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FROM THE Chair’s Desk

Writing the Chair’s Letter comes about but twice a year, and yet I find that focusing on USLAW’s recent and upcoming highlights always presents me with a particularly happy and somewhat challenging task. More so, as we move into Spring/Summer 2012 we continue to focus on the essential principles that will best shape our Network’s focus over the next several years.

First and foremost, partnership remains the foundational principle. Partnerships forged between NETWORK members. Partnerships with our member firm’s clients as well as our peer partners, the in-house counsel. Partnerships with our newly built global partners, as well as the valuable relationships we enjoy with our corporate partners. USLAW NETWORK thrives through its very real sense of loyalty... a sense of family. And it is best evidenced by the way we conduct ourselves and our business.

We foster these partnerships by providing more opportunities for partner participation and involvement. Our newly created Client Leadership Council is an excellent example of how we encourage increased dialogue between our attorneys and our firm’s clients and within the USLAW community of clients themselves. Our soon-to-be-debuted electronic publications, the USLAW National Counsel Right Next Door Jurisdictional Update and USLAW Success Stories, are more proof of our commitment to becoming a go-to resource for our partners. Our ability to successfully blend educational opportunities with fun, social, and networking events remains a hallmark of ours and a very real asset in our efforts to build longlasting partnerships at USLAW NETWORK.

Partnerships — hardly stand a chance of success without our second principle — trust. As overstated and obvious as it may seem, no relationship can stand the test of time without this key ingredient. USLAW NETWORK nurtures and protects this trust, and not just with our words, but most importantly, with our actions.

Through diversity — another key principle — new partnerships are created and new relationships of trust are forged. Already in place is a host of diversity initiatives designed to build diversity at all levels of the NETWORK. Proof remains in the pudding and positive strides have clearly already been made. Continuous monitoring of success rates will follow to ensure these essential goals are being met.

I hope you will share in my excitement as we move forward towards a very bright future. We have succeeded so handsomely in laying our ground work for growth. Partnerships. Trust. Diversity. These are the elements that have brought us to where we are today and will in turn, continue to strengthen our all-important bonds tomorrow.

Sincerely,

Sheryl J. Willert
Chair, USLAW NETWORK, Inc.
Insurers, insurance defense counsel and coverage counsel are constantly faced with the dilemma of whether liability and coverage issues may co-exist in one claim file, what information and knowledge can be shared between the respective attorneys and claim-handlers, and whether the claims file should be "split." When and how to "split" the file will necessarily impact the insured. Failing to split a file, when appropriate, or failing to correctly handle a split file, can impact both the liability and coverage issues, and result in ethical problems and bad faith exposure to the insurer.

There are no easy answers to these sticky issues. The "correct" answers may vary, to some degree, by jurisdiction, and by the applicable standard for determining whether an insurer has handled a claim in "good faith." Understanding the issues is the first step to an insurer and an insured protecting oneself from future ethical and legal problems.

When investigating claims and/or defending an insured against them, insurers are oftentimes faced with both "defense" issues (pertaining to liability and damages) as well as investigating and determining whether, and to what extent, the insured has applicable coverage. These two issues may be in conflict and not in the insured's best interests. It is important that the insured, whether an individual or a corporation, understand this conflict and know how to ensure it is protected.

One such protection, is requiring the insurer to "split the file," assigning one claim-handler to tend to the insured's defense and another to tend to the insurer's coverage investigation and determination. Many insurers do this on their own accord – it is good claims handling practice and ensures a peaceful co-existence.

It is a basic principle of law – liability insurance companies owe a duty to defend and investigate any potentially covered claim, against an insured. The obligations of the insurer pre-suit, however can be different than post-suit. Pre-suit, generally, there is no conflict between coverage and defense interests. If there is no immediate or apparent conflict, an adjuster can investigate coverage and liability while reserving its rights. At this initial stage, the adjuster
can accept or deny the claims. If the insurer has timely advised the insured of potential coverage issues and reserved its rights, the insurer is entitled to request and use any information provided by its insured in order to investigate liability and coverage. The insurer generally has a contractual duty to cooperate with its insurer’s investigation.

It is when suit is filed that the conflict can occur. Liability insurance companies generally have an absolute duty to defend their insureds against claims where it is clear that the claims are covered under the language of the policy. Likewise, liability carriers have no duty to defend against claims that are clearly outside the coverage afforded under the insured’s policy. However, when coverage is less than clear, such as “where the allegations of the complaint are covered by the liability policy, but the facts are such that it may very well develop at trial that the conduct of the insured was not covered by the policy, or where ‘the allegations of the complaint themselves are ambiguous so that read in one way there is no coverage, but read in another there is,’ [u]nquestionably, the insurance carrier has a right to offer the insured a defense, while at the same time reserving the right to deny coverage even if a judgment is rendered against the insured.”

However, where the file is split, the defense adjuster may not be precluded from using the information to the defense adjuster’s advantage. (That stated, where independent counsel voluntarily discloses such confidential information to the adjuster where a file is not split, the sole adjuster may not be precluded from using the information in formulating the insurer’s coverage position). See, e.g., Travelers Indem. Co. v. Page & Assoc. Constr. Co., No. 07-01-0022-CV, 2002 WL 1371065, at *10 (Tex. Ct. App. June 25, 2002); State Farm Fire & Cas. Co., 216 Cal. App. 3d 1222, discussed supra.

With respect to settlement negotiations in split file cases, the liability adjuster should make independent recommendations to the insurer for settlement authority. The coverage adjuster has the right and duty to either accept the liability adjuster’s settlement recommendation or to modify or reject it consistent with the insurer’s coverage analysis. Both adjusters can exchange opinions on settlement, but the coverage adjuster should have the ultimate responsibility to take an accurate position on coverage, be fair to the insured, and protect the insured’s uninsured interests.

An insurer is charged with a duty of utmost good faith and fair dealing with its insured. However, that does not relieve the insured of its own obligations to protect itself. Coverage and defense can peacefully co-exist so long as the insurer and the insured are aware of the pitfalls and take an active role in avoiding the conflicts – split the file within the insurance company, retain independent counsel and know the roles of each player.

Ms. Faust, a partner at Roetzel & Andress, focuses her national practice on insurance coverage analysis, counseling and litigation, including first party and third party matters, employment liability coverage, construction, life and disability as well as professional liability issues. She counsels and defends clients on bad faith cases. She also has extensive practice handling appellate cases from advising trial counsel to briefing and arguing before the Ohio state and Federal Courts of Appeal. Ms. Faust has handled trial and appellate work in Ohio’s state and federal courts. She has argued in courts of appeals throughout the country. She has partnered with a wide range of clients, including major corporations nationwide.
THE NCAA IN FEDERAL COURT: COLLEGE ATHLETES ARE CALLING FOUL

Whether it’s the relentless hype of “March Madness” in the spring, or the crowded college campuses during the fall football season, welcome to an American growth industry: big-time college sports. From ticket sales to media promotion, and from video games to on-line stores hawking replica jerseys of this year’s star players, the money is flowing in this multi-billion dollar industry across the country.

The Apple, Inc. of college sports is the National Collegiate Athletic Association (NCAA), a carefully crafted and omnipresent non-profit membership association. It comprises more than 1,000 educational institutions, ranging from the hallowed halls of the Ivy League to the Southern-fried ambiance of Alabama and the southeast, across the plains to the Pacific and the likes of Southern Cal and Stanford. The NCAA is a monopoly—there is no other game in town if your favorite college or university wants to play intercollegiate sports. The NCAA and its member institutions regularly articulate a carefully-crafted message of being concerned only about the welfare of the student-athletes and the protection of their “amateur” statuses. The facts, however, show otherwise. The NCAA and its member schools are in the entertainment business in the quest for the revenue that big-time college sports generate. (The NCAA’s primary source of income is the TV money for the NCAA basketball tournament. The new contract with CBS provides for $11 billion for television rights over 14 years.)

The NCAA is quick to point out that its purview encompasses a range of men’s and women’s sports – from soccer, swimming, and golf to the traditional campus elites of football, basketball and baseball – and that over 400,000 students participate, most of whom “will go pro in something other than sports.” But it is the approximately 20,000 or so elite athletes who play major college football and basketball that are the driving force behind this enormous money-making enterprise. It is these young men, many of whom come from disadvantaged backgrounds, who fill the stadiums and coliseums for their “games,” and who drive television ratings and advertising budgets for businesses large and small. Everybody is making money off the talent, hard work, and sacrifices of these young men – except them. And now, there are some who want to see that change.

In a federal district court in Oakland, California, with enough lawyers involved to field a good-sized football squad, a potential bombshell in the world of collegiate sports is ticking away. The business entities that profit from this system and the lawyers who advise those businesses need to be paying close attention as the case makes its way through the judicial system. At the center of the litigation is this basic question: Should former college athletes be entitled to a percentage of the revenues that their alma maters and private companies generate based on the sale of sports merchandise, video games, DVDs, and other officially-licensed products, when those products use the athletes’ names or images? The answer to this question potentially involves billions of dollars in revenue from licensing and merchandising.

The litigation, which consists of several lawsuits that have been consolidated before a federal trial judge, pits former college ath-
Electronics (including former UCLA basketball
power forward Ed O’Bannon and former
University of Nebraska quarterback Sam
Keller, who filed two of the lead lawsuits)
against the NCAA and its licensing affiliate,
the Collegiate Licensing Company (“CLC”).
The athletes have also filed claims against
Electronic Arts (“EA”), the manufacturer
of several popular sports-related video games,
including NCAA Football and NCAA
Basketball.

The athletes are challenging the ac-
tions of the NCAA and other licensing enti-
ties on two broad grounds. First, the athletes
claim that the NCAA violated federal antitrust
law (or “anti-monopoly” law) when it required
student-athletes to sign mandatory form contracts authoriz-
ing the NCAA to use the athletes’ names or images
to “promote NCAA championships or other NCAA
events, activities, or programs.” According to the
athletes, those mandatory contracts (in addition to
certain NCAA bylaws) have resulted in “signifi-
cant anticompetitive ef-
facts” upon the collegiate athletic market, in viola-
tion of federal law. The athletes also claim that,
even if those contracts are not illegal, the contracts
did not grant the NCAA permission to use the ath-
letes’ names or likenesses for commercial purposes. If the athletes suc-
cessfully establish those claims at trial, or in a pre-trial motion, the litigation could poten-
tially have a significant effect upon the collegiate
bylaws. In 2011, the NCAA changed the rules to
require student-athletes to agree to the terms of the
mandatory form contracts.

Second, the athletes claim that
Electronic Arts and other NCAA affiliates
improperly used the athletes’ likenesses,
including their images or photographs, in
video games and other media products. The
athletes’ claims are based upon the legal
theory of “misappropriation” (a rule pre-
venting one person from using the property
of another), as well as the “right to publicity”
(which exists only in certain states, and par-
cularly in California, which gives strong
rights to celebrities to protect the use of
their images for commercial purposes). In
response to the athletes’ claims, Electronic
Arts argued that the First Amendment
trumps any interest that the athletes may
have in protecting their likenesses. Elec-
tronic Arts even went so far as to file a
claim against the athletes, arguing that the
athletes’ lawsuit infringed upon Electronic
Arts’ First Amendment rights. The trial
court dismissed Electronic Arts’ claim, which
is still pending on appeal before the United States Court of Appeals for
the Ninth Circuit, of the time this article went
to press.

When the federal Court of Appeals
rules, its decision could have a widespread
impact upon the rights of Electronic Arts
and other businesses to use sports-related
information in their media products (in-
cluding the photographs or “likenesses” of
athletes, but potentially extending to other
forms of information, such as sports stats-
tics). To date, at least one
federal judge in New Jersey
disagreed with the California trial court. In a
separate lawsuit filed by
Ryan Hart, a former quar-
terback for Rutgers
University, a federal district
court judge in New Jersey
ruled on September 9, 2011
that the First Amendment
protects the right of
Electronic Arts to use play-
ers’ likenesses in its video
games, at least up to a point.

If the Ninth Circuit Court of
Appeals upholds the
California trial court — and
agrees with the New
Jersey court — the conflict-
ning cases could potentially
form the basis for review by the United
States Supreme Court.

To date, the NCAA litigation has been
consumed with much wrangling during
the discovery phase, in which the NCAA has re-
sisted efforts by the athletes to obtain inform-
ation about the NCAA’s internal
operations. The courts have shown some
willingness to limit the scope of the athletes’
investigation into the NCAA’s operations,
but a United States magistrate judge recently
granted a request by the athletes to require the
deposition (or pre-trial testimony) of
NCAA President Mark Emmert no later than
March 20, 2012 — and thus perhaps smack in
the middle of March Madness. The discov-
ery process is scheduled to proceed for at
least several more months, before the
California trial court will be called upon to
make a pre-trial ruling or to conduct a trial.

If and when that happens, there could poten-
tially be widespread changes in the rights
of former student-athletes to receive com-
ensation for the use of their likenesses
by the NCAA, its constituent institutions, and
commercial enterprises. At least one com-
mentator has argued that the NCAA should
implement a system similar to that used by
the United States Olympic Committee, to ac-
crue funds in trust for student-athletes while
they hold amateur status, and to make up
for scholarship shortfalls.

For those of us watching this lawsuit on
the sidelines, the action has not really yet
started. We know where the players stand,
but until the court steps in to referee the cen-
tral dispute, we don’t yet know whether the
claims are out of bounds. Given the amount
of money involved, rest assured that plenty
of eyes will be on this game. For those stu-
dent-athletes who generate tons of cash for
their alma maters, will their schools and the
NCAA agree to share the pot? Or are these
lawsuits little more than the legal equivalent
of a Hall of Fame? Stay tuned, sports fans.

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Robert F. “Bob” Orr recently
joined Poyner Spruill Of
counsel, based in the firm’s
Raleigh office. A former state
Supreme Court justice and
one-time Republican gubern-
torial candidate, Bob is a
member of Poyner Spruill’s
Litigation practice group. Orr focuses his prac-
tice on general litigation and legislative and
regulatory advocacy. Prior to joining Poyner
Spruill, Orr was the Executive Director and
Senior Counsel at the North Carolina Institute
for Constitutional Law. In 2004, Justice Orr
retired from the N.C. Judiciary after serving for
18 years. He spent almost 10 years as a member
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of Appeals. He received both his undergraduate
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A “gas rush” is revitalizing the domestic petrochemical exploration industry, and the legal ramifications could be felt for decades. Through hydraulic fracturing (“fracking”), petrochemical companies access once cost-prohibitive shale gas formations by creating fractures in underground rock formations, thereby facilitating oil or gas production by providing pathways for oil or gas to flow to the well. These pathways are commonly referred to as the “fractures.” The legal consequences of fracking could impact more than half of the Lower 48 states.

