of error-correction occur the first time you exchange opinions with your experienced colleague or your classmate. The bad news is that more than half of experienced attorneys simply ignore other attorneys’ opinions. The discouraging news for all experienced attorneys is that averaging all estimates provided by law students gave greater accuracy than individual estimates provided by experienced attorneys.

...attorneys are different than jurors in every demographic characteristic that matters: education, employment conditions, living conditions and level of empowerment.

The study shows that experts are having a hard time guessing what jurors did and no wonder: attorneys are different than jurors in every demographic characteristic that matters: education, employment conditions, living conditions and level of empowerment. It would be superhuman if anyone could actually put themselves simultaneously in the shoes of unemployed single mothers, retired veterans, postal and union workers while setting aside their own expertise, opinions they stated earlier and their client’s expectations and hopes. Still groups do better. Large companies now use their in-house attorneys to serve as focus groups for purposes of case evaluation. But how diverse can such a group or a trial team be — united by the common employer, common goals, experiences and friendships? The Wisdom of Crowds concludes that the best groups are diverse and made of independent people: “Diversity and independence are important because the best collective decisions are the product of disagreement and contest, not consensus and compromise. The best way for a group to be smart is for each person in it to think and act as independently as possible.”

The legal industry pioneered the use of small groups of non-experts for complex decisions in the form of juries. Is it falling behind other industries now in terms of mining the wisdom of groups? Not entirely. Attorneys and clients who could afford it followed the earlier business trend of utilizing market research and turned to jury research. Jury experts began to charge significant fees because the value was immediately apparent. Combining with the costs of staging a mock trial in a physical space the activity was not affordable for most litigants. However, the number of experts increased exponentially; and since nearly everybody is online, who needs physical space in order to get together? Crowdsourcing, by many definitions is about online activity and it is time for litigants and the legal industry to take greater advantage of it. It is happening already. Not only can you get a crowd of your own to give you dispute resolution advice, you can get a real attorney, you can join discussion groups that will inform you of your choices. Go on the Internet and you can sign up to participate in online alternative dispute resolution for your case, or you can be an expert or a juror for someone else’s case; you can submit your case for live online jury research in a secure setting with surrogate jurors recruited from your venue; you can check what is being said on social media about your client or your opponent or see if your jurors are tweeting about your case. The future is here and your best decision-makers are cheap and plentiful and are at your fingertips. Should you deprive yourself and your company of the best source of wisdom and problem solving just because the old ways became too inconvenient? All the research says that diverse groups of citizens have much to contribute to your evaluations. And knowing their opinion, contributes a great deal to your level of certainty and negotiation strategy in any given case.


4 Dr. Galina Davidoff provides creative solutions to difficult persuasion problems based on sound jury research practices, deep understanding of jurors’ psychology and over 16 years of experience.
No, this is not a tribute to Pete Townshend or Roger Daltrey, but for folks involved with general liabilities policies, maybe just as exciting. This is a reflection on the term “you” as defined and used in the standard general liability policy form. Despite the benefit of being defined by the insurance contract, courts vary on their interpretation of the term “you,” and often in a manner inconsistent with its definition. Sometimes the definition is observed; other times it is ignored.

THE POLICY DEFINITION OF “YOU”
The ISO general liability coverage form separates additional insureds from named insureds by defining and limiting the term “you” and “your” in the policy to mean the named insured, while anyone else qualifying as an insured, such as an additional insured, is simply an insured. The policy also describes “we” to mean the insurer issuing that policy, but there is only one of those (unlike multiple potential “insureds”), so the interpretation of “we” is straightforward.

Of course, many will argue that there need not be judicial interpretation of a defined policy term. An important concept running in the background of all this is that any ambiguity in an insurance policy is construed against the drafter, under the doctrine of contra proferentem. The insurer is deemed the drafter of its insurance policy, so any genuine question of interpretation is decided against the insurer-drafter. Therefore, if we stopped here, it could be safe to assume that “you” means the named insured, but not an additional insured.

As an initial thought, additional insureds on a general liability policy typically receive the same coverage — and are subject to the same duties — as the named insured, absent a stated distinction in the policy. An additional insured could also have less, or even greater coverage than the named insured, based on the interpretation of “you.” One would think that in the event of a question on policy interpretation, the courts would apply the language of the insurance contract in favor of the insureds, but this is not always the case.

In many states, the courts hold that “you” includes additional insureds. As one court put it, “neither the capitalization pattern nor the usage distinction between the terms ‘Named Insured’ and ‘Additional Insured’ can suffice to create legal ambiguity.” The reasons for this view include: the definition of “you” does not put additional insureds on notice that they are excluded from the policy provisions, the policy does not state that additional insureds are different from named insureds, or the definition is not intended to change the nature of the coverage, nor to change the meaning of the policy declarations. But this view ignores the
definition and focuses more on what the policy intends to say, but does not, versus what it actually does say.

Perhaps part of the blame lies with the policy format. “You” is defined separately from other definitions, and unlike other defined terms, “you” does not appear in boldface or in quotation marks when it appears in the policy. It does not stand out, and can often go unnoticed.

“YOU” IN THE OTHER INSURANCE CLAUSE

One of the more commonly observed appearances of “you” is in the “other insurance” provision of the recent policy forms. There, the policy states that it is excess over “any other primary insurance available to you...for which you have been added as an additional insured by the attachment of an endorsement.” The application intended by ISO is that this policy, while primary for the named insured if it is the only coverage, becomes excess coverage where the named insured has been added as an additional insured on another primary policy.

Thus, in practice, where a general contractor has been included as an additional insured on a subcontractor’s policy, the general contractor’s policy is rendered excess over the subcontractor’s policy, even where the two policies may have identical “other insurance” clauses. This is because the general contractor is an additional insured on another policy (that of the subcontractor) but the subcontractor is not added as an additional insured to the general contractor’s policy. Granted, in this hypothetical the interpretation of “you” often goes unnoticed in the context of self-insured retentions. Often, the named insured agrees to be responsible for payment of the retention amount, as seen in the phrases: “you will continue to be responsible for the payment of the Retention Amount,” or “you are responsible for the payment of Allocated Loss Adjustment Expenses.” The word “you” refers to the named insured, which is the same entity that clearly assumed the obligation to pay the retention. In this context, very few courts would hold that “you” includes additional insureds to the point of requiring additional insureds to satisfy or even contribute to the policy’s self-insured retention. A broad application of “you” in these scenarios would certainly be unexpected.

“YOU” MUST PAY THE SELF-INSURED RETENTION

A circumstance that appears relatively predictable is the interpretation of “you” in the context of self-insured retentions. Often, the named insured agrees to be responsible for payment of the retention amount, as seen in the phrases: “you will continue to be responsible for the payment of the Retention Amount,” or “you are responsible for the payment of Allocated Loss Adjustment Expenses.” The word “you” refers to the named insured, which is the same entity that clearly assumed the obligation to pay the retention. In this context, very few courts would hold that “you” includes additional insureds to the point of requiring additional insureds to satisfy or even contribute to the policy’s self-insured retention. A broad application of “you” in these scenarios would certainly be unexpected.