BACKGROUND OF HYDRAULIC FRACTURING

The basic technique of fracking is not new. In fact, fracking has been used in wells since the late 1940s. The first commercial fracking job took place in 1949 in Velma, Oklahoma, however, sequestered layers of shale gas were inaccessible until 1985, when pioneers such as Mitchell Energy and Development Corporation combined fracking with a newer technology called directional, or horizontal drilling in the Austin Chalk. Directional drilling gave producers access to the shale gas because it allowed them to turn a downward-plodding drill bit as much as 90 degrees and continue drilling within the layer for thousands of additional feet. The positive results were soon transferred to the Barnett Shale in North Texas. To date, more than one million wells have been fractured. The “hottest” shale plays are as follows:

- Bakken (Montana, South Dakota and North Dakota)
- Barnett Shale (Texas)
- Eagle Ford (Texas)
- Haynesville (Arkansas, Louisiana, and Texas)
- Marcellus Shale (New York, Ohio, Pennsylvania, and West Virginia)
- Utica (Kentucky, Maryland, New York, Ohio, Pennsylvania, Tennessee, West Virginia and Virginia)

Confirmed and/or prospective shale plays are also found in Alabama, California, Colorado, Illinois, Indiana, Kansas, Michigan, Mississippi, Missouri, Nebraska, Utah, and Wyoming. Shale plays have been confirmed in countries around the world, but the US is the leader in shale gas exploration.

MORE MONEY, MORE PROBLEMS

The new application of an old technology made it possible to profitably produce oil and gas from shale formations. Domestic and international companies quickly rushed to capitalize on the large reservoirs of shale gas. But unlike the preceding decades, where new oil and gas exploration had occurred offshore and in deepwater, oil and gas drilling started to occur in areas that were not accustomed to oil and gas activity. Overnight ranchers became millionaires as landmen leased large swaths of property to drill. The media started reporting about enormous domestic supplies of oil and gas that could be profitably produced from shale formations and politicians touted energy independence that could alleviate the country’s demand for foreign reserves. But with the increased attention came increased scrutiny.

Environmental groups have criticized the industry for fracking. The chief concern is that fracking will cause contamination of drinking water. Movies such as “Gasland” and “Gasland 2” fueled the public’s concerns that the drilling caused polluted water wells and flammable kitchen faucets. Additionally, the industry received criticism for the engineering process that involved high-rate, high-pressure injections of large volumes of water and some chemicals into a well to facilitate the fracking. The EPA and state regulatory bodies have become involved in the discussion and new regulations are likely to follow. In the meantime, some lawsuits have already been filed.

PENDING HYDRAULIC FRACTURING LITIGATION

Plaintiffs have filed approximately forty shale-related lawsuits across the country. These lawsuits include: (1) tort lawsuits; (2) environmental lawsuits; or (3) industry lawsuits. As the shale boom accelerates more suits are anticipated.

1. Tort Lawsuits

Tort lawsuits have been brought by individuals and as class actions. Typically the claimants assert claims for trespass, nuisance, negligence and strict liability. Their complaints involve excessive noise, increased seismic activity, environmental contamination (air, soil and groundwater), diminution in property value, death of livestock/animals, mental anguish and emotional distress. The plaintiffs seek actual damages and, in some instances, injunctive relief. A few parties have even sought the establishment of a medical monitoring fund. The majority of these lawsuits have been filed in Texas, Pennsylvania and Louisiana. The first wave of lawsuits has established new law in the respective jurisdictions as the appellate courts weigh in with published opinions on issues that range from oil and gas lease forfeiture, consequences of forged contracts and contract formation.

2. Environmental Lawsuits

Environmental organizations and some citizen groups are seeking to enforce environmental laws and regulations in an effort to protect the environment and the public from what the litigants perceive to be negative consequences of fracking. In some instances they are even seeking to restrict the use of hydraulic fracturing until it is proven to be environmentally safe. A popular target among these litigants is federal and state regulatory bodies, such as the EPA, and federal statutes, such as the Clean Air Act.
3. Industry Lawsuits
The final category of lawsuits includes those brought by the industry against the government. Claimants have sought to challenge federal, state, and local government actions that have impeded the industry’s ability to drill.

**Fracking Lawsuits 2.0 – Transportation, Construction, Personal Injury and Beyond**
The survey of current fracking lawsuits does not take into account the claims that will spin out of the new shale plays. In fact, the engineering and logistical side of the fracking process— not fracking itself—will lead to many more attendant claims.

- **Transportation:** Transportation lawsuits are likely to increase because fracking means increased tanker truck trips. One horizontal well requires 1,000 truck trips during drilling and fracking.
- **Commercial:** Lessor involved in mineral disputes will lead to commercial claims. Many lessors will feel they were shorted, or want a better deal as those now positioned to lease their rights sign a more lucrative mineral-rights lease. Company-to-company disputes will also rise as the price of natural gas fluctuates.
- **Construction:** The contractors and design professionals building midstream facilities, among others, will lead to construction-defect and delay claims. Many states have recently adopted anti-indemnity statutes that will impact claims that arise during construction of midstream facilities, pipelines and other infrastructure-related construction projects.
- **Insurance:** Coverage issues will arise as parties file first- and third-party claims for myriad reasons. Issues including comparative indemnity agreements, flow-through indemnity and additional insured endorsements, among others, will need to be analyzed.
- **Personal Injury:** Additional workers drilling and working the wells will lead to an increase in personal injury and workplace accident claims. Many of the shale plays are located in what have traditionally been considered “plaintiff-friendly” venues. A claim in Pennsylvania will have a different value than one located in Webb County, Texas.

**How To Reduce Future Fracking Litigation Risk?**
Parties can act now to discourage litigation or better position themselves in the event they are named in a suit.

1. **Institute electronic records protocol**
The proliferation of email and increased retention and archival capabilities means that emails never die. A potential defendant would be well served with a protocol in place that outlines to its employees what are acceptable electronic communications.

2. **Strictly comply with fracking fluid disclosures**
For those parties who could be exposed to claims regarding the fluids used during drilling, it is important that they minimize the public’s suspicion that they are withholding information about the fluids. The best way to neutralize that misconception is to strictly comply with the state-mandated disclosure rules where applicable. It may even behoove them to voluntarily disclose the fluids’ contents through the companies’ websites.

3. **Be prepared for a fire-drill**
A party must be ready to quickly assert its position when a claim is brought. The best way to do so is to track current litigation. Following the cases will provide the company a preview as to what claims it may be subject to, and it also allows them to evaluate defenses. It may also enable the company to insulate itself from suit by avoiding certain actions. Along those same lines, knowing the facts, documents, emails, fact witnesses and expert witnesses will work to a party’s advantage. Some industry leaders have proactively retained experts even though they have not been sued.

4. **Know your neighbors**
Parties should view their neighbors as allies and potential jurors. To that end, it makes sense to open a dialogue about fracking with the regulators on a local, state and federal level. It would also benefit the parties to engage the community and publicize information about the benefits associated with fracking, e.g., jobs, lower energy prices, cleaner energy, energy independence, etc. Certain midstream players have rolled out public education campaigns aimed at that very goal.

**Conclusion**
Articles on shale gas and fracking adorn the front pages of the Wall Street Journal and New York Times. 60 Minutes runs stories on shale-gas drilling and the faux pundit Stephen Colbert discusses fracking’s impact on his tongue-and-cheek news show. The premise of profits, domestic jobs and energy independence has the country talking about the gas shale plays that dot the landscape. Fracking and all that it encompasses will serve as the backdrop for a variety of legal issues during the foreseeable future.
In this era of spiraling health care costs, especially for pharmaceuticals, consumers are more interested than ever in having their prescriptions filled with less expensive generic drugs instead of their brand name equivalents. In fact, each state has a law permitting pharmacists to substitute a generic for its counterpart, and generics constituted 75 percent of all dispensed prescription drugs in 2009. Until now, whether you should insist on receiving the generic form of a prescription drug involved a relatively simple financial calculation, because you were receiving the same product and saving money. Based on the June 23, 2011 decision of the United States Supreme Court in *Pliva, Inc. v. Mensing*, 131 S.Ct. 2567 (2011), however, such savings may come with a high cost: your ability to pursue a state-law failure to warn claim against the manufacturer.
Although Supreme Court jurisprudence has long recognized a presumption against pre-emption absent a clear and manifest purpose of Congress, manufacturers of federally regulated products argue, with varying degrees of success, that state law tort claims are necessarily pre-empted when they appear to conflict with federal law. Specifically, manufacturers argue that it is impossible to comply with both federal and state law and/or that subjecting the products to the tort law of individual states would obstruct the objectives and purposes of the federal law. In the pharmaceutical context, its is typically the manufacturers’ position that once the Food and Drug Administration (“FDA”) accepts labeling for a particular drug, those warnings should not be subject to litigation under state law.

In Pliva, the Supreme Court agreed, holding that federal drug regulations applicable to generic drugs pre-empt state law warning claims. Although the decision might appear to be a relatively straightforward application of federal law and regulations when viewed in a vacuum, the Court had previously ruled, in Wyeth v. Levine, 129 S.Ct. 1187 (2009), that such failure to warn claims against brand name pharmaceutical manufacturers are generally not pre-empted. The decisions seem difficult to reconcile, because they create different liability postures for manufacturers of identical products. More importantly, the import of the decisions is that whether consumers can pursue state law tort claims may rely on the fortuity of their pharmacist’s choice in filling prescriptions.

**Wyeth: Name-Brand Manufacturers are Subject to State Law Tort Claims**

The plaintiff in Wyeth had her arm amputated after developing gangrene as the result of the administration of Phenergan, an antihistamine used to treat nausea, using an IV-push methodology directly into her vein.

The FDA first approved injectable Phenergan in 1955. Although Wyeth and the FDA subsequently communicated about adding a warning against IV-push administration due to the known risk of developing gangrene if it enters a patient’s artery, the FDA approved a Phenergan label without such a warning in 1998. The trial court instructed the jury that it could consider Wyeth’s compliance with the FDA requirements, but that such compliance was not determinative of the adequacy of the warnings. The jury found in favor of plaintiff, and that decision was affirmed by the Vermont Supreme Court.

The Supreme Court found that the state law warning claims against Wyeth were not pre-empted by FDA approval of the Phenergan label in 1998. The Court found meaning in the fact that although Congress had specifically enacted an express pre-emption provision the medical devices under the Federal Food, Drug, and Cosmetic Act (“FDCA”), no such provision was enacted for prescription drugs. Thus, the Court rejected Wyeth’s claim that the FDCA was both a floor and a ceiling for drug regulation, i.e., that FDA approval of the labeling precluded a state court finding that the labeling was inadequate. Importantly, the Court further held that it was not impossible for Wyeth to comply with both the FDA regulations and state law requirements, since drug manufacturers are required by the FDCA to change their labels based on information learned after the drug’s initial approval, and Wyeth could have unilaterally changed its label to include a warning against IV-push administration and sought FDA approval of the amended label.

**PLIVA: State Law Claims Against Generic Drug Manufacturers Are Pre-Empted**

Plaintiffs in the trilogy of cases decided in Pliva developed tardive dyskinesia, a severe neurological disorder, due to long term use of the generic form of Reglan, which is commonly used to treat digestive tract problems. The risks of such use were well known and, subsequent to plaintiff’s ingestion of the generics, the name brand manufacturer requested, and the FDA approved, a label change adding a warning against use of Reglan for more than twelve weeks. The trial and appellate courts had reached different conclusions on whether the state-law tort claims were pre-empted.

The Supreme Court began its decision by noting that Congress had changed the regulatory duties of generic manufacturers in 1984 by enacting the Drug Price Competition and Patent Term Restoration Act, otherwise known as the “Hatch-Waxman Amendments.” Under that Act, generic drugs can gain FDA approval by showing equivalence to an FDA-approved drug. This serves the purpose of developing generic drugs inexpensively, as duplication of the costly clinical trials performed on the brand name drugs was not necessary. However, the Act requires, inter alia, that a generic drug application must show that the proposed labeling is the same as the labeling approved for the name brand drug. Thus, although Congress imposes on name brand manufacturers a continuing duty to ensure that its label is both accurate and adequate, the generic manufacturer has no such duty. In fact, federal law prevents the generic manufacturer from independently changing their labels. Accordingly, the Court held that it was impossible for the generic drug manufacturers to comply with both federal and state law, and found that the state law warning claims were pre-empted.

In so holding, the Court noted that, given the Wyeth decision, the Pliva holding seemed to make “little sense.” However, the majority explained that the different statutory duties and regulatory schemes were created by Congress and the FDA, and that it was simply applying them to the controversy before it. If a different result was desired, those entities had the power to change the laws and regulations.

**CONCLUSION**

It would be easy to interpret the decisions in Wyeth and Pliva in terms of ideology. The Wyeth decision, which seemingly expands tort liability, was written by Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, Breyer and Thomas (concurring in the judgment only). Pliva, which appears to limit liability claims, was written by Justice Thomas, joined by Justices Roberts, Scalia, Alito and Kennedy. But such a facile conclusion would ignore the reality that the differing liabilities faced by brand name and generic drug manufacturers were the result of Congressional action, done for the otherwise laudable purpose of bringing generic drugs quickly and inexpensively to market.

The Court could not disregard the express provisions of federal law in order to fashion favorable result for the plaintiffs in Pliva. Despite a favorable result and the fact that whether a person has a state law tort claim may be decided by the happenstance of who is filling their prescriptions, the problem was created by Congress and the FDA and the ball is now in their court. Until they choose to act, Pliva is a significant victory for generic drug manufacturers, who should be able to seek dismissal of state law failure to warn claims.
INTRODUCTION

SOPA and PIPA have taken prominent roles in the news over the past several months. If you have not heard, these are not the names of the next reality stars, but rather, aggressive legislation geared towards government regulation of the internet. The introduction of these two bills has sparked an immense amount of debate, both for and against the proposed legislation. The bills are very similar in their stated goals and means to accomplish the same. The passage of one or both of the bills would create a number of questions for internet users, intellectual property owners, and the companies that conduct business over the web. Naturally, the potential for substantial litigation over every aspect of the bills loom large. However, given the massive push back from various business groups, companies, and the public-at-large, both bills have come to a screeching halt in their respective Congressional locations.

Some sources claim that internet piracy and digital theft and infringement of intellectual property exceeds $50 billion per year in financial output, costs hundreds of thousands of jobs, and costs federal, state and local governments several billion dollars in tax revenue each year. One of the main problems with enforcement of IP rights has been that a great host of the offending websites engaged in the allegedly infringing activity are located and registered outside of the United States, where our current IP laws do not reach. This has posed a problem for U.S. based companies and owners of intellectual property in enforcing their rights against the alleged infringers. Past attempts at broad-based regulation of internet piracy, such as the Combating Online Infringement and Counterfeits Act (COICA), have failed. SOPA and PIPA have tried to incorporate the past efforts with new language aimed at stemming the tide of infringement over the internet.

SOPA AND PIPA

SOPA is the acronym for the House Bill titled “Stop Online Piracy Act,” introduced by Representative Lamar Smith in October of 2011. PIPA, a similar Senate bill introduced by Senator Patrick Leahy in May of 2011, is an acronym of an acronym. PIPA is short for the PROTECT IP Act where “PROTECT” stands for Preventing Real Online Threats to Economic Creativity and Theft. Both bills are directed at curbing the infringement of intellectual property by “rogue sites,” mainly from overseas, which is allegedly accounting for billions of dollars in losses. While almost everyone agrees that this is a noble goal, as with most of the legislation coming out of Congress, the devil is in the details.

The originally proposed provisions of SOPA would seek to combat the problems of intellectual property infringement by expanding the U.S. Department of Justice’s (“DOJ”) powers to regulate alleged infringements. Some companies and internet users were concerned that the bill as originally written could have had a chilling effect on legitimate websites and could potentially restrict free speech. Also, some countries were concerned that the bill would lead to a slowdown in internet access and could impede the spread of technology.