NOW TELL ME, WHO ARE YOU?

In sum, there is inconsistent treatment of “you” in the standard form liability policies, which is surprising given that the term is defined. As it stands now, one side will argue that the policy means what it says and should be read strictly, with any omissions construed against the carrier. The other side will respond that insureds — named or additional — are intended to have the same rights and duties under the policy, which does not clearly state otherwise. If your venue has not dealt with the specific policy language at issue, you can credibly apply either argument to your case.

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Counsel rarely need to be told to include ‘more’ when they write. Indeed, it is often the woe of many a reviewing court that counsel are too wordy. However, when it comes to Medicare and its concomitant reporting and repayment obligations, a seemingly ‘small’ trial court decision from Allegheny County, Pennsylvania (Pittsburgh), serves to inform counsel across the nation that when it comes to protecting both their clients and themselves from Medicare liability, “more” may be better.

Heightened awareness of potential liability to Medicare for reimbursement of Medicare expenses rushed to the forefront in a 2009 case, United States of America v. Stricker, 1:2009-CV-2423, brought before the U.S. District Court of the Northern District of Alabama. In Stricker, the U.S. government filed suit against almost all involved in the $300 million Abernathy v. Monsanto class action settlement. The government’s position was clear and incredibly broad since it sued the original companies, their insurers and even participating attorneys, alleging that in the course of the original settlement’s distribution, counsel improperly failed to account for Medicare’s interests. In its suit, the government sought reimbursement for payments it made for the benefit of the settling plaintiffs. The government continued, arguing that the defendants were liable to Medicare for up to double the amount of medical expenses indemnified by Medicare, claiming authority under the Medicare Secondary Payer statute, 42 U.S.C. §1395y(b). Under this statute, tortfeasors and, by extension, their insurers (as well as plaintiffs) are “primarily responsible” for payment of the items and services for which Medicare (the “secondary payer”) typically makes payment. As such, if Medicare subsequently determines that it has paid for covered items or services, these “primary payers” can be held financially responsible by direct action against them by Medicare in the event it was not reimbursed.

While the Stricker litigation was eventually dismissed based on a statute of limitations defense, and remains on appeal, its wake is clear. Since that litigation, parties, their insurers and their counsel have attempted various ways to protect not only their clients, but themselves, from running afoul of the Medicare and the Secondary Payer Statute. One of the ‘easiest’ ways devised to seek insulation from liability to Medicare was the relatively simple “two check” or “two payee” approach. Indeed, many self-insureds and carriers insist on putting Medicare on the settlement check or receiving a no-lien letter before issuing payment upon a settlement. Plaintiffs generally take issue with this approach because it can substantially delay receipt of their money.

While not a federal decision, the
Pennsylvania Superior Court provided guidance on how it views insurers and others attempting to protect themselves in this manner. In Zaleppa v. Seiwert, 9 A.3d 632 (Pa. Super. 2010), a jury rendered judgment and an award in favor of the plaintiff, a Medicare beneficiary. The defendant sought to condition payment of that judgment by adding Medicare as a payee on the check or by holding the money in court until Medicare’s interest could be determined, both of which options the plaintiff refused. The Zaleppa court noted that a defendant was not authorized to act “on behalf of” Medicare and, thus, ordered that the defendant make payment as called for by the jury in its award. Although Zaleppa involved a judgment, many believe that were the case appealed on the same issue, but involving a settlement, the outcome would be the same.

However, in 2012, what could have been dismissed as a ‘mere’ trial court opinion, provides sound guidance for insurers, clients and counsel seeking to protect themselves against Medicare liability, by conditioning the settlement itself on the issuance of a final lien letter or placement of Medicare on the settlement draft.

In the case of Wimberly and Dawson v. Katruska, AR-11-004777957 (Allegheny County, Pennsylvania, May 23, 2012), Judge R. Stanton Wettick was faced with determining when and whether a defendant may condition a settlement payment upon plaintiff providing a no-lien letter from Medicare—a daily, almost universal dilemma in civil litigation. While it was undisputed that the parties agreed upon the amount of the settlement and, essentially, that the case was settled, when it came time for payment, the defendant insisted on verification that Medicare was not involved in the matter. Possibly recognizing the length of time such a letter would take to obtain, Plaintiff responded by filing a motion to enforce the settlement.

Judge Wettick began his analysis by noting what is at stake when Medicare is involved in third-party litigation, describing, of course, the Secondary Payer statute. The court recognized that in an attempt to avoid potential Medicare exposure, the defendant’s insurer in Wimberly sought an affirmative statement that Medicare did not have an interest in the matter—a “no lien letter.” The defendant argued that it merely sought to avoid double liability. As the matter remained within the Commonwealth of Pennsylvania, the court rejected this argument under Zaleppa. However, the defendant also argued (in the alternative) that prior to settlement the parties agreed to condition payment of any settlement proceeds upon determination of Medicare’s interest. Not surprisingly, plaintiff denied that any such arrangement existed. In considering this argument, Judge Wettick relied on standard principles of contract law, recognizing the parties’ common interest in reaching a settlement and achieving finality. Indeed, in personal injury litigation, a plaintiff desires financial payment and the defendant desires an end to its liability. Clearly, both of these desires were before the court. Accordingly, Judge Wettick issued a rule upon the defendant to show cause why the settlement should not be enforced and ordered that, at the hearing upon that rule, it would be defendant’s burden to establish that payment of the settlement was conditioned upon determination of Medicare’s interest.

The “take away” here is clear. We suggest that it would be a good practice for defendants and their insurers to clearly include their intention to determine Medicare’s interest at the time they communicate any and all offers of settlement.

We suggest that it would be a good practice for defendants and their insurers to clearly include their intention to determine Medicare’s interest at the time they communicate any and all offers of settlement.

Language akin to the following should be included in any settlement offer:

“To the extent that your client is a Medicare beneficiary, as part of the conditions of settlement, a Final Demand Letter will be necessary before any settlement draft is issued. Acceptance of a settlement offer in this matter shall constitute an express understanding that no settlement funds will be distributed to plaintiff or plaintiff’s counsel until a Final Demand Letter is received. We reserve the right to place Medicare’s name on any settlement draft or to issue separate payment to Medicare based on the Final Demand Letter.”

Although the specific issue has yet to be determined by a reviewing court, it appears to the authors that such an approach would be most beneficial. The interposition of conditions, such as Medicare’s provision of a final lien letter and/or placement of Medicare as a payee on the settlement check, as material terms of the settlement negotiated by the parties may serve to protect the defense’s interest in informing Medicare, determining reimbursement obligations and, most important, staying clear of Medicare scrutiny.