In response to these concerns, the House of Representatives and the Senate both made changes to the bills. The resulting bills now provide more explicit protections for legitimate websites and are designed to be targeted at the worst offenders. The changes also provide a narrower definition of what constitutes infringement, which is now limited to copyright, trademark, and trade secret infringement.

Despite these changes, there is still concern among some advocacy groups that the bills could still have a negative impact on the internet and on legitimate websites. However, the general consensus is that the changes made to the bills are a step in the right direction.

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The allegedly infringing activities.
in allegedly infringing activities or facilitate enforcement held by the owner of the allegedly infringed works. Courts can be petitioned for enforcement through the DOJ or from a direct right of en-franchisement. US rights under this bill can come either from linking to said sites; and requiring internet service providers to block access to the sites.

The bill also contains provisions which would allow owners of intellectual property to act independently to enforce rights. To enforce their rights, the owner of a work of intellectual property must have a "good faith belief" that their work is being infringed. They must then provide written notifica-tion to the payment facilitators and ad networks of the allegedly offending website of the infringement. The notice must then be passed along to the accused website and service must be suspended, unless the accused website provides notice of how and why it is not in violation of any intellectual property rights. Opponents of the bill say that this provision unjustly places the burden of proof and costs of any litigation on the allegedly infringer to prove their innocence rather than the other way around.

Further, the bill’s provisions appear to impose duties and responsibilities on websites and service providers to self patrol and monitor the content of their sites or face prosecution and penalties. The proposed act increases penalties and adds fines for vi-olations of intellectual property rights and criminalizes various other activities. There are limited immunity provisions included for companies that would voluntarily comply with the proposed provisions. Also, there are penalties for intellectual property owners that knowingly make false accusa-tions against a website for infringement.

PIPA is very similar to the language and provisions of SOPA; however, it is more limited in scope. While it too seeks to cut the revenue sources to websites that engage in intellectual property infringement, it does not target internet service providers like SOPA. Enforcement of intellectual property rights under this bill can come either through the DOJ or from a direct right of en forcement held by the owner of the allegedly infringed works. Courts can be petitioned for orders restraining or enjoining the activities of various websites which are either engaged in allegedly infringing activities or facilitate the allegedly infringing activities.

SUPPORT
Support for the proposed legislation comes from a variety of sources with the most cited supporters being the Record Industry Association of America (“RIAA”), the Motion Picture Association of America and the U.S. Chamber of Commerce. Generally the most support for these bills comes from companies whose primary business is the ownership, licensing, and manage ment of intellectual property.

The supporters of these bills point to the fact that they fill important gaps left in their ability to enforce their rights against foreign websites. They claim that the pas sage of these bills will provide the necessary protection for intellectual property owners against overseas piracy which continues to have a substantially negative impact on the U.S. economy and has a chilling effect on the creation of new and creative works.

Proponents state that the proposed legis lation would work in conjunction with the current laws, such as the Digital Millennium Copyright Act and existing criminal statutes, to ensure that internet entities do not sit passively while infringement is ongoing on their websites. Constitutional scholars have reviewed the proposed language for the sup porters and concluded that legislation is not inconsistent with the First Amendment, contrary to the opposition’s fears.

OPPOSITION
On the other hand, opposition to these bills is fierce. The opposition comes from various internet giants such as Mozilla Corp., Facebook, eBay, Wikipedia and Google, just to name a few. Most companies that host, support or conduct a substantial amount of business over the internet have voiced some sort of concern over the breadth of the proposed legislation. U.S. Government subcommittees, such as Homeland Security, have voiced concerns over what appears to be short sighted provi-sions that do not coexist with current efforts to maintain cybersecurity. Even foreign gov ernments and officials have been outspoken over their concerns of “fracturing the world wide web.”

Online protests and petitions have expl oded and have caused key votes in the House and Senate to be postponed. Wikipedia and Reddit hosted “blackouts” in January, Google gathered millions of signa tures to its protest petition, and scores of people have marched in New York, San Francisco, Seattle, and Washington D.C. against these bills.

FUTURE OUTLOOK
The potential short and long range consequences of these bills are murky at best. Critics of the bills claim that they will lead to censorship and wide spread viola tions of the freedom of speech. Some have voiced the fear that any IP owner with a “good faith belief” that their property is being infringed could shut down an entire website of thousands of pages of non-infringing material for one possible infringe ment. Further, companies that host, place ads with or facilitate payments on the web are concerned that the self-policing provis ions will place a tremendous, if not impos sible, burden on them.

Passage of these bills could cause U.S. companies that do business over the internet to experience unanticipated interruptions in business due to their web provider or payment facilitator’s website being shut down for violating the act. For instance, if eBay or PayPal were to be found in violation of either of the Acts as passed, they could be shut down until they could prove their innoc ence. Any company that was using eBay or PayPal services to do business with their own non-infringing goods would be an un fortunate casualty of this war.

Supporters claim that the fears stated above are misguided and the proposed bills have nothing to do with loss of freedoms or censorship. Further, it is pointed out that the bills are targeted at foreign based web sites that are currently outside the reach of existing laws. A spokesman from the RIAA claims that the main opponents of the bills are simply stirring up propaganda which is difficult to fight since they have direct access to the public through their websites.

Ultimately, we will have to wait and see how this all unfolds. Massive rewrites are being planned and alternative legislation has recently been proposed. If Congress takes anything away from this endeavor, it should be the knowledge that attempting to regulate the internet is a slippery slope with some potentially substantial unintended consequences.
BEWARE THE PITFALLS OF PRE-LITIGATION INVESTIGATION AND RELIANCE ON THE ATTORNEY-WORK PRODUCT DOCTRINE

Although it is increasingly becoming the custom of clients and their insurance carriers to engage consultants to obtain facts, assess potential liability, and develop defense theories before or after a lawsuit has been filed, these reports and assessments may be susceptible to discovery in civil litigation. Understanding what is protected by the attorney work product doctrine and what is discoverable is key to structuring pre-litigation investigations. The following hypotheticals illustrate how the attorney work product privilege comes into play.

The first scenario involves an employer and its attorneys who are threatened with a sexual harassment lawsuit based on a hostile work environment theory. The employer and its attorneys conduct a preliminary investigation; the employer takes detailed notes of the interviews with the other employees, reciting verbatim statements made. The former employee then initiates a lawsuit and plaintiff demands production of the investigative file which includes the statements of its employees. Opposing counsel then sends interrogatory requests, asking for all written information relating to the plaintiff. Whether an employer’s counsel invokes the work product privilege when refusing to hand over the employee statements depends on the jurisdiction you are in and what the interview notes contain.

The second scenario involves a situation where an insured submits a claim to its insurer to recover for the loss of its building which was destroyed by a fire. Before deciding whether to accept or reject the claim, the insurer hires consultants to investigate the cause and origin of the fire to ascertain whether the insured is covered under the insurance policy. Detailed reports are written, theories of liability are discussed, and ultimately the documents are handed over to the insurer to put into its claim file and decide the appropriate action. If litigation subsequently arises, defense counsel may be required to hand over the claim file when requested by plaintiff’s counsel. This will depend on the jurisdiction and other factors.

Many would argue that under both these illustrations, the insurer and employer could invoke the work product doctrine to prevent their adversaries from discovering these potentially damaging documents. The work product doctrine protects the written materials, charts, and investigations of one party collected during the course of litigation or in anticipation of litigation from being discovered by the adverse party when a lawsuit is initiated. This doctrine is not as broad in its application as it may seem.

It is helpful to understand the background behind the work product privilege, in order to understand some of the common pitfalls involved in seeking protection from this doctrine, depending on which jurisdiction governs the matter.

FOUNDATION OF WORK PRODUCT PRIVILEGE

The leading case involves the Supreme Court decision of Hickman v. Taylor, when tracing the roots of the attorney work product privilege doctrine.¹ It was decided in 1947, two decades before the doctrine was codified in the Federal Rule of Civil Procedure 26(b)(3).² In Hickman, a tugboat sank, resulting in the deaths of five crewmembers. The owners of the boat and its underwriters hired a law firm days later to defend against potential suits. One of the attorneys privately interviewed the survivors “with an eye toward the anticipated litigation.” A lawsuit was later initiated and the plaintiff sought discovery of the written statements in interrogatory requests. The attorney objected to answering these requests on the ground that the information was privileged. The Supreme Court agreed, stating that the plaintiffs were, “[attempting], without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared

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¹ Tim M. Agajanian and Mhare O. Mouradian, “Hickman v. Taylor,” The Supreme Court of the United States:

² Tim M. Agajanian and Mhare O. Mouradian, “Hickman v. Taylor,” The Supreme Court of the United States:
or formed by an adverse party’s counsel in the course of his legal duties. As such, it falls outside the arena of discovery and con- travenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

The Supreme Court emphasized the need for an attorney to “work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” The Court recognized that without this privilege, much of what is now put into writing would remain unwritten. The Court did not want for “[t]he inefficiency, unfairness and sharp practices” to develop when attorneys gave their clients legal advice. Yet, the Court recognized that where “relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had.”

In 1970, Rule 26 of the Federal Rules of Civil Procedure was changed to govern the duty of parties to disclose during discovery. Under the section limiting the scope of the duty, subsection (b)(3) reads “[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” This limitation can be overcome where the documents sought are otherwise discoverable and the requesting party demonstrates a substantial need for the information since they would not otherwise be able to obtain the information without undue hardship.

The notes of the advisory committee which discussed the amendments to Rule 26 in 1970 state that materials assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation are not under the qualified immunity provided for in subsection (b)(3). Hickman v. Taylor, 329 U.S. 495 (1947). Hickman left open the issue of whether the work product doctrine extends only to the preparatory work of lawyers, versus any other agents of the party involved in the litigation. The committee decided to extend the protection of materials prepared in anticipation for litigation by any representative acting on a party’s behalf, or just the attorney.

**THE ISSUE: DIFFERENT APPLICATIONS BETWEEN STATE AND FEDERAL COURTS**

The biggest obstacle in understanding the reach and scope of the work product doctrine is the lack of uniformity in its application in state and federal courts. Even though Hickman was the guiding principal for most states in adopting their own version of the work product privilege, each state interprets the doctrine differently and has its own application.

**Who May Investigate**

The discrepancies between state and federal applications are demonstrated when comparing the language of California’s work product doctrine with the language of the Federal Rules. California has an absolute privilege, which states, “[a] writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.” It also has a qualified privilege which reads, “[t]he work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party’s claim or defense or will result in an injustice.” In contrast, the Federal Rules do not put the limiting term “attorney” in its work product doctrine and instead has the broad phrase “by or for another party or its representative.”

Whereas California makes it clear that only work done under the direction of an attorney can qualify for protection under the privilege, the federal courts acknowledge that statements taken by an insurance or claim adjuster in anticipation of litigation qualify for protection under the doctrine, even where an attorney has not yet been hired.3

**“Anticipation of Litigation”**

The phrase “in anticipation of litigation” is an oft litigated issue. Just about any document can arguably be compiled in anticipation of litigation somewhere down the line; the question becomes how far remote in the future qualifies.

The circuit courts are split between two different approaches: (1) documents prepared “because of” litigation and (2) documents prepared “primarily to assist in” litigation. The former arguably gives broader protection to different types of documents since it would protect a memorandum analyzing anticipated or threatened litigation but prepared to assist in a business decision rather than to assist in the conduct of litigation.

In describing the “because of” litigation formula, the Second Circuit Court in United States v. Adlman explained that where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under the formulation merely because it is created in order to assist with a business decision. However, the Court cautioned that protection under the work product doctrine is withheld for documents that are prepared in the ordinary course of business or that would have been created in essentially similar form regardless of potential litigation.

**CONCLUSION**

Whether the employer or insurer could use the work product doctrine to shield their preliminary investigations depends on how carefully you prepare the investigative reports and which jurisdiction would cover the case. If you are in federal court, it is more likely that statements taken by an insurance or claim adjuster in anticipation of litigation qualify for protection under the doctrine, even where an attorney has not yet been hired. However, some state courts only protect work done under the direction of an attorney.

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3. See generally, Hamilton v. Canal Range Co., 395 F.Supp. 975 (1975) (Eyewitness statements, taken day of accident by defendant’s insurance adjuster, although taken by insurance adjuster, fell within Rule 26(b)(3) category of material prepared in anticipation of litigation.)

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This article could not be written without the research and assistance of Kelsey C. Starn, Law Clerk at Murchison & Cumming, LLP.

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What does Social Media have to do with eDiscovery? How can eDiscovery costs be reduced and made more predictable? Is there an “easy button” for eDiscovery? These are questions we often hear and they deserve answers. The landscape of eDiscovery is indeed changing.

There is little doubt the number of matters involving Electronically Stored Information (ESI) will continue to grow for the foreseeable future. Factual evidence can not only be found in email, office documents or corporate databases but is now found in new places such as Facebook, LinkedIn, Twitter, text messages, digital voicemail, digital surveillance video and electronic on board recorders (EOBR) in vehicles. Still, many in the legal community remain slow to adopt this new source of facts, citing the costs outweigh the benefits. Times are changing. The future is here, today.

The plaintiff bar is getting smarter and their document requests increasingly include ESI. Corporations continue to wrestle with what to bring in-house and what to outsource as a means to gain control of eDiscovery costs, and the judiciary has handed down decisions that will motivate counsel to work in a spirit of cooperation with regard to evidence stored as ESI.

Below is a summary of the four most significant eDiscovery trends that the prudent legal professional needs to understand. This list provides insight on how to apply these trends to your practice as well as practical guidance on how to make these trends benefit your clients.

1. SOCIAL MEDIA – THE “NEW” ESI FRONTIER

Consider the fact that from January 1, 2010 through November 1, 2011, there have been 674 state and federal court cases involving social media evidence in some capacity. It is early in 2012 and we are on track to see even more cases involving social media and decisions regarding preservation, disclosure and access to that information. One does not need to look further than recent cases such as Lester v. Allied Concrete Company, Zimmerman v. Weis Markets, McMillen v. Hummingbird Speedway, and Crispin v. Audiger, as these are setting the stage for future cases involving social media. Lester v. Allied Concrete Company: If you are an attorney, do not even think about telling your client to purge unflattering content or posts. That is what the attorney did in this matter and he ended up being fined $522,000 and is now enjoying retirement. Well, he might not be enjoying retirement, but he is not practicing law.

Zimmerman v. Weis Markets: Think your posts are private? In the case of Zimmerman v. Weis Markets, the court held that a person who voluntarily posts photos or information to a social-networking profile has no reasonable expectation of privacy that would prevent discovery of those posts.

McMillen v. Hummingbird Speedway: Think that someone can’t get access to your entire social media account in litigation? In the case of McMillen v. Hummingbird Speedway, the court found that a person who voluntarily posts photos or information to a social-networking profile has no reasonable expectation of privacy that would prevent discovery of those posts.

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McMillen v. Hummingbird Speedway: Think that someone can’t get access to your entire social media account in litigation? After a motion to compel by the defendant, the court found the requested information was not confidential nor subject to the protection of privilege and ordered its production to defendants’ attorneys within 15 days.
The judge also ordered the plaintiff to not purge information from his social networking accounts.  

_Crispin v. Audigier_. In this matter, the defendant subpoenaed Facebook unsuccessfully and used the Stored Communications Act to quash the subpoena. The Stored Communications Act affords Fourth Amendment-like protection in the form of a statute that regulates government access to private electronic communications. Many may argue the SCA is outdated, but this was the first time it was used in a case involving social media.