Any questions regarding this case can be directed to USLAW members, Stephen E. Geduldig (717-237-7119, sgeduldig@tthlaw.com) or Ryan C. Blazure (570-820-0240, rblazure@tthlaw.com) of Thomas, Thomas and Hafer LLP, Harrisburg, Pennsylvania.

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During litigation, aggressive plaintiffs’ and policyholders’ attorneys often consider an insurer’s claims file to be a treasure chest of potentially valuable discovery. They may demand, for example, information that is privileged, irrelevant, overly broad, and/or not likely to lead to admissible evidence. Notwithstanding, insurers will often produce to their insureds the relevant, non-privileged portions of their claims files, such as documents which describe facts pertinent to the insurer’s handling of a claim. However, insurers should be prudent in taking reasonable steps necessary to protect privileged, proprietary, and/or otherwise non-discoverable portions of their claims file materials from disclosure in litigation.

As set forth in more detail below, certain jurisdictions around the country have recently issued judicial opinions concerning the scope of privilege and discovery rights in the context of the “tripartite” relationship. The tripartite relationship describes the complex relationship among an insurer, the insured, and defense counsel retained by the insurer to defend against third-party claims. In the majority of jurisdictions, confidential communications between counsel and the insured or the insurer are generally protected, and both the insurer and the insured are holders of the privilege. In some circumstances, however, courts may closely examine and/or narrow the protections from discovery typically afforded among parties within the tripartite relationship.

For example, in a recent case from the U.S. District Court for the Northern District of Georgia, the Court rejected an insurer’s attorney-client privilege and work product doctrine arguments holding that an insurer’s communications with defense counsel retained for the insured in an underlying liability suit were discoverable.1 Of note, the Court ordered the production of the insurer’s entire claims file notwithstanding objections that portions were protected by the work product doctrine based on the specific facts of the dispute. However, while the Court permitted the production of the underlying claims file, it did limit said production and permitted redaction of any mental impressions, conclusions, opinions or legal theories of the insurer’s in-house counsel and insurer’s claims representatives handling the file regarding the litigation. In any event, this Georgia Federal District Court’s ruling serves as a reminder that insurers should be careful in organizing and maintaining their claims files so that discoverable and non-discoverable materials do not overlap.

Conversely, a recent Court of Appeals decision from California applied the attorney-client privilege broadly with respect to confidential communications among claims counsel for a title insurer, its insured, and the insured’s counsel appointed by the title insurer.2 In a case involving a title insurer’s retention of counsel to prosecute an equitable subrogation claim on behalf of the insured lender, the Court of Appeals confirmed the creation of a “tripartite attorney-client relationship” whenever an insurer retains counsel to defend its insured. That tripartite attorney-client relationship includes the insurer, the insured, and the counsel, which together form a unified front in the litigation. As such, confidential communications between either the insurer or the insured, on one hand, and counsel, on the other hand, are protected by the attorney-client privilege. Both the insurer and insured are holders of the privilege and either one can assert it. Moreover, the Court held that the counsel’s work product retains its protection when it is transmitted to the insurer.

Next, a related developing question involves the duties of defense counsel when they acquire information from the insured that may impact the insured’s insurance coverage. Generally, the litigation privilege exists to protect communications between the insurer and defense counsel concerning the defense of an insured. The litigation privilege is deeply rooted in the common law doctrine that attorneys are immune from civil suits for defamation or libel when they arise out of communications made in the course of judicial proceedings. This privilege is predicated upon the long-established principle that the efficient pursuit of justice requires that attorneys and litigants must be permitted to speak and write freely in the course of litigation without the fear of subsequent lawsuits. While the litigation privilege was originally used to protect against defamation suits, Court apply it today to most civil causes of action.

Some jurisdictions, such as Florida, appear to have taken a broad view of the litigation privilege as they held that “absolute immunity” must be afforded to any act during the course of a judicial proceeding, regardless of whether the act involved a
defamatory statement or “other tortious behavior” as long as the act has some relation to the proceeding. Conversely, other jurisdictions have taken a narrower view of the litigation privilege. For example, the Supreme Court of West Virginia held that the litigation privilege should only be permitted in limited circumstances. In addition, the Supreme Court of Idaho held that the litigation privilege does not provide attorneys with blanket immunity.

Recently, the New Jersey Appellate Division ruled that the litigation privilege did not shield an attorney from a legal malpractice suit brought by his former client where the attorney was alleged to have acted in violation of the Rules of Professional Responsibility. In Buchanan v. Leonard, 2012 N.J. Super. LEXIS 162 (App. Div. Oct. 9, 2012), plaintiff asserted a claim for defamation and legal malpractice against the attorney appointed by his malpractice insurer to represent him in an underlying legal malpractice action. Plaintiff’s former clients claimed that he was negligent in handling their bankruptcy filings, causing them to lose their home. When sued, Plaintiff’s insurer appointed Defendant and his firm to represent and defend Plaintiff. As trial neared, Defendant requested settlement authority from the insurer and in doing so completed a settlement form discussing the basis for said request. In this form, Defendant stated that a correspondence from Plaintiff to his former clients demonstrated an admission of bankruptcy fraud, and that criminal conduct may have occurred. Defendant further warned that if the matter proceeded to trial and the letter was disclosed, Plaintiff could be subject to ethical discipline, and potentially a suspension of his license to practice law.

While intended to motivate the insurer to provide defense counsel with settlement authority, Defendant’s settlement memo instead prompted the insurer to withdraw coverage to Plaintiff one week before trial pursuant to an exclusion in Plaintiff’s policy for any claim arising out of dishonest, fraudulent, criminal or malicious acts or omissions. Thereafter, Plaintiff filed suit against Defendant and his law firm claiming legal malpractice and defamation. The trial court granted Defendant’s summary judgment motion on the basis of the litigation privilege, but the Appellate Division reversed. While the New Jersey Appellate Division recognized that attorneys must be free to vigorously represent their clients without fear of being sued, the Court held that the privilege did not protect attorneys from discipline for violating the Rules of Professional Conduct. Moreover, the litigation privilege did not protect an attorney from a claim by his or her client based upon statements the attorney made in the course of a judicial proceeding where, as in this case, it was alleged that the attorney breached his duty to the client by failing to adhere to accepted standards of legal practice. Although the New Jersey Appellate Division did not address the issue of whether or not communications between the insurer and defense counsel, as well as the claim’s file itself were discoverable, it will undoubtedly be an issue litigated during discovery. Moreover, this case demonstrates a situation in which the insurer and their claims file is dragged into subsequent litigation even without a claim of bad faith.

Overall, the tripartite relationship is one of the most difficult associations to define, as multiple duties exist and can present challenging actual or potential conflicts among the parties. Ultimately, the onus is on the parties to the “tripartite relationship” to be proactive in ensuring that the attorney-client privilege will be protected. In particular, insurers and defense counsel should make it clear at the outset of the “tripartite relationship” that they understand the defense counsel’s ultimate obligation is to protect the interests of the insured. Thus, the parties should consider including appropriate language to this effect in any retainer agreements or other written communications between defense counsel and the insurer or the insured. This simple step can help to avoid misunderstandings as to the parties’ respective roles.

Furthermore, in the context of providing periodic status reports, defense attorneys must be sure to exercise care in representing the insured, and remain conscious of that duty when communicating with the insurer. While the insurer may fund the defense and potentially any judgment or settlement, and therefore must be kept abreast of significant developments in the case, jurisdictions across the country have recognized that a defense attorney’s first duty is to his or her client, the insured. Thus, insurers and defense counsel must balance the need to provide information to the insurer related to the defense of claims with defense counsel’s obligation to avoid providing information that could be prejudicial to an insured’s interests or adversely impact an insured’s entitlement to coverage. As a practical matter, defense attorneys should provide the client with drafts of any significant development reports that may contain sensitive information for approval prior to sending it to the insurer. Additionally, to the extent a defense is being provided pursuant to a reservation of rights, the client should be advised to consider retaining personal counsel to protect his interests.

Finally, insurers must recognize that they cannot rely on defense counsel to provide them with information relating to coverage, but should instead conduct their own investigations if coverage issues exist. In these circumstances, insurers should consult with competent coverage counsel and make sure that mental impressions, conclusions, opinions or legal theories regarding the underlying litigation are kept separate from the claims file itself, or at the very least organized in such a manner to reflect the privileged nature and/or permit appropriate redactions. Ultimately, all parties involved in the tripartite relationship should remain mindful of the potential conflicts that may arise, and potential attempts to pierce the privileges between them.

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Hailed as the fastest growing social media site ever, Pinterest was launched in March, 2010 with the mission of “connect[ing] everyone in the world through the things they find interesting.” By January 2012 Pinterest had 11.7 million unique users, making it the fastest site in history to break through the 10 million mark. In July 2012, it broke the 20 million visitors mark.

Pinterest allows users to save images and categorize them on different “boards.” Users can follow the boards of other users with similar tastes. Popular categories include travel, cars, food, film, humor, home design, sports, fashion, and art.

Because Pinterest relies almost entirely on images posted by “pinners” and does not vet images before they are pinned, it faces potential copyright and trademark actions arising from the pinning of images owned by third parties. Its efforts to address these concerns have varied considerably over the past year and raised concerns among both pinners and those whose copyrighted images may be pinned regarding whether Pinterest seeks to protect copyright interests or just insulate itself from potential liability.

THE CONTROVERSY SURROUNDING PINTEREST’S TERMS OF SERVICE

In February 2012, photographer and lawyer Kirsten Kowalski wrote a blog post in which she announced that she was deleting her Pinterest inspiration boards due to potential copyright violation concerns. Her post “went viral” and contributed to building criticism of Pinterest’s Terms of Service (TOS). Blog posts warning users of their potential liability and complaints from content creators were rampant.

In response to Kowalski’s post, Pinterest co-founder Ben Silbermann contacted her directly to discuss making Pinterest more user friendly and legally compliant. Silbermann explained he knew there were “issues with Pinterest and the fear of claims of copyright infringement and he want[ed] to figure out a way to make his little web page work within the confines of the law.” Eventually, Pinterest revised its TOS.

PINTEREST’S APRIL 2012 TOS

Pinterest released new TOS on April 6, 2012. The revised TOS surprisingly did little to allay concerns about Pinterest’s attempts to foist potential copyright liability onto its users. But they did begin to differentiate between individual and commercial pinners.

In its original TOS, Pinterest claimed to have a permanent license to users’ content. Under the April 2012 TOS, users’ content remained on Pinterest’s servers for a “commercially reasonable period of time” after users terminated their accounts. There was, however, an exception: if users posted content publicly, or other users re-pinned it, Pinterest would keep it posted.

Under the TOS, liability to third parties was placed solely upon users. Pinners were advised: “[y]ou therefore agree that any User Content that you post … does not and will not violate any law or infringe on the rights of any third party, including … any Intellectual Property Rights … publicity rights or rights of privacy.” Similarly, Pinterest’s April 2012 TOS warned users that: “[t]he entire risk arising out of your access to and use of the services … remains with you.”

The TOS’s indemnity clauses required users to indemnify Pinterest for costs incurred as a result of an action stemming from Pinterest use. Users agreed “to indemnify and hold harmless Pinterest … from and against any claims … including … reasonable legal and accounting fees.” The primary distinction between the original and April 2012 TOS’s indemnification provision was the addition of the section “Your Responsibility for Your Content.” This section instructed users that “you are in the best position to know if the materials you post are legally allowed.”

Pinterest’s April 2012 TOS for the first time included a liability provision for those creating a Pinterest account on behalf of an entity. “If you open an account on behalf of a company … then (a) ‘you’ includes you and that entity, and (b) you represent and warrant that you are an authorized representative of the entity with the authority to bind the entity to these Terms, and that you agree to these Terms on the entity’s behalf.”

PINTEREST’S CURRENT TOS

Pinterest again revised its TOS; as of March 1, 2013, the TOS more clearly define the rights, responsibilities, and potential liabilities of business and individual users. It also published a separate “Copyright” policy.
that governs all users, identifies the protections that it asserts it has under the Digital Millennium Copyright Act (DMCA), and informs copyright owners of the steps they should take to provide notice that an infringement has occurred. The latest TOS, however, only require indemnification of Pinterest if it is used “for commercial purposes,” a departure from the former terms which attempted to impose indemnification upon all users. These changes likely reflect Pinterest’s expansion into a new model that emphasizes increased posting by businesses, which was previously prohibited by the TOS. The new TOS also do not differentiate between public or private posts for the purposes of their use after a pinner departs.

DEFENSES TO COPYRIGHT INFRINGEMENT AVAILABLE TO PINTEREST
Federal copyright laws grant the author of a copyrighted work the sole and exclusive right to publish and reproduce the work, with certain limitations. Some use of copyrighted work may constitute “fair use,” which allows limited rights to its use. Under 17 U.S.C. §107, the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship and research is not an infringement of copyright. The fair use analysis, which weighs the social benefit of use against the private loss, considers four factors:
- The purpose and character of the use, including whether it is for commercial or educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the copyrighted material used in relation to the work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

PINTEREST’S TOS INCLUDE A POTENTIAL ARGUMENT TO REBUT ALLEGATIONS OF COPYRIGHT INFRINGEMENT: CAPTIONS. Pinterest requires users to post a caption to anything they pin. By adding a caption, Pinterest is essentially requiring its users comment on the image. Commentary is a type of fair use that the law encourages and provides a potential argument against a copyright infringement claim.