2. ACCEPTANCE OF TECHNOLOGY ASSISTED REVIEW AND PREDICTIVE CODING

Technology Assisted Review and Predictive Coding (TAR-PC) sparked much debate and confusion in the eDiscovery industry for 2011. Its proponents couldn’t agree on what to call it and its skeptics feared that it may not be legally defensible. Names like “Adaptive Coding,” “Computer Assisted Review” and “Intelligent Categorization” (all slightly different approaches using different technology) emerged from various vendors. However, TAR-PC is not a radical new tool, but rather an evolution of widely accepted technologies and workflow practices that integrates human intelligence with machine efficacy.

2012 will be a turning point year for the combined “human aided by the machine” approach to prioritize document review and TAR-PC workflows. There is just too much compelling evidence that TAR-PC significantly reduces cost, increases quality and squeezes days out of the review cycle. Consider the independent study by Maura Grossman and University of Waterloo professor Gordon Cormack, using data from the Text Retrieval Conference Legal Track.


This study concludes with:

- Technology Assisted Review finds at least as many responsive documents as exhaustive manual review (meaning that recall is at least as good as manual review).
- Technology Assisted Review is orders of magnitude more efficient than manual review (meaning that it is quicker and cheaper).

As far as defensibility, the legal grounds of TAR-PC are supported by the Federal Rules for Civil Procedure, as well as authoritative thought leadership organizations and the judiciary, including Judge Andrew Peck in his article “Predictive Coding: Reading the Judicial Tea Leaves,” (Law Technology News, October 17, 2011).

3. PREDICTABLE eDISCOVERY COSTS MODELS

Law firms and corporate law departments will increasingly ask their litigation support providers to offer flat rates for projects, and they will ask for annual pricing for a given level of volume and service. Providers who can do this well will succeed and others will have to step up.

When clients ask “How much?,” they become impatient with “It depends.” At the beginning of litigation discovery projects, so the answer goes, there may be too many variables to predict costs with any reasonable accuracy.

Still, clients want predictable costs. Many law firms offer alternative fee arrangements that are based on time, performance, complexity of the job, and some sharing of risk. In 2012 the litigation support community will step up and provide alternative fee arrangements for their services. Some providers are already leading the change. Others will come along. They will evaluate their cost structures, their risks, their cost accounting, and their revenue visibility to come up with predictable pricing in what is essentially a project-based business.

Busy litigation groups in law firms and corporate law departments certainly know their budgets from years past. They are keeping and analyzing their historical data regarding how many cases, how many custodians, how many gigabytes, and how many documents have gone through what parts of the discovery process. Used carefully, this data forms the basis for assumptions about future requirements. Clients will use this historical data as the set of assumptions upon which to request pricing. More litigation support providers will commit to these arrangements based on their clients’ overall purchasing power and from the economies of scale that come from knowing their clients well.

4. ALL-IN-ONE eDISCOVERY PLATFORMS

In 2012, more of the EDRM workflow will coalesce into single and integrated operations. Advanced technologies will allow support organizations to do more identification, analysis, selection, review and processing all on a single platform.

Identification, analysis, review, and processing have been separate blocks in the EDRM workflow, not because having it that way is ideal, but because there have been no effective ways to integrate them. In years past, the steps used to select data for review were separate from the steps used for the review itself. Depending on what technologies you were using, processing came before or after selection. The time and cost associated with getting a collection ready for review was too great to put a whole large collection into a review tool, and if you did, you would have no cost-effective way to cull it.

Now what if in one single platform, we can load data, refine what we need to review, review and then export results that are production-ready? The tools and technologies are becoming available to do this in eDiscovery and we see this trend continuing for the next few years.

SUMMARY

Sources of ESI are increasing and the industry is responding with improved, cost effective approaches such as Technology Assisted Review – Predictive Coding to deal with it. Social Media is the “new eDiscovery frontier” with case changing potential. Counsel are finding ways to leverage ESI for their advantage along with lower, more predictable cost structures and integrated platforms. With proper resources and technology, effectively handling ESI will benefit clients for the prudent counsel who takes time to fully utilize it for their advantage.

_Crispin v. Audigier_. In this matter, the defendant subpoenaed Facebook unsuccessfully and used the Stored Communications Act to quash the subpoena. The Stored Communications Act affords Fourth Amendment-like protection in the form of a statute that regulates government access to private electronic communications. Many may argue the SCA is outdated, but this was the first time it was used in a case involving social media.

2. ACCEPTANCE OF TECHNOLOGY ASSISTED REVIEW AND PREDICTIVE CODING

Technology Assisted Review and Predictive Coding (TAR-PC) sparked much debate and confusion in the eDiscovery industry for 2011. Its proponents couldn’t agree on what to call it and its skeptics feared that it may not be legally defensible. Names like “Adaptive Coding,” “Computer Assisted Review” and “Intelligent Categorization” (all slightly different approaches using different technology) emerged from various vendors. However, TAR-PC is not a radical new tool, but rather an evolution of widely accepted technologies and workflow practices that integrates human intelligence with machine efficacy.

2012 will be a turning point year for the combined “human aided by the machine” approach to prioritize document review via TAR-PC workflows. There is just too much compelling evidence that TAR-PC significantly reduces cost, increases quality and squeezes days out of the review cycle. Consider the independent study by Maura Grossman and University of Waterloo professor Gordon Cormack, using data from the Text Retrieval Conference Legal Track.


This study concludes with:

- Technology Assisted Review finds at least as many responsive documents as exhaustive manual review (meaning that precision is much better than manual review).
- Technology Assisted Review is orders of magnitude more efficient than manual review (meaning that it is quicker and cheaper).

As far as defensibility, the legal grounds of TAR-PC are supported by the Federal Rules for Civil Procedure, as well as authoritative thought leadership organizations and the judiciary, including Judge Andrew Peck in his article “Predictive Coding: Reading the Judicial Tea Leaves,” (Law Technology News, October 17, 2011).

3. PREDICTABLE eDISCOVERY COSTS MODELS

Law firms and corporate law departments will increasingly ask their litigation support providers to offer flat rates for projects, and they will ask for annual pricing for a given level of volume and service. Providers who can do this well will succeed and others will have to step up.

When clients ask “How much?,” they become impatient with “It depends.” At the beginning of litigation discovery projects, so the answer goes, there may be too many variables to predict costs with any reasonable accuracy.

Still, clients want predictable costs. Many law firms offer alternative fee arrangements that are based on time, performance, complexity of the job, and some sharing of risk. In 2012 the litigation support community will step up and provide alternative fee arrangements for their services. Some providers are already leading the change. Others will come along. They will evaluate their cost structures, their risks, their cost accounting, and their revenue visibility to come up with predictable pricing in what is essentially a project-based business.

Busy litigation groups in law firms and corporate law departments certainly know their budgets from years past. They are keeping and analyzing their historical data regarding how many cases, how many custodians, how many gigabytes, and how many documents have gone through what parts of the discovery process. Used carefully, this data forms the basis for assumptions about future requirements. Clients will use this historical data as the set of assumptions upon which to request pricing. More litigation support providers will commit to these arrangements based on their clients’ overall purchasing power and from the economies of scale that come from knowing their clients well.

4. ALL-IN-ONE eDISCOVERY PLATFORMS

In 2012, more of the EDRM workflow will coalesce into single and integrated operations. Advanced technologies will allow support organizations to do more identification, analysis, selection, review and processing all on a single platform.

Identification, analysis, review, and processing have been separate blocks in the EDRM workflow, not because having it that way is ideal, but because there have been no effective ways to integrate them. In years past, the steps used to select data for review were separate from the steps used for the review itself. Depending on what technologies you were using, processing came before or after selection. The time and cost associated with getting a collection ready for review was too great to put a whole large collection into a review tool, and if you did, you would have no cost-effective way to cull it.

Now what if in one single platform, we can load data, refine what we need to review, review and then export results that are production-ready? The tools and technologies are becoming available to do this in eDiscovery and we see this trend continuing for the next few years.

SUMMARY

Sources of ESI are increasing and the industry is responding with improved, cost effective approaches such as Technology Assisted Review – Predictive Coding to deal with it. Social Media is the “new eDiscovery frontier” with case changing potential. Counsel are finding ways to leverage ESI for their advantage along with lower, more predictable cost structures and integrated platforms. With proper resources and technology, effectively handling ESI will benefit clients for the prudent counsel who takes time to fully utilize it for their advantage.
PRIVATE PROPERTY OR PUBLIC FORUM?

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HOW THE OCCUPY MOVEMENT IMPLICATES FREE SPEECH AND PROPERTY RIGHTS IN RETAIL SPACES
As the legions of Occupy Movement members sprouted tent cities on both public and private property across the nation, the highly publicized movement raised a number of questions beyond the merit or effectiveness of its protest against perceived economic or social inequalities – principal among them the issue of when and how owners and managers can control expressive conduct on their properties. No commercial group is more affected by these issues than the shopping center industry, whose vast parking lots and increasingly public-space-like designs create an attractive forum for protestors to make their stance.

**RETURNING TO THE PRUNEYARD**

Shopping centers are private property. Nonetheless, more than thirty years ago, the Supreme Court held in *PruneYard Shopping Center v. Robinson* that despite the fact that the purpose of a shopping mall is to provide retailers with an environment that encourages consumers to purchase goods and services, the right of a property owner to regulate speech on its property is not unfettered. Rather, the constitutions of the various states are free to define how private property owners who open their property to the public may control non-commercial speech.

Since *PruneYard*, the courts of many states have interpreted the decision and the holding that a shopping center can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks “and that a shopping center to which the public is invited provides ‘an essential and invaluable forum’” for exercising free speech rights. *United Broth. of Carpenters v. NLRB.*

Nonetheless, despite the fact that the *PruneYard* decision would have seemed to open the door to protests like the Occupy Movement, the majority of state courts that have been heard on the public-private issue have taken the more conservative approach and held that patrons have no inherent right to free speech at privately owned shopping centers. These state courts reason that their own state constitutions, like the federal Constitution, define rights as protecting citizens from government action only and not from restrictions placed by one private individual or entity on another. Therefore, if restrictions on speech at privately owned shopping centers cannot be defined in some way as commensurate with state action, then a constitutional right to free speech at those shopping centers is not triggered. See, *ex. SHAD Alliance v. Smith Haven Mall; Fiesta Mall Venture v. Mecham Recall Comm.* In contrast, other states have gone so far as to hold that a privately owned shopping center is a public forum and that a privately owned shopping center must permit peaceful picketing of businesses in a mall, even though the picketing may harm the shopping center’s business interests. See, *Best Friends Animal Society v. Macerich Westside Pavilion.*

A less clear line arises when centers allow for access by some groups while at the same time hoping to prohibit others. For example, a center might want to allow Girl Scouts to sell cookies but not want a racist, militant group handing out literature on a common area sidewalk. Even in those states that hold that their constitutions limit the ability of owners to control public access, shopping centers may impose reasonable restrictions on the time, place, and manner of expressive activities so as to eliminate or limit disruption or threats to health and safety. See, *Green Party v. Harts Mt. Indus.; Best Friends Animal Society v. Macerich Westside Pavilion.* As a result, shopping centers often times restrict speakers to certain sections of the common area, set up community booths, and require written applications in advance of the activity. Owners can also prohibit altogether speech that is fundamentally incompatible with the centers’ purpose, such as obscenity, pornography, and hate speech.

**OCCUPY WALL STREET**

In this context, shopping center owners should not be prohibited from preventing the establishment of tent cities on their properties. Recently, in *Waller v. City of New York,* petitioners were participants in the Occupy Wall Street demonstrations who had set up camp in Zuccotti Park. The park is a privately owned public access plaza that was established by the City of New York by a special permit that requires the park to be open year round to the public and maintained for public use. Sometime after the encampment began, the owner published rules that included prohibitions on the erection of tents and camping. Following the publication of the rules, the “occupiers” were told by the police that they had to leave the park and remove their belongings. Petitioners sought an injunction preventing the enforcement of the newly published rules.

In denying the request for the injunction, the Court held that while it was “mindful of movants’ First Amendment rights of freedom of speech and peaceable assembly...[e]ven protected speech is not equally permissible in all places and at all times.” The Court found that the demonstrators’ rights were not superior to those of the owner who was bound to maintain the property in a safe and lawful condition.

It should be noted that New York is in the majority in holding that shopping centers are not the equivalent of public forums. In addition, the property in question, Zuccotti Park, is non-commercial and by permit, a park required to be open to the public. Nonetheless, the reasoning behind the *Waller* decision should be applicable in all jurisdictions. Property owners have the right to impose reasonable limitations on the use of their properties.

**CONCLUSION**

The specter of a field of tents covering a corner of a parking lot may seem daunting to a shopping center owner or manager. There is nothing to fear. Even in those jurisdictions with constitutions that imply that shopping centers are the equivalent of public forums, owners and property managers should feel comfortable enforcing rules that prohibit camping conduct that operates outside the reasonable limitations imposed by the centers. Centers are open to the public during defined hours for the purpose of shopping. Limiting expressive speech, in terms of time and place as well as manner, is allowed.
Economic damages – actual monetary loss caused by a tort or breach – occur in many forms and can involve a variety of issues. A good understanding of the basic elements of damages and the issues that might be involved is essential to effective representation. Here, I present a guide to the basic elements of damages and some of the issues that can arise in personal-injury damages claims.

A forensic economist, retained early in the case-preparation process, can identify elements of loss, assist with discovery and gather pertinent evidence.
BASIC ELEMENTS OF DAMAGES CAN INCLUDE:
- Lost Earnings
- Lost Fringe Benefits
- Lost Household Services
- Medical Costs

In wrongful-death matters in many jurisdictions, the decedent’s likely personal-consumption expenditures (the decedent’s personal living expenses, exclusive of what he or she would have saved or spent on family support) are deducted from damages.

Rules on deductions of collateral sources vary from jurisdiction to jurisdiction. For example, in New Jersey, Social Security payments are subtracted from damages, while in Pennsylvania, Social Security payments do not offset damages.

MAJOR ISSUES:
Damages are determined by how long the injury will limit earnings, to what degree the injury will limit earnings, and what, if anything, will offset the loss (e.g., subsequent earnings).

OTHER ISSUES MAY INCLUDE:
- Earning capacity. Expected income taking into consideration age, education, personal attributes, health, labor-market conditions and the plaintiff’s actual earnings.
- Worklife. How long plaintiff can expect to work, taking into consideration expected retirement age and absences from the workplace for illness, child rearing, education or other reasons.
- Employment patterns. How plaintiff performs in the workplace, taking into consideration such issues as hours and overtime and other issues.
- Earnings growth. How will earnings grow over time due to inflation and increases in personal productivity?

PRE-INJURY EARNING-CAPACITY EVIDENCE:
- The plaintiff’s actual earnings history.
- Statistical earnings of the plaintiff’s cohort. Sources can include employment and union records, government and academic studies, trade associations and employment agencies.
- The plaintiff’s physical, mental and medical status. Were there any preexisting medical conditions that would have limited earning capacity regardless of the tort? What was the plaintiff’s aptitude? Were there any planned or actual career or educational advancements?