PINTEREST’S DEFENSES FOR LIABILITY UNDER THE DMCA
The DMCA is a U.S. copyright law that implements two 1996 treaties of the World Intellectual Property Organization. Under the DMCA, production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works is criminalized. Merely circumventing an access control (whether or not there is actual infringement of copyright itself) is also a violation of the DMCA. The DMCA contains a safe harbor provision which protects websites from liability for content uploaded by users as long as the site promptly removes content when requested by its owner. Pinterest has a notification system which allows copyright holders to request that content be removed from the site. This system, however, may not provide Pinterest with protection from copyright infringement claims. There are exceptions to the safe harbor defense when the service provider actively encourages copyright infringement; when a service provider has knowledge of the infringement but ignores it; and when a service provider receives a financial benefit from the infringement and has the ability to control the activity.

PINTEREST released a statement in March 2012 in which it claimed protection under the DMCA’s safe harbor provisions. No major copyright lawsuits against Pinterest had emerged as of March 1, 2013, although there is increasing internet chatter about the effectiveness of Pinterest’s terms of use in avoiding or removing pinned copyrighted material. Pinterest has also enabled entities to opt-out of having their content pinned. A “no-pin” HTML meta tag was released by Pinterest in February 2012 to allow websites to opt-out. On February 24, 2012, Flickr implemented the code to allow users to opt-out their photos.

LIABILITY ISSUES OF INDIVIDUALS AND BUSINESSES USING PINTEREST, CLAIMS OF CONTENT CREATORS, AND REMAINING CONCERNS FOR PINTEREST ITSELF
Generally speaking, U.S. governmental entities and courts have been more willing to protect ownership rights of content creators on the internet than they have been to take action that may appear to affect First Amendment rights. While Pinterest’s TOS attempt to insulate it from copyright liability, it is unclear whether its efforts, at least in their current form, will be successful. It will, however, likely take a potential plaintiff with financial or political clout to require Pinterest to affirmatively undertake more stringent initial oversight of pinned images or more decisive action once it receives notice under the DMCA.

While individual pinners no longer face the risk of indemnifying Pinterest if they pin protected content that risk remains for its corporate users. Businesses should update their social media policies to: (1) emphasize that employees who use the site must only share company-owned content; and (2) that the content will remain the property of the company even if the employee leaves. Both individuals and businesses, however, still may be subject to claims by content creators for copyright violations.

Kevin Nelson is Managing Partner of Huddleston Bolen’s Charleston, West Virginia office. The primary emphasis in his legal practice is in employment law, where he has litigated matters involving trade secrets, discrimination, and wrongful discharge. He also provides his clients with risk management advice and review on a variety of employment matters including social media use and is also an active litigator in defamation and First Amendment cases. He has been recognized for five consecutive years as one of The Best Lawyers in America and was named a SuperLawyer in employment law in 2013.

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1 http://pinterest.com/about/
2 An inspiration board is a large group of images on a user’s page. “How to Use Pinterest’s Pinboard on the Web.” http://www.usatoday.com/tech/news/story/2012/01-17/how-to-pinterest-mark-smith/32618856/1
3 http://dldportraits.com/2012/02/my-date-with-ben-silbermann-following-up-and-drying-my-tears/
4 http://pinterest.com/about/terms/
5 http://about.pinterest.com/copyright/
6 http://techcrunch.com/2012/11/14/pinterest-launches-new-business-terms-for-companies-website-verification-widgets-and-access-to-new-features/
7 http://articles.bussinessinsider.com/20120308/tech/31135048_1_caption-copyright-image-owners
8 Interestingly, Pinterest still asserts that it may “take whatever action, in its sole discretion, it deems appropriate” upon receipt of the notice of copyright infringement.
9 http://pinterest-out.blogspot.com/
10 http://www.bizreport.com/2012/02/virtual-pinboard-social-network-releases-nopin-tag-code.html If a user attempts to pin content that is “non-pinable,” the user will be notified that “This site doesn’t allow pinning to Pinterest. Please contact the owner with any questions.”
11 Kevin Nelson has been recognized for five consecutive years as one of The Best Lawyers in America and was named a SuperLawyer in employment law in 2013.
USLAW NETWORK offers our members’ clients countless products free of charge to assist with day-to-day operations and management of legal issues. Many of these products are the direct result of concepts and initiatives developed by our Client Community for the Client Community.

The following listings detail each product which runs the gamut from USLAW Solutions to USLAW Resources and finally to USLAW People. We encourage you to review these and take advantage of those that are applicable to you.

USLAW is continually seeking ways to ensure that your legal outcomes are seamless and, most importantly, successful and we hope that these resources can assist in this regard. Please don’t hesitate to send us input on your experience with any of the items listed in the Sourcebook as well as ideas for the future that would benefit you and your fellow colleagues.

**USLAW SOLUTIONS**

**TEAM USLAW**
Corporations and insurers alike need consistent, quality legal services over a broad spectrum of legal and geographical areas. The cost, time, and expertise required in securing legal representation and negotiating fee schedules throughout the region, country and around the world can be overwhelming, requiring constant effort, oversight, frustration and missed opportunity. Team USLAW is the solution to meet these challenges. Team USLAW, a wholly-owned subsidiary of USLAW NETWORK, Inc., manages a client’s legal needs, providing one point of contact to clients ensuring they receive consistent and quality legal firm choices and services no matter where in the world your needs may arise. Team USLAW eliminates the need to negotiate different fee schedules for each and every legal need. And clients always have the option to reject any candidate firm presented. In summary, Team USLAW is a comprehensive service designed to eliminate much of the hassle and uncertainty of moving from in-house to outside counsel.

**EDUCATION**
It’s no secret – USLAW can host a great party; however, we are much prouder of the industry-leading educational components of our events and conferences. Reaching from national to more localized offerings, USLAW member attorneys and the clients they serve provide countless seminars, workshops and conference sessions not only at USLAW branded events but also at many legal conferences throughout the year. CLE accreditation is provided for most USLAW educational offerings.

**A TEAM OF EXPERTS**
USLAW NETWORK undoubtedly has the most knowledgeable attorneys in the world, but did you know that we also have the most valuable corporate partners in the legal profession? Don’t miss out on an opportunity to better your legal game plan by taking advantage of our corporate partners’ expertise. Areas of expertise include forensic engineering, structured settlements, court reporting, jury consultation, e-discovery, medical record analysis, forensic accounting, investigation and legal animation services.