POST-INJURY EARNING-CAPACITY EVIDENCE:
- An assessment by a vocational specialist on the plaintiff’s abilities and reduced expectations.
- The plaintiff’s actual post-tort earnings.
- A medical specialist’s opinion regarding total disability.

FRINGE BENEFITS:
Fringe-benefit items that generally count toward damages include company-paid health insurance, company-paid life insurance and pension benefit. Losses are not the cost to the employer but the loss to the claimant, measured by replacement cost.

FUTURE MEDICAL EXPENSES:
Future medical expenses are calculated by medical-cost specialists who provide reports referred to as life-care plans, showing what the plaintiff will need for medical care. The cost of this element of damages is affected by life expectancy in instances where the injury is permanent.

USEFUL DOCUMENTS:
- Tax documents (e.g., 1099s, W-2s, 1040s, Schedule Cs)
- Lifetime earnings information from the Social Security Administration
- Fringe-benefit documents (pension plan, health plan, employer-paid insurance policies, employee handbook)
- Plaintiff or decedent’s resume
- Past and present collective-bargaining documents
- Pay stubs
- Bank-account records (checking and savings)
- Employment records
- Medical records

For detailed checklists and assistance in producing comprehensive damages arguments in employment, personal-injury and wrongful-death matters, contact the Center for Forensic Economic Studies at 215-546-5600 or cfes@cfes.com.

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Imagine you are in-house counsel in the following scenario: Your phone at the office rings. You learn there is a process server waiting for you at the reception desk. Wondering why you are not getting the call or e-mail from CT Corporation, you head out to meet the person. To your surprise, the envelope includes a complaint naming your company as a defendant in a case filed in tribal court. What do you do next? Hint: Do not toss the complaint and related papers away. Tribal courts can exercise jurisdiction over non-Indian defendants in certain circumstances. Take the matter seriously.

Now that you are starting to recover from the initial shock of being sued in an unfamiliar jurisdiction, what then? Of course, every suit presents different challenges, and the strategy to plan and prepare a defense should be tailored to the specific circumstances. This article outlines some of the key steps necessary or appropriate to define certain key strategies and tactics that are presented in the context of suits in tribal courts. To some degree, we also address some of the considerations that may arise in any suit against an Indian tribe or tribal interest irrespective of the court in which the case may be filed.

Litigation in tribal courts or suits against Native American groups in the United States presents unique challenges for the trial lawyer. Many of those challenges arise from the quasi-sovereign status of Indian tribes and other Native American groups. Since the 1820s and 1830s, when Chief Justice John Marshall defined the relationship between Indian tribes, the federal government, and the several states, Indian tribes have been understood to retain certain attributes of sovereignty. Those attributes or powers, however, are subservient to the plenary power of Congress. As Justice Marshall said, Indian tribes are “domestic dependent sovereigns.”

Over time, the federal courts and Congress have continued to define the scope of tribal powers and jurisdiction. Today, we have more guidance concerning the “rules of the road” relating to tribal authority over non-Indians; however, not all questions have been answered, and this area of the law continues to be an evolving one. As general counsel and outside lawyers, this is a source of frustration because often there are no clear-cut answers. For the same reason, this area of the law lends itself to thoughtful preparation and creativity in developing strategies to defend one’s position.

While generalizations can be dangerous, we recommend serious consideration of the following steps to inform how to proceed in the hypothetical scenario with which we started this article:

1. **Determine the Tribe’s status as a federally recognized tribe (or not):** There are roughly 565 tribes that have been officially recognized by the federal government. There are many others not so recognized. Be sure that the tribe that has filed suit is federally recognized, or that the tribal court in which suit has been filed is associated with a federally recognized tribe. The current list of federally recognized Tribes can be found at 75 Fed. Reg. 60810 (October 1, 2010). Tribes not federally recognized should not have jurisdiction over you or your company. Nonetheless, as possible stakeholders in your company’s business activities it may be a better practice to contact the “Tribe” and its representatives to discuss the situation.

2. **Obtain and review the Tribe’s organic documents: constitution, tribal code (including any applicable jurisdictional and substantive law), tribal court rules, etc.** Some of this material may be available on-line. This material can also be available at the tribe’s government offices, or at local law libraries as well. This information is critical in helping determine the scope of a tribe’s authority over non-Indians as a matter of tribal law, and in some cases as a matter of federal law. You may find that some tribal court organic documents provide that those courts have jurisdiction over internal tribal disputes only, such as do-

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**SUED IN TRIBAL COURT?**

**FIRST STEPS TO PREPARING A DEFENSE**

Walter E. Stern  Modrall Sperling
mestic relations issues between tribal members. Alternatively, you may find a relatively sophisticated court system with well-defined rules and clear statements of jurisdictional authority.

There is also a wide variety of tribal websites available for review. The sites have a high degree of variability in what information is available, but it is useful to gather as much information as possible about the tribe, its governmental structure, its court system, and related subjects. Moreover, do not ignore information about its culture and history. If you end up needing to participate in hearings, that information may come in handy. (If you are reading this while considering a possible transaction on Indian lands, we recommend comprehensive research along these lines up front.)

3. **Determine whether any federal laws apply to the matter:** If Congress has acted, federal statutes may be controlling on a range of issues, including where disputes are to be presented, whether the tribe or tribal court has jurisdiction, and related subjects. In addition, there is a great deal of federal common law defining the scope of tribal jurisdiction over non-Indians or non-members. See Item No. 6 below.

4. **Investigate and determine the key jurisdictional and related facts giving rise to the case:** It is common for tribal cases to be slotted higher on the list, perhaps. If the suit arises from a contract, one should understand who the parties to the contract are, and what relationship the parties and the agreement have to the tribe and to the lands over which the tribe may have jurisdictional authority. Is the contract between your company and the tribe? Does it have a forum selection clause? Is there a choice of laws clause? If the suit is a personal injury case, where did the accident occur? Was it on a Reservation? What is the land status where the injury occurred—privately owned, tribally owned, held in trust by the United States for the tribe or an individual Indian? The answers to all of these questions (and others) will help inform the inquiry whether the tribe and its tribal court would have jurisdiction over your company.

5. **Retain experts as necessary concerning jurisdictional issues (historians, demographers, etc.):** Often jurisdictional disputes require collection and analysis of a range of historical, demographic and related information in order to assess whether a tribe and its courts have jurisdiction. The analysis of a tribe’s power usually does not end with the language of a statute or treaty. Contemporaneous interpretations and subsequent history may be considered relevant as well. Historians with experience in working with the National Archives and Federal Records Centers can bring good value where there may be ambiguities concerning the geographical extent of a tribe’s powers. Similarly, because settlement patterns of tribal members and non-Indians can be relevant to determining jurisdictional questions, demographers, sociologists, and similar experts may provide useful data as well.

6. **Evaluate the facts in light of applicable federal and tribal law to determine whether the tribe or its court has jurisdiction under applicable Supreme Court and other applicable authority:** While Supreme Court doctrine often requires exhaustion of tribal judicial or administrative remedies in the first instance, exhaustion is not always required. In some circumstances, the best defense may be taking the offensive and filing a declaratory judgment action in federal court seeking a declaration that the tribal court lacks jurisdiction. Montana v. United States, 450 U.S. 544 (1981), has been described by Justice Ginsberg as the “pathmarking” case in seeking to define whether an Indian tribe has jurisdiction over non-Indians. While there are nuances to the rule, under Montana, tribes generally lack jurisdiction over non-Indians operating on private lands even within reservations unless (a) the non-Indian has a consensual relationship with the tribe or its members, or (b) the non-Indian’s activities threaten the economic existence, political integrity, or health and welfare of the tribe or its members. These exceptions are ordinarily narrowly defined.

7. **Assess whether the tribal forum is the appropriate one, relative to (a) arbitration or forum selection clauses in contracts; (b) state or federal court options:** If your case is a contract case, or arises in some measure from a contractual relationship, the relevant contract may have forum selection and choice of law provisions that apply. Scrutinize the agreement to determine whether it includes such direction.

8. **Formulate strategy and implement:** Your research and investigation may lead to a strategy to file suit in federal court to avoid the necessity of proceeding in tribal court. Alternatively, you may determine that the best course is to proceed initially in tribal court, with the possibility that, after exhausting tribal remedies, federal court review may be necessary. If you find that starting in tribal court is the right approach, remember to treat the tribunal with respect, make your record from the beginning with your pleadings, in the jury selection process (e.g., the jury limited to tribal members?), and through trial and any tribal court appeals. While there are no “appeals” from tribal court to federal court, a federal court likely will review the record developed in tribal court should you seek federal court intervention to set aside a tribal court judgment for lack of jurisdiction. Of course, you may also find that tribal judges are as effective and thoughtful as judges in other jurisdictions.

Now you know just enough to be dangerous, but we hope that this provides a flavor for the challenges of defending oneself in tribal court. In some measure, it can be like a home court advantage for your adversary, but there are unique challenges as well. Good luck!
What Exactly Is A Pollutant Under The Pollution Exclusion?

William J. Mitchell  Ahmuty, Demers & McManus

Here’s a riddle: When is a substance a pollutant? The answer may affect you, because the standard general liability policy contains a coverage exclusion for damages arising out of the release of pollutants. As the policy forms change and evolve, so do the insurers’ definitions of pollutants. Although the standard insurance policy promulgated by the Insurance Services Office – ISO – tries to define “pollution,” the courts still wrestle with that term. Thus, the answer depends on several factors, which makes for an elusive answer, particularly after one looks at the varying judicial interpretation of the general liability pollution exclusion.

ISO stated that the original pollution exclusion was intended to avoid coverage for ongoing dumping of pollutants into the environment. In 1973, ISO’s “Comprehensive General Liability” policy excluded damages “arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water.” The exclusion did not apply if the discharge was “sudden and accidental.”

The reference to “discharge” of “toxic chemicals” into bodies of water, or land, or the atmosphere thus conjured up images of blackened factory smokestacks billowing gaseous waste into the environment. As one state’s Supreme Court observed, the “ordinary, popular meaning of the phrase ‘the atmosphere’ connotes the external atmosphere that surrounds the earth and consists of the air and any gases or particles therein.” This understanding was in line with the intent of the original pollution exclusion. But ISO revises its pollution exclusion every few years, which makes things a little more confusing.
By 1986, after extensive litigation and varying precedent concerning the scope of the original exclusion, ISO introduced the “absolute pollution exclusion,” a new version of the pollution exclusion, now excluding damages “arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants...at or from premises you own, rent or occupy.” The revised policy broadened the definition of “pollutants” to “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalies, chemicals and waste.” The requirement that the discharge be made into the “atmosphere” or “watercourse” expanded to “premises you own, rent or occupy.” The intended result was to eliminate insurance coverage in most situations for any pollution damage, although later versions allowed for several exceptions to the exclusion, which would allow coverage.

For its part, ISO dubbed the revamped exclusion the “absolute pollution exclusion.” Although we still called it a “CGL” policy, with the adoption of the absolute pollution exclusion, the formal name of the liability policy changed from a “comprehensive general liability” policy to a “commercial general liability” policy.

Subsequent ISO forms broaden the exclusion slightly to include “seepage” or “migration” of pollutants to “any premises, site or location” currently “or at any time” owned or occupied by the insured, among other things. The list of the pollution-related injuries not covered by the policy, with an equally substantial list of exceptions to those exclusions, makes up the longest exclusion in the general liability policy. Nevertheless, many questions remain as to what is a pollutant.

The pesky answer that is still unclear to both the ordinary policyholder, and in many cases, the claims handler, is what is covered and what is excluded under the policy. Most people will probably agree that the stuff coming out of a factory smokestack or illegally dumped in a river is pollution. But what about when an insurance carrier invokes the pollution exclusion to disclaim coverage for illness or damages due to less obvious sources, such as furnaces leaking carbon monoxide, pool chemicals, or household chemicals?

There have been mixed judicial decisions, even where different courts are interpreting the same policy language. For instance, some courts rule in favor of coverage, looking to the initial intent of the exclusion and the reasonable expectations of the insured, finding coverage for “injuries resulting from everyday activities gone slightly awry.” Examples include faulty home furnaces, leaking restaurant exhausts, or even emissions from the use of a Zamboni inside a hockey rink. These courts found coverage under the respective policies, even though these chemical emissions are harmful to people.

In other jurisdictions, courts have found that carbon monoxide is a pollutant and is excluded by the pollution exclusion. These courts reason that the policy no longer requires an “industrial” or environmental release, and moreover, the federal government classifies carbon monoxide as a pollutant. Therefore, in contrast to the other jurisdictions, injuries caused by leaks of carbon monoxide from household furnaces and—oddly enough—emissions in another Zamboni case were not covered. Clearly, there are some jurisdictional differences that contribute to seemingly opposite results. But carbon monoxide is a harmful waste product; what about chemicals that are useful?

Even with useful products, too much of a good thing is bad. Damages from ordinary chemicals such as soap, ammonia, bleach, and fabric softener have been excluded under the pollution exclusion. Of course, what constitutes “too much” has been debated. One court refused to classify ordinary chemical compounds as pollutants, where the chemicals were harmful only in high concentrations, such as in a small room. Another court framed the issue completely differently, writing that it “defies logic” to suggest that a chemical compound does not qualify as a pollutant simply because when highly diluted, it doesn’t noticeably irritate the human body. Moreover, “any discharge could, theoretically, be dispersed with adequate ventilation,” resulting in very few, if any, chemicals which would qualify as pollutants.

In other words, while the first court said that a high concentration of a chemical to which people are normally exposed in low concentrations is not pollution, the second court wrote that when people are exposed to very low amounts of a pollutant normally concentrated, that substance is pollution. Clearly, judges frame the issue quite differently.

At different times, many courts have enumerated the substances generally found to be “pollutants” within the pollution exclusion. These lists often include asbestos, carbon monoxide, gasoline, fuel oil, lead paint, pesticides, and emissions from Chinese drywall as excluded under the policy, but not always, because it depends on where the substances are found. For example, fuel oil in a tank is not categorized as a pollutant until it is introduced to a place where it doesn’t belong, which usually is after a discharge into the environment. The substances most often cited as not being pollutants are muriatic acid, styrene resins, carbon monoxide, pesticides, carbon monoxide, lead paint, bacteria and spray paint. Note there is some overlap between the two lists.

Other courts have observed, quite correctly, that pollutants that cause damage not because of their toxic nature, but because of other effects, do not fall within the pollution exclusion. Thus, the rushing liquid from an overflowing sewer pipe that caused flood damage was not necessarily an excluded event under a commercial policy. While the liquid was both waste and an irritant, the flood-like nature of the discharge, rather than its polluting character, was at issue. Another court observed that bodily injury suffered by one who trips and falls on the spilled contents of a can of Drano is not injured because of a pollutant, nor is an individual suffering from an allergic reaction to chlorine in a public pool.

Insurance policies do not attempt to list each and every substance and the circumstances under which it is a pollutant; nor could they, and as a result the exclusion refers broadly to irritants or contaminants, which then leaves some room for interpretation. At that point, the elasticity of the English language further complicates the matter. One court summed it up as follows: “So it is that we speak of releasing a balloon into the atmosphere but letting the air out of a tire.”

Thus, the original question of “when is a substance a pollutant?” simply involves too many variables to reach a general answer. Whether interpreting the earlier or the later broadened exclusions, American courts are divided as to the applicability of the pollution exclusion. The definition of a pollutant varies by several factors, including the state where the risk is located, by the precise version of the insurance policy at issue, by the nature of the discharge and by the nature of the injury. So the final answer to the pollution riddle must wait for another day.