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

**USLAW CLAIMS CHALLENGE**
The Challenge is a one-day, experiential claims program that USLAW brings to you and your company. Directed to claims personnel, a detailed, hypothetical, multi-jurisdictional scenario is played out with USLAW member attorneys and corporate partner experts working side-by-side with your staff in smaller teams to manage all of the issues and curveballs that are sure to come. Do we go to trial, mediate, or settle? This is just one of the many questions at hand as USLAW stages this highly interactive program customizable for your specific company and legal staff.

**LAWSUIT MONITORING**
Let USLAW help you be the first to know when your company is facing litigation. With USLAW’s Lawsuit Monitoring program, we can search for your company on a daily basis and alert you of any activity we find.
USLAW NETWORK CLIENT SERVICES AND PRODUCTS

USLAW RESOURCES

COMPENDIUMS OF LAW
USLAW regularly produces new and updates existing Compendiums providing a multi-state resource that permits users to easily access state common and statutory law. Compendiums are easily sourced on a state by state basis and are developed by the member firms of USLAW. Just some of the current Compendiums include: Transportation, Construction Law, Offers of Judgment, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal.

STATE JUDICIAL PROFILES BY COUNTY
Jurisdictional awareness of the court and juries on a county-by-county basis is a key ingredient to successfully operating legal challenges throughout the United States. Knowing the local rules, the judge, and the “gossip” provides a unique competitive advantage. In order to best serve clients, USLAW NETWORK offers a judicial profile that identifies counties as Conservative, Moderate or Liberal and thus provides you an important Homefield Advantage.

JURISDICTIONAL UPDATES
Highlighting timely information specific to state by state jurisdictions, USLAW’s Jurisdictional Update is released via e-mail bi-weekly and is an excellent resource to keep abreast of new case law, important verdicts and other pending legislation.

USLAW CONNECT
USLAW’s password-protected area for Clients, USLAW Connect boasts libraries of papers and articles prepared by USLAW members, USLAW Magazine and webinar archives, discussions amongst colleagues, past Conference presentations and much, much more. Get your log-in today!

USLAW MOBILE APPS
We pack light. Take USLAW with you wherever you go with a variety of USLAW mobile applications. View past conference information by downloading any of our Client Conference apps, search our member directory online using Mobile Membership, or go to our mobile site by visiting www.uslaw.org on your mobile device.

USLAW MAGAZINE
USLAW Magazine is an in-depth publication produced twice annually and designed to address legal and business issues facing commercial and corporate clients. Released in Spring and Fall, recent topics have covered managing litigation in a tighter economy, changes in M&A strategies, sidestepping legal challenges during a workforce reduction, best practices in e-discovery policies, and weighing the pros and cons of litigation versus mediation and much more.

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

USLAW RADIO
Timely and relevant, USLAW Radio is a monthly podcast produced for in-house counsel, risk managers, claims personnel and senior executives in companies large and small. Topics include emerging federal statutes, cases pending before the Supreme Court, issues employers should be aware of, file and case management, cost containment, retention of women and minorities in the legal profession and more.

USLAW PEOPLE

USLAW MEMBER AND ATTORNEY DIRECTORIES
Clients can access USLAW member firms and the attorneys in those firms through a variety of USLAW directories, including our annual USLAW Membership Directory as well as directories by specific practice area. Find a firm in a specific jurisdiction or search for an attorney in a specific area of practice, at any moment. Available through hard copy, electronic files and the web.

RAPID RESPONSE
USLAW Rapid Response Directories and Quick Access Online Searches secure USLAW attorneys quickly when timeliness is critical for you and your company. Offered in several practice areas, this resource provides clients’ cell and home telephone numbers along with assurance that USLAW will be available 24/7 with the right person and the right expertise.

PRACTICE GROUPS
USLAW prides itself on variety. Its 6,000+ attorneys study all areas of legal practice and participate in USLAW’s 16 active groups and communities including Banking/Finance, Business & Advisory Services, Business Litigation, Construction Law, E-Discovery, Employment & Labor Law, Healthcare Law, Insurance Coverage, International Business & Trade, IP and Technology, Product Liability, Professional Liability, Retail, Transportation, White Collar Defense, and Workers’ Compensation. Don’t see a specific practice area listed? No worries as USLAW firms cover the gamut of the legal profession and we are sure to find a firm that has significant experience in the area of need.

CLIENT LEADERSHIP COUNCIL
Take advantage of the knowledge of your peers. USLAW NETWORK’s Client Leadership Council is a hand-selected, diverse group of prestigious USLAW firm clients that provides expertise and advice to ensure the organization and its law firms meet the expectations of the client community. In addition to the valuable insights they provide, CLC members also serve as USLAW Ambassadors, utilizing their stature within their various industries to promote the many benefits of USLAW NETWORK.

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Successful Recent USLAW Law Firm Verdicts

Ahmuty, Demers & McManus (Albertson, NY)

In Cahn v. Ward Trucking, Inc., Ahmuty, Demers & McManus scored a unique victory in the Appellate Division First Department when the court granted its motion to reargue and issued a new decision which granted summary judgment to its client for the claims asserted by the plaintiff. In Cahn, the firm represented a contractor retained to perform HVAC work in a building. The contractor required chemicals to be delivered to the building. Upon delivery, a barrel fell striking the plaintiff. The client had contracted to be responsible for deliveries. The firm was able to show that the client did not actually supervise the delivery and did not launch the instrumentality resulting in the injuries. Further, they successfully argued that the client’s contractual obligation did not entirely displace others obligations to maintain safety during deliveries. Relying on prior precedent it was argued that the client could have no liability to the injured plaintiff. The court had initially held that the client’s motion was properly denied given the very specific duty in its contract to oversee deliveries. Glenn A. Kaminska handled the appeal on behalf of the firm.

Copeland, Cook, Taylor & Bush, P.A. (Ridgeland, MS)

Jim Moore and Eric Toney of Copeland, Cook, Taylor & Bush, P.A., in Ridgeland, MS obtained a defense verdict for their client, Kohler Transport, Inc., in a recent four-day trial in federal court. Following a tractor-trailer/car collision, two plaintiffs filed suit in Hinds County against a truck driver and his employer, Kohler, with the primary claim being that the truck driver ran a red light. The matter was removed to federal court. Both plaintiffs alleged and presented proof that they would require spinal surgery on their neck and/or back in the future. At trial, the plaintiffs called the defendant truck driver as an adverse witness and further presented testimony through an accident reconstruction expert, a vocational rehabilitation expert, a neurosurgeon, an emergency room physician and a family practitioner. The defendants called only one witness, a neurosurgeon. During closing arguments, the plaintiffs requested a jury verdict totaling $1,000,000. The jury returned a verdict for the defendants.