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You received a call from your boss. He told you that you are the “designated 30(b)(6) witness for a deposition. I will be sending you the subpoena. Get ready.”

If this is your first time, you are asking yourself, “A 30(b) WHAT?”

Well don’t panic. With a little guidance and some hard work, you can do a superior job of being the voice of your company. But I will warn you, without good preparation and a good understanding of what it means to be a 30(b)(6) witness, you risk inadvertently damaging your company.

Remember that the company will be required to provide testimony through you regarding any knowledge reasonably available to the company. Even if no current employee has knowledge, the company is not off the hook. Your company may be required to obtain “available information” through former employees or prior business records. In preparation, you may have to familiarize yourself with this “reasonably available information.”

If your company fails to adequately prepare the 30(b)(6) witness, such failure could be considered a failure to produce a witness at all. The court may order a new deposition at the organization’s expense, or the court could go so far as to strike your company’s answer and order a default judgment in favor of the serving party.

3. Be truthful. It may seem to be unnecessary advice, but you must understand how important it is to tell the truth. The legal consequences of lying can result in liability for you and your company.

4. Understand the theory of the case. Your company’s attorney may discuss with you how the law will apply to the key events in the case. Your company’s attorney will discuss with you how your testimony will fit into the factual context of the case.

5. Your company’s attorney can help you communicate but cannot put words in your mouth. If your words are confusing, too technical, too general, etc., your company’s attorney may suggest alternate ways of communicating the same information.

6. A deposition is not a “closed book” test. You as a witness are not required to memorize all relevant information. Be aware, however, that anything that you bring with you to the deposition will probably become a deposition exhibit. You must discuss this with your company’s attorney in advance. Sometimes
SO IT IS THE DAY OF THE DEPOSITION, WHAT SHOULD YOU DO?

10. Come to the deposition well-groomed. You are representing your company. If the deposition is videotaped, think “television anchor.” Sit up straight. Choose clothing that looks good on camera. Be careful you don’t have distracting items sitting in front of you visible to the camera. Remember that answers are not on the ceiling or the floor, so look at the camera when you answer just like you are talking to the judge or the jury. Watch your facial expressions – no sighs or eye rolling. Test out the camera angle before the deposition starts. Have your company’s attorney sit in your spot and take a look through the camera and see how it looks.

11. Remember that a deposition is an adversarial process. The attorney taking your deposition is not your friend, no matter how nice that person may seem. Be professional but not cozy. The opposing counsel is trying to set you up to make an admission adverse to your company.

12. Answer clearly and articulately. The court reporter cannot transcribe nods of the head. Use “yes,” rather than “yeah.” It reads better and you will sound smarter!

13. Do not overindulge. Listen carefully to the question and only answer what is asked for. Don’t fall into the trap of answering when there is a pause. Don’t volunteer. If you don’t know the answer, just say so. Don’t guess. Remember that in a 30(b)(6) deposition, the “I don’t know” response is attributed to the entire organization, not just the individual. Take your time answering questions – you are in control, not the opposing attorney. If the deposition is not videotaped, no one can tell if there is a pause in the transcript.

14. Documents are important. You will be shown exhibits. Take the time to look at the entire document before answering questions about it. Look at the dates and the signatures. Notice the Bates Numbers. These are identification numbers that are usually placed on the document during litigation. These numbers may give you a clue where the document originated. Ask your company’s attorney about this before the deposition. Take the time to read the document carefully if you need to. Look for notes written on the document. Identify the document by the Exhibit Number and the specific page by the Bates Number. This will help the clarity of the testimony.

15. Don’t let your attitude hinder the deposition. Come in with a professional attitude. All “chips on the shoulder” should be left at the door. Don’t try to be funny. Remember the opposing counsel will likely test you. He or she may try to rattle you, confuse you, lead you, or otherwise twist your answers. Do not let it happen. You can control your emotions and your answers. You can control the timing of your answer. Be alert for “zingers” as you begin to get tired. If you need to take a break, do so.

16. Watch out for trick questions and be prepared to respond. Don’t let opposing counsel mischaracterize your testimony. Be careful when questions are framed in absolutes. For example, “Your company always keeps these documents on the job site, doesn’t it?” Your answer might be, “It is the practice of the company to keep the documents at the job site.” Be careful when the opposing counsel asks you to “agree” that something is “reasonable.” He or she is trying to induce you to admit a fact on behalf of the company. Only agree if the fact is true. Watch out for hypothetical questions. These are questions that are intended to force you to speculate. Rarely are there sufficient facts provided to proffer an opinion on the matter. If there are not, you can explain that it is impossible for you to answer.

17. Listen carefully to the objections by your company’s counsel. The “form” objection means that there is a problem with the form of the question. It might be that the question contains unfair assumptions, such as “When did your company quit discriminating?” The “form” objection might also mean the question is compound. For example are there two questions in one? If so, your answer may be confusing. A “foundation” objection means that you might not have the knowledge to answer the question. Answer only if you have the knowledge, but don’t speculate. If your company’s attorney objects on the basis of the attorney-client privilege, do not answer unless instructed by your company’s attorney to do so. If after an objection you don’t recall the question, ask for it to be read back to you.

18. If you realize that you have testified inaccurately, confer with your company’s counsel to see if you need to correct it. If you cannot confer with counsel during breaks, you may need to state that you need to correct a statement on the record and go ahead and do it.

19. Do not be lulled into off-the-record discussions with opposing counsel or parties during breaks. You may end up divulging something that the opposition will latch onto.

20. Finally, have confidence. With preparation, you can be a successful 30(b)(6) witness!
This article was printed on biodegradable, post-recyclable paper with chemical-free ink, and produced in a carbon-neutral fashion by an energy-efficient printing company that uses only sustainable resources. Got your attention? Although untrue here, it is probably not the first time that you have heard an over-the-top, too-good-to-be-true line as it seems everyone is rushing to be “green” in the hopes of capitalizing on the environmentally-savvy consumer and his or her purchasing power. If such assertions stretch the truth or are not capable of sufficient authentication, however, they also may catch the attention of governmental officials or enterprising class-action attorneys.

Dubbed “greenwashing” or “eco-fraud,” these actions are brought against companies that engage in misleading or deceptive advertising regarding the environmental practices of the company or the green benefits of a product or service. As consumers have become more environmentally conscious and companies tout their “green” credentials in marketing and branding efforts, so has the scrutiny on companies whose promotional assertions might not be supported by the facts. Because of this heightened sense of environmental awareness, a company should be wary of screaming “green” without first performing the necessary due diligence on the product or service it is selling. If it does not, consumer class actions and federal and state enforcement of advertising and marketing regulations may be waiting around the corner.

**TYPICAL GREENWASHING CLAIMS**

Greenwashing litigation generally falls into one of three types of actions: (1) the public-enforcement action, (2) the consumer class action, and (3) the unfair-competition action. The “public enforcement action” is usually brought by the FTC and seeks injunctive relief to force offending companies to revise or cease deceptive marketing programs pursuant to Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. First written in 1992, and updated in 1996 and 1998, the FTC’s Guides for the Use of Environmental Marketing Claims (16 C.F.R. pt. 260), or “Green Guides,” as they are commonly known, provide guidance as to how the FTC interprets Section 5 of the FTC Act with regard to environmental advertising and marketing practices. Although the “Green Guides” are administrative in nature, holding no force of law, the guidelines establish environmental-marketing criterion for American products to protect consumers. They also may provide compliant advertisers with a safe harbor to help avoid litigation and a potential defense to liability but, on the other hand, can provide the impetus for litigation if consumers recognize corporate-marketing practices are not in step with the regulations’ rules and illustrations. In sum, the Guides help set the “rules of the road” for what can (and cannot) be asserted about certain environmental attributes of product, and, along with illustrative examples, they set forth the evidence companies must be able to produce if they intend to make such green-marketing claims.

The second vehicle for greenwashing claims, and the one that creates the most financial concern for companies that tout their products as “green,” is the consumer product class action. Recent examples of greenwashing lawsuits include a consumer class action brought against Fiji Water, who marketed itself as “The World’s Only CARBON NEGATIVE bottled water.” In the action, consumers alleged that they were misled into paying more for Fiji water than competing brands because it was a carbon-negative product when, in fact, the company’s use of a practice called “forward crediting” meant it was rewarding itself for carbon-reducing actions that it had not yet taken. American Honda Motor Co. is another example, having recently found itself the target of a suit alleging that the Civic Hybrid consumed too much gas to live up to the company’s fuel-efficient description of the vehicle. And S.C. Johnson & Son, Inc., was also sued over the use of its “Greenlist” trademark, which consumers claimed was deceptive because it was actually a mark owned by the company itself, rather than a third-party endorsement.

Finally, some companies have confronted their competitors directly, seeking injunctive or declaratory relief for misleading or deceptive “green” advertisements in order to maintain parity in the marketplace. For example, Sony Corporation challenged Panasonic’s claims that its plasma televisions were “environmentally friendly” when it was known that plasma televisions used more electricity than LCD televisions. Dell, similarly, complained that Apple’s advertising, touting “the world’s greenest family of notebooks,” was deceptive and misleading.
which prompted Apple to change its marketing campaign to “the world’s greenest lineup of notebooks.” And, in New York, the manufacturer of a portable handheld steam cleaner was hauled into court by a competitor because the infomercial the manufacturer ran falsely claimed its product was “EPA tested so you know it’s safe” when the EPA had no testing or approval mechanisms for such a product.

HOW TO AVOID GREENWASHING LIABILITY

Although we live in a more eco-conscious society with consumers seeking out environmentally safe products and willing to pay a premium for such products, companies planning to market their products as “green” need to be vigilant and take the necessary precautions to prevent a greenwashing accusation. Below are some tips on how to avoid liability from greenwashing or “eco-fraud” claims, while still tapping into the new “green” consumer market.

• **Always Tell The Truth.** Although telling the truth in any marketing or advertising campaign should go without saying, the truth is sometimes ignored and stretched, hurting not only your company’s credibility with consumers but also opening yourself up to liability in litigation.

• **Be Relevant.** Do not make an environmental claim about your product that is unimportant or not helpful to the consumer. For instance, do not claim that a product is free from a chemical banned by the government for decades. This is misleading because every product is going to be free from a banned chemical.

• **Document, Document, Document.** Study, evaluate, and document the environmental impact of your product or service before you begin a “green” advertising and marketing campaign. Scientific and empirical studies help determine your product’s potential environmental benefits and risks, leading to a more focused advertising and marketing campaign and being a valuable resource if greenwashing or eco-fraud litigation is ever filed against you.

• **Be Precise and Avoid Vagueness.** If possible, absolute and vague terms in environmental advertising and marketing campaigns should be avoided because they are difficult to substantiate and may mislead consumers. Refrain from touting your product as “environmentally friendly” and instead use the term “environmentally friendlier” because it is a claim that is easier to substantiate. Other terms from which you may want to shy away include, but are not limited to, earth friendly, eco-conscious, carbon neutrality, energy efficient, sustainable, renewable, organic, non-toxic, chemical free, all natural, recycled, and biodegradable.

• **Consult Guidelines.** You should consult and review environmental marketing guidelines before you begin your advertising and marketing campaign, like the “Green Guides.” Other third-party organizations that publish best practices for “green” advertising and marketing campaigns are the American National Standards Institute (“ANSI”), the International Organization for Standardization (“ISO”), the United States Environmental Protection Agency (“EPA”), and Consumer Unions (“CU”). In using these guides, you may be able to establish a “safe harbor” for your advertising if the government, consumers, or a competitor knocks at your door.

• **Seek Certification From Reputable Programs.** Environmental-certification programs provide consumers and companies with the assurances that the product they are buying or selling meets stringent environmental standards established by the program itself or an independent, unbiased third-party. Although a certification will not insulate a company from greenwashing or eco-fraud liability entirely, it may reduce the potential for liability. A few of the reputable programs that certify a product’s environmental footprint are Green Seal, Co-op America, MBDC: Cradle to Cradle, and EcoLogo.

• **Be Consistent And Diligent.** With the explosion of the Internet as a news and entertainment source along with other digital media forums, the possible avenues for environmental advertising and marketing are endless. These endless possibilities, however, also lay traps for today’s businesses. For example, if a product is not marketed as “green” but is placed on a television or radio show that publicizes itself as environmentally-conscious, the product’s manufacturer may face some liability for implicitly greenwashing its product. As a result, companies should routinely and carefully review their environmental advertising and marketing plans for consistency to avoid potential claims.

CONCLUSION

Although honesty, consistency, and research are the cornerstone of any marketing campaign, this has become especially true in today’s green-focused economy. A company must do its homework and stay true to its product if it wants to avoid the pitfalls of litigation with government regulators, consumers, and competitors because today, like Kermit said, “it’s not easy being green.” However, if they follow the rules outlined above and avoid the traps into which other companies have fallen, there is nothing to stop any company from successfully marketing the “green” aspects of its products or services.
The law governing the federal securities statutes is widely known and well developed since each year hundreds of securities fraud claims are filed against publicly traded corporations. What is less discussed is the potential liability that sellers of securities can incur in states that have adopted state securities statutes known commonly as the “blue sky laws.” These laws can have broad impact on any seller of securities including hedge funds, persons engaged in private securities sales, brokers and the like. They are also being increasingly used by investors to recoup losses sustained when an investor can identify a misrepresentation made by a seller because proving a violation may be easier than to do so under federal statutes. 

The term “blue sky” is said to refer to “an investment opportunity in which the promoter promises rain but delivers blue sky.” The first blue sky laws were adopted by Kansas in 1911 to address the problem of turn-of-the-century scam artists who sold investments to fund phony operations by promising to end droughts in the Midwest. Over the next twenty years, forty-seven states would follow suit. The federal government soon entered the field when it passed the Securities Act of 1933 and followed up with the Securities Exchange Act of 1934. After the adoption of the federal laws, states moved toward adopting uniform securities laws and, in 1956, a new set of uniform laws was released and adopted by thirty-seven states. Since then there have been two major updates to the uniform laws, in 1985 and 2002. At present, all fifty states, as well as the District of Columbia, Puerto Rico, and Guam have blue sky laws. Many have adopted some form of the uniform laws, while a handful of states, such as New York, Florida and Illinois have opted for their own system. Every jurisdiction except New York has provided for a private right of action for misrepresentation. The trend is to consider an action under these uniform laws as separate from traditional notions of contract or tort claims, which makes a suit of this kind especially powerful for plaintiffs.

A leading case illuminating these trends was decided by the highest court in Massachusetts in 2004, entitled, Marram v. Kobrick Offshore Fund, Ltd. 442 Mass. 43 (2004). In Marram, an investor, a profit-sharing plan for employees of a Massachusetts high-tech company, brought a claim under the Massachusetts Uniform Securities Act (among others), M.G.L.A. c. 110A, §410(a)(2) (the “Act”), against a hedge fund, its investment manager, and managing entity, alleging that the manager of the hedge fund had made materially misleading statements to the investor before and after the investment and that the investor had sustained losses on his investment. The trial court dismissed the investors’ claims on the grounds protective language in the private placement memorandum and stock subscription agreement that the investor signed precluded the lawsuit. The Massachusetts Supreme Judicial Court ultimately reversed the trial court’s dismissal.
After reviewing the facts alleged in the complaint, the SJC discussed the background and purpose of the Act. The court noted that the Act’s aim is “to compensate the buyer for a loss. More importantly, it creates a strong incentive for sellers of securities to disclose fully all material facts about the security.” Marram at 51. To protect a buyer who receives misleading information from the seller of a security, the Act imposes upon the seller “the heavy burden of proof that he did not know, and in the exercise of reasonable care, could not have known, of the untruth or omission.” Id. at 52. (internal quotation omitted). Additionally, under the Act, the plaintiff’s burden in proving a violation is “considerably lighter”:

> It is enough for the plaintiff to establish that the defendant “offers or sells a security”; (2) in Massachusetts; (3) by making “any untrue statement of material fact” or by omitting to state a material fact; (4) the plaintiff did not know of the untruth or omission; and (5) the defendant knew, or “in the exercise of reasonable care [would] have known of the untruth or omission.” Id.

Though the court notes the Massachusetts Legislature’s directive is to “interpret the [Act] in coordination with the [federal] Securities Act of 1933”, the decision deviates in substantial, plaintiff-friendly ways from the federal statute. Id. First, the buyer of a security does not need to prove the seller was negligent or had “scienter” (acted deliberately or knowingly) in connection with the inaccurate disclosure or omission of material information (i.e., important for an investor to know) to the buyer. Simply making a material misstatement of fact is enough. More significantly, the investor need not show that he relied on the seller’s misstatement; that is, so long as the misstatement was material, the misstatement could have been irrelevant to the investor’s actual reasons for making the investment. The investor’s sophistication is irrelevant as well. In other words, the Act requires only that the buyer show “lack of knowledge of a misleading statement or omission to prevail.” Id. at 53-54.

Finally, the court also found that the “integration clause” in the subscription agreement (this is a common paragraph in which investors agree that they are not relying upon any oral or written statements made outside the four corners of the agreement), did not release the seller from liability for material misstatements or omission under the Act. As the Court stated, “[t]hese are contract defenses. Were this a contract action, they might have merit. But it is not.” Id. at 56. This important point highlights the fact that statutes impose independent liability that a seller cannot contract away.

While the Massachusetts court refers to certain provisions available to sellers of securities under the Act (an abbreviated statute of limitations, limited remedies, and the limited jurisdictional reach of the Act), the thrust of the court’s holdings make it easier for a buyer of a security to prove a claim under the Massachusetts blue sky law than under its federal counterparts. This is notable given the relative potency of the remedy (return of the investment) plus attorneys’ fees and interest,2 and the relatively light burden that a plaintiff must carry compared to federal law.

Under federal law by contrast, investors have two main options to recover for material misrepresentations: Section 12(a)(2) of the 1933 Act or Section 10(b) of the 1934 Act. Section 12(a)(2) is an express remedy (Section 410(a)(2) of the Massachusetts Act is based on it), but it was limited in its application to stocks that are public offerings. Section 12(a)(2) also imposes liability for misrepresentations made orally by the “seller” outside of a prospectus in connection with a public offering by an issuer or person controlling the issuer.3 That left many buyers with only Section 10(b), under which the remedy is implied – and with the implied remedy came the burdensome elements from the common law tort of deceit, (e.g., reliance and scienter). There is no doubt that a plaintiff would prefer not to have to prove these additional elements in order to prevail.

While many other state blue sky laws are drafted similarly to the Massachusetts statute, not many of these statutes have received a judicial gloss or interpretation. Accordingly, the Marram case may prove to be instructive as to how other state courts will interpret their own statutes. Of course, practitioners need to review individual state statutes. For example, Georgia, Tennessee, and Washington have modified the language of section 410 to require reliance. In Wisconsin, despite having a unmodified section 410, courts have found a reliance requirement implicit in that language. Maryland courts likewise require an investor to show reliance. On the other hand, Florida is still undecided. Of the states that have not adopted the uniform laws, only Illinois requires reliance. Still, the overwhelming majority of states do not require scienter so that a seller is almost strictly liable for a material misstatement or omission. To the extent that other states embrace Marram as the interpretation of their own blue sky laws, buyers within those states have a potent cause of action.

What all this means is that a seller of securities, be the seller a hedge fund, broker, or business owner, needs to be aware that whatever is said or provided to a potential investor could prove to be costly in the event a buyer brings claims following a loss. In other words, a seller should be scrupulously honest in describing the investment and should not rely on protective language in, for example, a placement memorandum, to obviate prior oral or written statements. Investors, on the other hand, be they pension funds or individuals, have a powerful remedy in the event that they make an investment after the seller has “promised rain but delivered blue sky.”


2 Only three states, New Jersey, Pennsylvania, and Ohio explicitly reject attorney’s fees. The remaining states have either made express rulings affirming attorney’s fees, or have adopted statutory language that is identical to the majority states. States are split, however, as to whether the fees are mandatory or discretionary. See Joseph C. Long, Blue Sky Law § 12:14 (2011).

3 For a detailed explanation of the limitations of a 12(a)(2) action, see Thomas Lee Hazen, Law of Securities Regulation § 7:6 (4th Ed. 2009).

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When facing an internal investigation, it is essential for a corporation and its employees to be fully aware of the potential advantages and pitfalls regarding attorney-client privileges and work product protections during each stage of the investigation.

APPLICABLE PRIVILEGES IN CORPORATE INVESTIGATIONS

The attorney-client privilege is an evidentiary rule encouraging the exchange of full and frank information between attorney and client by protecting the information exchanged from disclosure to others typically defined as: (1) Communications; (2) between lawyer and client; (3) for the purpose of rendering legal advice; and (4) an intent that the communication be confidential.

Another protection applicable in the corporate setting is the work product doctrine. This doctrine applies to documents and other materials prepared in anticipation of litigation or for trial. Information prepared under the work product doctrine is protected from disclosure unless the party requesting disclosure can prove a substantial need for the information and an undue hardship in obtaining the same information through other means.

SHOULD THERE BE AN INTERNAL INVESTIGATION?

A corporation may have no choice but to initiate an internal investigation if the government is already investigating the corporation or if a private lawsuit has been commenced.

A corporation may choose to conduct a proactive internal investigation for several reasons including: the anticipation of a governmental investigation, compliance concerns, reporting issues, or employee complaints. The board of directors has a duty of care in the management of the corporation, and should order an internal investigation for any threat to the compliance of that duty.

There are advantages to conducting a proactive internal investigation. A proactive investigation will permit more time for a thoughtful and complete investigation, allowing for the implementation of proper investigative procedures and making it less likely that information obtained from the investigation will be leaked or otherwise escape the attorney-client privilege and work product protections.

There are also disadvantages to conducting an internal investigation in a proactive manner. The investigation may reveal a situation worse than originally anticipated, and the corporation will be forced to deal with the results. It is in this situation that potential waiver of privileges becomes a substantial threat in internal investigations. In many instances, unless the proper precautions are taken with respect to privileges, information discovered in the investigation is fair game for discovery by the government or a private party in a potential lawsuit. Once a corporation decides to commence an internal investigation, precautions must be taken to protect the information that will flow from the investigation.

DEFINING THE SCOPE OF THE INVESTIGATION

Making clear at the outset what the scope of the investigation will be is important for several reasons in connection with attorney-client privilege and work product protections. A clearly defined scope allows for the identification of individuals within the corporation who will need to be involved in the investigation, either as a facilitator or as a potential witness. If the relevant individuals are identified early in the investigation, more planning can be done to address how the information should be collected and documented. The information should flow
through an attorney to make it more likely that the information will have the attorney-client privilege attach to protect the information from disclosure.

A clearly defined scope also allows for timely the efficient and email preservation notices to be sent to the departments or individuals that will be subject to the investigation. If the relevant documents have been destroyed because there wasn’t proper notice, the government may view the destruction as intentional and charge the corporation with obstruction of justice. The existence of information withheld as privileged is likely less of a credibility issue than the destruction of potentially relevant evidence.

Finally, the scope of the investigation should be defined in the context of seeking legal advice. Whether it be from in-house counsel or an outside attorney, the documentation surrounding the scope of the investigation should be clear in that regard. Any documentation linked to the investigation has a better chance of being considered attorney-client privileged or work product protected if it can be linked to the need for legal advice, regardless of whether or not the documentation has come directly from an attorney. If it was prepared at the direction of an attorney for the purposes of providing legal advice, there is a strong argument that it is privileged.

WHO SHOULD BE INVOLVED IN THE INVESTIGATION?

In-house Counsel

A corporation may be tempted to rely on its in-house attorney to handle the internal investigation. The use of in-house corporate counsel presents many challenges regarding attorney-client privileges and work product protection issues.

One challenge relates to the nature of the in-house attorney’s role within the corporation. Many corporate attorneys are responsible for not only legal advice, but business advice as well. In-house counsel may be overseeing entire departments of non-legal employees. Courts have determined that attorney-client privileges do not attach to what is considered purely business advice. When it comes to communications containing mixed business and legal advice, many courts will require production of the mixed communication if it cannot be established which portions contain legal advice and which are of a business nature.

Another set of challenges with respect to the use of in-house counsel involve the perceived relationship between individuals within the corporation and the potential belief that they as individuals are represented by in-house counsel, when in fact they are not. If the in-house attorney has actually represented individuals that may be part of the investigation, there may be a conflict of interest and that particular attorney should not be used in the investigation.

Outside Counsel

The best way to ensure that communications exchanged during an internal investigation are protected by the attorney-client privilege is to use outside counsel. There are other advantages to using outside counsel as well. Outside counsel will provide a fresh perspective on potential problems with compliance programs and other procedures in place, which likely gave rise to the need for the investigation. Furthermore, hiring outside counsel that specializes in internal investigations may be the most efficient and ultimately cost effective way to conduct the investigation.

There are disadvantages to hiring outside counsel as well. It will likely take a considerable amount of time for outside counsel to become familiar with the particular business practices of the corporation and formulate a plan for implementing the investigation. Additionally, employees may not (and probably should not) trust outside counsel. An employee may withhold relevant information based on this lack of trust.

Regardless of whether the investigation is headed up by an in-house attorney or outside counsel or a combination of the two, each written communication to the board or other corporate representative relating to the investigation must relate only to the investigation and contain legal impressions or advice relating to the investigation.

Experts and Consultants

Oftentimes there will be a need for an expert or consultant in the investigation, such as a forensic accountant or an IT professional. If the need arises, the expert or consultant should be retained directly by counsel and the relationship should be reflected in a formal engagement letter. This will further establish attorney-client and work product protections stemming from the work conducted by the expert or consultant.

THE INVESTIGATION

The investigation will involve interviews with individuals within the corporation, and special considerations must be made during those interviews. Courts have set forth guidelines for communications with individuals under which the information obtained will be protected by the corporation’s attorney-client privilege. It must be made clear that the interview is being conducted at the direction of the board for the purpose of obtaining legal advice and should remain confidential. To remain within the attorney-client privilege, the information obtained from the individual should relate to the individual’s corporate duties and be necessary for the investigation. The privilege belongs to the corporation not the individual employees. The corporation may divulge information that may incriminate the individual and the individual should be made aware of that fact.

The moment it becomes evident that an individual is involved in the wrongdoing, counsel should inform the individual that they may seek independent legal counsel, and that the corporation will not be representing them. When it comes to the payment of legal fees, the individual should be informed that the corporation is not responsible for the attorney fees.

RESULTS OF THE INVESTIGATION

Whether to issue a report summarizing the results of the investigation may be troublesome, especially if the corporation is not currently under investigation by the government. If the investigation was carefully conducted a report may be protected as attorney-client privileged and as work product. However, providing the report to the government may demonstrate credibility and cooperation to gain favorable consideration.

CONCLUSION

Although there is no guarantee on how the government or court will receive a corporation’s assertion of attorney-client privilege and work product protection claims, the corporation at the very least will possess more options if the assertions are made intelligently and with purpose from the very beginning of the investigation.
In accidents at night or in diminished or adverse lighting conditions, the question of whether a pedestrian could be seen, a stopped or slow moving vehicle could be identified, a trailer could be observed when a truck turned onto the road, or a step or wheel stop was visible in a parking garage are questions that arise often. The question is, however, not answered with just a "light meter", a professional or amateur’s video or still camera or just going to the accident site. Visibility at night is properly evaluated primarily through contrast and other measurements and an understanding of perceptual issues surrounding the event.

THE VISUAL SYSTEM AT NIGHT

Night accidents are different because, in part, vision under low light conditions is different. Humans can see over a very large range of light intensities and the eye adjusts to existing lighting conditions. Photoreceptors in the eye, cones and rods, play an important role. Their distribution in the retina and an understanding of their response in changing light conditions are critical to understanding vision. In high light levels, vision has the benefit of high sharpness and color. In low light levels, rod receptors become the key players with high sensitivity to light but poor ability to resolve fine details and a loss of color vision. In real world night accidents, vision usually occurs in mixed modes as there is often enough ambient light to blend some operating level of each of the cones and rods. In addition, the clearest imaging that occurs in central vision is significantly degraded at night while peripheral vision retains its relative performance.

As a result, the ambient visual system, which relies on both peripheral and central information and is responsible for spatial positioning with respect to the environment, shows relatively little degradation as the lighting conditions are reduced. The focal visual system, which is responsible for identification and detection of objects in
central vision, however, is severely degraded by reduced illumination. Consequently, drivers rely mainly on the ambient system for guidance at night and have a decrease in their ability to extract detailed information from the scene ahead. This can make it difficult to see poorly lit items such as pedestrians, cyclists, and disabled vehicles.

DETECTION

Driver response is a function of detection and perception. The former relates to the information received by the eye, while the second relates to functions such as attention, recognition and conspicuousness and decision and judgement. For example, a stopped vehicle on the freeway may not be understood to be stopped although it was visible for many seconds. Furthermore, a visible object may not be "seen" because the driver's attention is occupied elsewhere.

In a night visibility evaluation, the first step of the analysis is typically to determine when the object can be detected. One of the most important parameter in establishing whether a pedestrian, an object or a feature is visible at night is discernable contrast. Contrast is the characteristic of "how readily an object will appear distinct from its background." Contrast is more important than the amount of light. The amount of light can be low, and yet contrast may be sufficient to see a stairway because the light reflected from the risers and the treads are different, thus creating sufficient contrast to see the steps.

In reconstruction of an accident, contrast can only be measured accurately after the accident site and environment have been recreated to reflect the accident conditions. This can be achieved by matching the weather conditions and time of day in addition to the moon position, for example. The vehicles involved in the accident or exemplar vehicles can also be used at the accident or similar site to complete the setting. A pedestrian's clothing needs to be duplicated as well as and, of course, the position of the pedestrian or vehicle at a given point needs to be reconstructed.

Luminance is a measure of the light reflected to the eye by a surface. In a pedestrian accident, the amount of light reflected by the clothing of the pedestrian as opposed to the light reflected by the background is a measure of the contrast between the two areas. At night, in order to be detectable, the luminance of the clothing of the pedestrian must be perceivably greater or smaller than the background's, thus resulting in positive or negative contrast. Luminance can be measured with a calibrated high precision luminance meter which allows single successive measurements at different locations. Calibrated luminance imaging photometers are also available that "image" the luminance of a scene, and thus capture multiple luminance measurements at once.