Dillingham & Murphy, LLP (San Francisco, CA)

Dillingham Murphy LLP achieved a victory last October in the California Court of Appeal, Ruiz v. Morse, et al. (2012) 209 Cal.App.4th 1455. This tragic case was filed in 2009 by Plaintiffs and Petitioners Michael and Lydia Ruiz, the parents of a young man killed in a 2009 motor vehicle collision by a minor motorist, Dylan Morse. Morse’s friend and companion, Ryne Spitzer, split a bottle of beer with Morse as Morse was driving just prior to the accident. Morse did not purchase the beer, but was present in line 30 minutes earlier at the store when Spitzer did. Morse also did not select, carry, or take the beer out of the store, or say anything in front of the checker about chipping in for the purchase. The Ruiz plaintiffs filed an action in the Sonoma County Superior Court under Business and Professions Code Section 25602.1. Section 25602.1 is an exception to California’s general immunity for retailers and other licensees who sell alcoholic beverages, which applies when the purchaser is an obviously intoxicated minor who then causes harm. The evidence here showed that neither Morse nor Spitzer had any outward manifestations of intoxication at the store. The evidence further showed that there was no sale of beer to the driver, Morse. The summary judgment obtained in the Superior Court was affirmed in the Court of Appeal because the Ruiz plaintiffs could not demonstrate, as they had stoutly alleged, that beer was sold to the driver, Dylan Morse. The undisputed facts showed instead that beer was sold to his friend Ryne Spitzer. The Court of Appeal held that Section 25602.1 must be construed narrowly – it is, after all, an exception to broad and sweeping immunity – and Courts will therefore not expand its scope to include potential licensee liability for selling beer to someone who later provides it outside the store to a minor driver at fault, even if that driver was present at the time of the sale. On January 3, 2013, the California Supreme Court denied review. The decision is now final.

Duke Scanlan & Hall PLLC (Boise, ID)

On October 25, 2012, Keely E. Duke and Richard E. Hall of Duke Scanlan & Hall, PLLC, secured a final decision from the Ninth Circuit affirming a jury verdict in favor of their defendant physician in a highly publicized case involving emergency room care provided to an infant in the face of parental refusal of such care. In Mueller v. Auker, the plaintiffs were parents to a five-week-old patient who developed a significant fever. The patient’s mother brought the patient to the emergency room, where the defendant physician determined that a lumbar puncture was necessary to determine whether or not the infant patient had contracted bacterial meningitis, which, if present, could have resulted in brain damage or death. The patient’s mother refused
the proposed care, at which juncture the child was taken into the protective custody of the State, allowing for the needed medical care to be provided. While the patient was ultimately determined to be healthy, plaintiffs sued a number of parties, including the defendant physician represented by Ms. Duke and Mr. Hall. Plaintiffs asserted a number of claims, including a Section 1983 claim for interference with parental rights. Plaintiffs’ claims were rejected at trial, and the Ninth Circuit ultimately affirmed the verdict, stating that: “If anything, the completed record shows that Dr. Macdonald exercised his best judgment in an emergency setting in favor of ensuring an infant’s safety from the very peril that caused her mother to take her in the middle of the night to a hospital emergency room.

Goldberg Segalla LLP (Buffalo, NY)

In a recent environmental action, local enforcement officials aggressively pursued the potential criminal and civil prosecution of a Goldberg Segalla LLP client for alleged willful Clean Air Act violations. Tactics included multiple subpoenas, obtaining statements, and the quarantine of the facility. Goldberg Segalla’s Environmental Practice Group successfully defended the corporate owner of the premises and its principal, avoiding in their entirety civil penalties against the corporation and the criminal prosecution of the principal for alleged violations of the Clean Air Act. Ultimately no fines or criminal charges were pursued.

LeClairRyan (Richmond, VA)

A landmark ruling upholding the rights of minority shareholders in a case involving one of Virginia’s most prosperous and long-standing mining and landholding enterprises has set a strong precedent and reversed the family’s fortune. A court opinion from Fairfax County Circuit Judge Jane Marum Roush resolved a decade-long contentious family dispute over allegations of self-dealing, shareholder oppression, and wasted or misdirected assets in favor of three dissident stockholders. The judge ordered the Dixon family holdings into receivership and the liquidation of what may total approximately $200 million in assets. The court found that defendants Gene Dixon Jr. and his son, Guy Dixon, retaliated against the plaintiffs for filing legal actions by refusing to value their stockholdings at levels reflecting the company’s true worth. The court also found that company assets were used to pay premiums on multimillion-dollar life insurance premiums in an effort to minimize estate taxes. The plaintiffs were Marion J. Colgate Sr., the husband of Gene Dixon’s now deceased sister, and her two children, Curtis Colgate and Sharon Newcomb, all of whom were represented by LeClairRyan shareholders John H. Craddock, Michele K. Burke and Thomas M. Wolf. The court’s ruling confirms that minority investors must be treated fairly and controlling shareholders may not run the business to primarily benefit themselves.

Modrall Sperling (Albuquerque, NM)

Martha G. Brown and Deana M. Bennett, attorneys with the USLAW law firm Modrall Sperling in Albuquerque, New Mexico, received a favorable decision from the New Mexico Supreme Court in the THI of New Mexico v. Vida Escantada, LLC, et al. v. Celia Archuleta, as personal representative for the Estate of Abelina Lucero, deceased, No. 33,618, a case which was certified to the New Mexico Supreme Court from the United States District Court for the District of New Mexico. Ms. Brown and Ms. Bennett participated in the case as amicus for the New Mexico Healthcare Association, and urged the court to quash certification. The federal court tendered to the Supreme Court the opportunity to issue a decision on several certified questions of critical importance to the long-term care community and its efforts at enforcement of arbitration clauses in nursing home contracts. These questions included whether an authorized agent can commit a resident to arbitrating any disputes which may come up with the nursing home, and whether the wrongful death beneficiaries are bound by such an election in favor of arbitrating disputes. The parties briefed both the procedural issue of whether certification was appropriate, given the existence of controlling New Mexico law and the merits of the case. Ms. Brown and Ms. Bennett argued that controlling precedent of the Court of Appeals concluded that an agent, with authority to admit a resident to a nursing home, has the authority to bind the resident to an arbitration agreement contained within the admission documents. Ms. Brown and Ms. Bennett pointed to the uninterrupted line of New Mexico cases construing the New Mexico Wrongful Death Act as a survival act and as derivative to demonstrate both that controlling New Mexico precedent exits to answer the certified question and that New Mexico precedent confirms that the wrongful death estate is bound, just as the decedent would have been bound. After briefing and oral argument, the New Mexico Supreme Court quashed certification on the basis that there is adequate authority on the issues to guide the federal court, as urged by Ms. Brown and Ms. Bennett. This result provides long-term care clients a strong basis to argue in current and future cases that the Court would not rule for plaintiffs on these issues.

Murchison & Cumming, LLP (Los Angeles, CA)

A Bakersfield jury returned a defense verdict in a premises liability case handled by Joseph Kang of Murchison & Cumming for defendant Tehachapi Towne Center, LLC. In Betty Ramirez v. Tehachapi Towne Center, LLC, the plaintiff alleged personal injury, general negligence and premises liability after tripping and falling on the flared side of the handicapped ramp near the entrance of a store located in the shopping center. Ms. Ramirez alleged that the shopping center carelessly and negligently owned, controlled, inspected and maintained a storefront to allow an apparent and obvious dangerous condition to exist. She claimed that the storefront impeded and obstructed simple walking in the area adjacent to the handicapped parking space. The defendant contended that the storefront condition was open and obvious, that the plaintiff was inattentive, and there was no notice of any dangerous conditions. Medical specials totaled over $59,500 including a rotator cuff surgery, left hand surgery, a fractured jaw, replacement of teeth, facial contusions and physical therapy. The jury returned an 11-1 verdict in favor of the defense.

Pion, Johnston, Nerone, Girman, Clements & Smith, P.C. (Pittsburgh, PA)

J. Lawson Johnston, Scott D. Clements and Aaron Ponzo of Pion Johnston were successful in having a Common Pleas Court Judge grant Defendant’s Motion for Frye Hearing and dismiss multiple occupational lung disease cases filed by former employees of Delaware and Hudson Railway Company. Eight former employees, who worked in different crafts, filed Complaints claiming occupational lung disease due to exposure to industrial dusts, gases, fumes, diesel exhaust, and other contaminants in the workplace. Plaintiffs submitted reports from a board certified pulmonologist who diagnosed pneumoconiosis from exposure to work place contaminants and opined that the individuals suffered permanent pulmonary impairment.

Defense counsel challenged the opinions and methodology of the Plaintiff’s pulmonologist, and upon completion of his trial deposition, filed a Motion for Reconsideration of a request for a Frye Hearing which had been previously denied. The Court, after reviewing the deposition transcript, granted the hearing and after en-
Successful Recent
USLAW Law Firm Verdicts

Poyner Spruill, LLP (Raleigh, NC)
Doug Martin and Eric Stevens of Poyner Spruill, LLP successfully defended a claim for copyright infringement in architectural plans. Plaintiff Building Graphics, Inc., an architectural firm in Charlotte, NC, alleged that design firm Drafting & Design, Inc. and builder Lennar Carolinas, LLC infringed its copyright in three home plans. The defendants denied that they had copied, or ever seen, the plaintiff’s designs. To defeat summary judgment in a copyright infringement case, a plaintiff must produce evidence (a) that defendant had access to the plaintiff’s copyright-protected work; and (b) that the challenged and copyright protected works are substantially similar. The district court granted defendants’ summary judgment motions, ruling that the plaintiff had failed to satisfy either of these requirements. The plaintiff appealed to the Fourth Circuit Court of Appeals. In a published ruling issued February 26, 2013, the Fourth Circuit affirmed. The Court ruled that the plaintiff failed to produce evidence that it was “reasonably possible” the defendants ever saw or had the opportunity to copy the plaintiff’s plans. Plaintiff argued it was “possible” that defendants accessed plaintiff’s plans because homes using plaintiff’s plans were built in Charlotte. Based on its customary practice, Lennar might have come across one of those homes while conducting a “due diligence” review of other homes available in the market. Plaintiff also noted that it had published its plans on an internet website. The Fourth Circuit ruled this evidence was not sufficient. Lennar’s due diligence was limited to new homes built by competitors in markets Lennar was entering, but there was no evidence that homes built with the plaintiff’s plans were located in any of those markets. The availability of plans on the internet did not matter absent evidence that Lennar was likely to come across those plans in a due diligence search or otherwise.

Carr Allison (Tallahassee, FL)
North Florida’s economic development will get a shot in the arm with the construction of a high-tech lumber company coming to Suwannee County. The construction of the Klausner Lumber One saw mill will bring 350 jobs to the area and inject $130 million in capital into the regional and state economies. Carr Allison’s Bill Graham, located in the firm’s Tallahassee office, was instrumental in assisting Suwannee County with securing this development project. Mr. Graham has represented the county for several months, negotiating the development agreement between the County and the Austrian sawmill company, bringing the project to a successful conclusion in late January.

Dillingham & Murphy, LLP (San Francisco, CA)
Tyrrell M. Prosser represented Seagate Technology LLC in its acquisition of one of the former manufacturing and office facilities of Solyndra, the failed solar panel manufacturer in Fremont, California (in bankruptcy since September, 2011). Seagate Technology LLC acquired the property on February 1, 2013 for approximately $90 million out of the Solyndra Residual Trust (the successor to Solyndra LLC through its reorganization in bankruptcy). Mr. Prosser was assisted by Stephen V. Falanga, of USLAW firm Connell Foley LLP in Roseland, New Jersey, on all matters related to the bankruptcy issues and procedures.
ABOVE USLAW NETWORK

2001. The Start of Something Better...
Mega-firms...big, impersonal bastions of legal tradition, encumbered by bureaucracy and often slow to react. The need for an alternative was obvious. A vision of a network of smaller, regionally based, independent firms with the capability to respond quickly, efficiently and economically to client needs from Atlantic City to Pacific Grove was born. In its infancy, it was little more than a possibility, discussed around a small table and dreamed about by a handful of visionaries. But the idea proved too good to leave on the drawing board. Instead, with the support of some of the country’s brightest legal minds, USLAW NETWORK became a reality.

Fast-forward to today. The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client’s legal success. Now as a network with over 6,000 attorneys from 110 defense-based law firms, spanning the United States, Canada, Latin America, Europe, Asia and Africa, USLAW NETWORK remains a responsive, agile legal alternative to the Mega-firms.

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

A Legal Network Not for Its Member Lawyers. Instead a Legal Network for Purchasers of Legal Services.
USLAW NETWORK firms go way beyond providing quality legal services to their clients. Unlike other legal networks, USLAW is organized around client expectations, not around the member law firms. Clients receive ongoing educational opportunities, online resources including webinars, jurisdictional updates, and resource libraries. We also provide monthly podcasts through USLAW Radio, a semi-annual USLAW Magazine, webinars, compendiums of law, as well as annual membership directories and practice group directories. To ensure our goals are the same as the clients our member firms serve, our 40-member Client Leadership Council is directly involved in the development of our programs and services. This communication pipeline is vital to our success and allows us to better monitor and meet client needs and expectations.

USLAW Abroad.
Just as legal issues seldom follow state borders, they often extend beyond US boundaries as well. In 2007, USLAW established a relationship with the Trans-European Law Firms Alliance (TELFA), a network of nearly 30 independent law firms representing more than 700 lawyers through Europe. Subsequently, in 2010 we entered a similar affiliation with the ALN (formerly the Africa Legal Network) to further our service and reach. Additional, USLAW member firms are located throughout Canada, Latin America, and Asia.

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

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

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

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

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