Contrast is then a measure of the difference between luminance values. Determining if the contrast is high enough is the next step and involves accounting for factors such as form, the age of the viewer, the object size and/or distance and the observation time. Glare from oncoming vehicles, the sun or background lighting may also play a critical role in detection. At the right angle, glare will reduce the ability to see an object, person or feature. To account for glare, additional measurements can also be performed at the scene. Factors such as location in the field of view, adaptation and viewer expectation must also be taken into consideration. Finally, factors such as drug and alcohol use as well as eye disease need to be considered.

The steps described above are part of a scientific and thorough evaluation of detection in night or low level lighting accidents. It should by now be evident that the use of a "light meter" alone, which is designed to measure the amount of light as opposed to the reflected light, may not be sufficient for this evaluation. Going to the scene to simply "look" is also insufficient, as the age of the observer and the characteristics of his or her eyes play important roles on the outcome, and there is no independent quantification of the process for others to duplicate or evaluate. Similarly, a video or digital camera, with its many automatic compensating features and functional and imaging differences with the human eye, may not properly capture information at the scene and can be misleading without proper foundation. A discussion of night photographic and videographic methods is, however, beyond the scope of this article. A combination of measurements, a quantitative evaluation and an analysis including all relevant factors, is the only way to scientifically evaluate the ability to detect an object, a person or a feature while properly documenting the steps in the process.

PERCEPTION

Detection is only an early step in a full evaluation of driver response at night. “The input of sensory organs (eye) combined with analysis and interpretation in the brain yields what [is called] perception.” It is hence important to understand the various processes and difficulties that can be encountered. In the example of a disabled vehicle on a freeway at night, to avoid a rear accident with a slow or stopped vehicle, an approaching driver must recognize not only that a vehicle is ahead, but also that a collision is imminent. The first task is reasonably simple, as taillights or reflectors can usually be detected (by alert drivers) at distances far beyond the minimum required to avoid an accident. More difficult to judge is the speed of closure with a vehicle ahead. Visual information provided as the vehicle “sweeps across” across the background, such as poles, trees, signs or other terrain features, is largely unavailable at night due to lack of background light, especially in rural settings. Therefore, to determine the speed of the forward vehicle at night, the driver depends on cues based on the visual angle between his eyes and the leading vehicle taillights or reflectors.

If the driver detects that this angle is increasing, this provides information that the driver is approaching the object ahead. The rate of expansion of the size of the object is another cue. Unfortunately, when a stationary (or barely moving) object the size of a car is several hundred feet ahead of a following vehicle, the lead vehicle’s visual angle does not expand rapidly. Observers, therefore, have difficulty in detecting whether or not the rate of expansion is positive. Therefore, if the object is detected only by cues based on the rate of visual expansion, the driver is approaching the limits of his/her capability to avoid a collision. Objects, whose sizes are relatively small, such as motorcycles, and even small vehicles, offer even greater difficulty when approached at a relatively high speed, since the threshold of the rate of visual expansion will sometimes be exceeded only when the following vehicle cannot avoid striking it.

Thus, conspicuity alone, if defined as the property of an object to call attention to itself, is not sufficient. The driver needs to understand what the other vehicle is doing relative to him. Seeing the vehicle, in this case, is not the problem; recognizing that it has stopped is the crucial issue, which is based on an understanding of human visual limitations.
The practice is familiar to any person required to draft an answer in federal court. Grab the Federal Rules of Civil Procedure, turn to Rule 8, and start listing, often in sequential fashion, those affirmative defenses that could be applicable:

• The claims are barred by the doctrines of estoppel and waiver.
• The agreement is unenforceable due to fraud, duress or a lack of consideration.
• The claims are barred by the applicable statute of limitations and/or statute of frauds.

And so on.

This common practice has been called into serious question in many courts, however, following two Supreme Court decisions which dealt with the pleading requirements for complaints, but are now sometimes being applied to affirmative defenses.

BACKGROUND

In a 2007 case, Bell Atlantic Corp. v. Twombly, the Court held that, to survive a motion to dismiss, a complaint must contain facts sufficient to state a claim to relief that is plausible on its face. That is, while plaintiffs are not required to include “detailed factual allegations” in their filing, more than bald accusations or mere speculation is needed to survive a motion to dismiss. In the words of the Court, providing nothing more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” is not enough.

Two years later, the Court reiterated in Ashcroft v. Iqbal that “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to plead a claim. Instead, the Court held that the complaint must “plausibly give rise to an entitlement to relief,” and that doing so requires “more than the mere possibility of misconduct.”

In the wake of Twombly and Iqbal, courts have been grappling with the corresponding issue not addressed in those decisions: if complaints need more factual detail, what about affirmative defenses? Without guidance from the Supreme Court or any federal appellate courts, district courts are reaching different conclusions – often in the same circuit and sometimes in the same district!

Decisions from the district courts in the United States Court of Appeals for the Fourth Circuit (which covers Maryland, North Carolina, South Carolina, Virginia and West Virginia), serve as a perfect example. Prior to Twombly and Iqbal, the Fourth Circuit held that general statements of affirmative defenses were sufficient, as long as they gave plaintiffs fair notice of the defense.

THE MAJORITY VIEW

Since then, however, the majority of the district courts in the Fourth Circuit (including judges in the District of Maryland, the Eastern District of North Carolina, the Eastern District of Virginia, the Western District of Virginia and the District of South Carolina) have held that the pleading requirements of Twombly and Iqbal do, indeed, apply to affirmative defenses. In reaching that conclusion, these courts have generally relied on the considerations of fairness, common sense and litigation efficiency underlying the Supreme Court decisions.

Explaining that “what is good for the goose is good for the gander,” they have reasoned that “it neither makes sense nor is it fair to require a plaintiff to provide the de-
fendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit a defendant under another pleading standard simply to suggest that some defense may apply in the case.2

According to these courts, the pleading requirements spelled out in Twombly and Iqbal are intended to ensure that an opposing party receives fair notice of the factual basis for an assertion, regardless of whether that assertion is contained in a claim or a defense. Applying this rule to affirmative defenses, the courts reason, furthers the interests of consistency and fairness by making sure plaintiffs receive proper notice of defenses in advance of the discovery process and trial—an advantage explicitly afforded to defendants as a result of the Twombly and Iqbal decisions.

In hewing to this line of reasoning, some courts have also cited the importance of litigation efficiency, noting that “boiler-plate” defenses serve only to clutter the docket and create unnecessary work by requiring opposing counsel to conduct unnecessary discovery. And at least two courts have noted that a sample affirmative defense form that is appended to the Federal Rules of Civil Procedure includes factual detail in support of a statute of limitations defense.

The majority view was perhaps best summed up by a district court in Maryland in a 2011 decision. In Barry v. EMC Mortgage, the district court stated that Twombly and Iqbal recognize the fairness and efficiency concerns highlighted by district courts that have subsequently applied those standards to affirmative defenses. The court also noted that, “[a]ll pleading requirements exist to ensure that the opposing party receives fair notice of the nature of a claim or defense.”

**THE MINORITY VIEW**

Of course, where there is a majority view, there is also a minority view, and that is the case here, as well. A minority of district courts in the Fourth Circuit (including judges in the Eastern District of Virginia and the Western District of Virginia) considering the same issue have held that the pleading requirements of Twombly and Iqbal do not apply to affirmative defenses. These courts have primarily grounded their decisions in the different language used to address complaints and affirmative defenses in the Federal Rules of Civil Procedure (Rules 8(a)(2) and 8(b)(1)(A)).

These courts have noted that Rule 8(a)(2), applicable to complaints, requires “a short and plain statement of the claim showing that the pleading is entitled to relief,” while Rule 8(b)(1)(A), which governs affirmative defenses, merely requires that a responding party “state in short and plain terms its defenses to each claim asserted against it.”

Minority-view courts have held the absence of the wording included in Rule 8(a)(2) (“showing that the pleading is entitled to relief”) to be a notable one. As one such court explained, “[b]ecause Rules 8(b) and 8(c) do not require a party to ‘show’ that it is entitled to a defense, the court declines to hold affirmative defenses to the same pleading standards required by Rule 8(a).”

The minority-view courts respond to the “fairness” argument by noting that there are countervailing considerations of whether it is fair to apply the same pleading standard to plaintiffs, who have far more time to develop factual support for their claims, as to defendants, who generally have only 21 days to respond to a complaint, did not initiate the lawsuit and risk waiving any defenses not raised.

**RECOMMENDATIONS**

Until this issue is resolved by an appellate court, parties interposing affirmative defenses should make every effort to meet the Twombly and Iqbal pleading requirements. Although this may be a change for some, one court has noted that Twombly and Iqbal require only minimal facts establishing plausibility, a standard that most litigants presumably would apply when conducting the abbreviated factual investigation necessary before raising affirmative defenses in any event.

Several courts have spelled out factors they consider necessary for an affirmative defense to rise to the level of plausibility required by Twombly and Iqbal, such as the inclusion of a brief narrative stating facts sufficient to give the plaintiff fair notice of what the defense is and the grounds upon which it rests, and a statement of facts that plausibly suggests cognizable defenses under applicable law.

One court held that affirmative defenses are insufficient under the Twombly and Iqbal standard if they are stated “in a conclusory manner and fail to provide fair notice to the plaintiff of the factual grounds upon which they rest.”

While this will require more effort than simply listing affirmative defenses seriatim, the Twombly/Iqbal pleading standard does not require the assertion of all supporting evidentiary facts. Nevertheless, some statement of the ultimate facts underlying the defense must be set forth, and the factual content and reasonable inferences from that content must plausibly suggest a cognizable defense available to the defendant.

Many courts applying Twombly and Iqbal to affirmative defenses have also noted that a party can move to amend its pleading under Rule 15 if it discovers additional facts, and that this remedy protects parties who learn of information supporting an affirmative defense later in the case. Attorneys should be aware of—and utilize—this rule.

Finally, even if the practitioner is before a judge who declines to apply the Twombly and Iqbal pleading standard to affirmative defenses, he or she should take little solace in that fact since affirmative defenses may nevertheless be subjected to extra scrutiny. Indeed, one district court judge did just that, holding that Twombly/Iqbal did not apply to affirmative defenses, but then striking 17 out of 19 defenses because it held there were no facts alleged in support that would make them “contextually comprehensible.”

For this reason, it is best to assume that the Twombly and Iqbal standard will be applied and proceed accordingly.

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INTRODUCTION
With the struggling economy of the last several years has come an increased issue for defendants and defense attorneys: how to handle liens associated with lawsuit funding loans when settling personal injury cases. Funding loans can have annual interest rates of 50% or more so even a fairly small loan can have a major influence during the settlement of a case. More importantly, defendants and their counsel need to be cautious in protecting the defendants’ interest in resolving matters with funding loans as the loan companies assert liens against the settlement and often attempt to be paid directly from defendants.

LAWSUIT FUNDING LOANS
Plaintiff and/or plaintiff’s attorney can obtain these funding loans and, while most companies insist that there be no other funding loans, the existence of just one loan depends on plaintiff and counsel being honest with the loan companies as to the existence of other loans. Unfortunately, there is often more than one funding loan in a case and we have seen matters with up to ten funding loan liens between plaintiff and counsel.

In deciding to give a lawsuit funding loan, funding loan lenders will evaluate claims based on their alleged severity and the plaintiff’s likely recovery. Cases where plaintiff simply alleges soft tissue injuries may not be eligible for these loans. However, cases alleging spinal bulges/herniations and especially cases where there is surgical intervention are usually eligible for these loans.

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Generally, funding loan companies will give notice to defense counsel and/or defendants of these loans early on in litigation. It is important for defense counsel to make the appropriate notation to their file so that upon resolution, the appropriate steps can be taken to protect defendants from these funding loan liens.

These funding loans can possibly hamper settlement because of large payoff amounts. For instance, with a 51% interest rate, if a plaintiff takes a $3,000 loan, the payoff amount in three years will be over $10,000. However, the bigger issue for defendants and counsel is the expectation that defendants will satisfy these funding loan liens directly. When this happens, defense counsel must take steps to protect defendant.

RESOLUTION OF MATTERS WITH LAWSUIT FUNDING LOAN LIENS
Issues with settlements involving funding loans typically begin because there has been an assignment of the right of recovery to the funding loan company. While funding companies are not permitted to weigh in on settlement of matters, some states have statutes providing that upon notification of the assignment of recovery of fees and costs from litigation that defendants may only discharge their obligation by payment directly to the lien company. In other words, the typical practice of making a settlement check out to “Jane Doe and her attorney, Mary Roe” does not discharge defendants’ obligation despite the fact that any funding lien is between plaintiff or counsel and the funding loan company. In such cases, while an interpleader action may be filed to name the potential lien holders as third party defendants and thus protect defendants’ interest, this may be a costly measure. Additionally, some Courts and/or judges may not allow this practice as once a matter is settled they want it off their docket and do not want to deal with a third party action and fights regarding funding loans.

The less expensive, and equally as secure, tactic to protect settling defendants from further action by funding loan companies may be to deposit the settlement funds into Court. This allows defendants to be protected and forces some court intervention as the payment of any settlement proceeds will have to have court approval. This method of resolution avoids defendants’ involvement in any squabbles between plaintiff and the lien holders or between multiple lien holders. It also discharges defendants from future obligations. In being additionally conservative and extremely protective of defendants’ interests, counsel can write to the known lienholders and secure their agreement that by the depositing of the funds into court that the lienholders will not come after defendants directly. Any such agreement should be confirmed in writing prior to the settlement funds being deposited in court.

CONCLUSION
When lawsuit funding liens are present, it will generally make final resolution more difficult. It will also take longer to finally complete all closing documents as several steps will need to be completed before closing documents can be signed. Clients need to be prepared that there will likely be additional costs associated with these types of settlements as defense counsel will need to file an interpleader and/or seek court approval to deposit the funds in court. Additionally, there is additional time and cost associated with securing agreement from the lienholder(s) that by depositing the funds in court, the lienholder(s) will not seek anything further from defendants. Despite the additional time and costs associated with taking these steps, they are necessary in order to protect defendants from any future action by the lienholders.

Catherine G. Bryan is an Associate with the New Jersey office of Clyde & Co US LLP, where she has extensive experience in general liability, products liability, professional liability and business litigation. She regularly represents businesses and individuals at the trial and appellate levels, in both state and federal court.
Indianapolis-based Bingham McHale LLP and Louisville-based Greenbaum Doll & McDonald PLLC have joined to create Bingham Greenbaum Doll LLP. With an expanded regional presence, the newly merged firm will offer expanded litigation, business, banking, tax, and government practices services. Bingham Greenbaum Doll has offices in Indianapolis, IN; Louisville, KY; Lexington, KY; Jasper, IN; Frankfort, KY; Evansville, IN; and Vincennes, IN.

Partner at Connell Foley LLP (Roseland, NJ), Karen P. Randall was recognized and named by New Jersey Biz as one of the “New Jersey’s 2012 Best 50 Women in Business.” An independent panel of judges selected the top 50 winners based on their dedication to business growth, professional and personal accomplishments, community involvement, and advocacy for women. Also, Connell Foley LLP opened a Cherry Hill, New Jersey office on February 1, 2012. The firm has expanded its presence into Southern New Jersey in response to its exponen-
tial client growth and ever-increasing client de-
mands, particularly in the healthcare sector. Patrick J. Hughes, managing partner in the Cherry Hill office, will be leading an impressive group of lawyers covering the full range of ser-
vice provided by Connell Foley.

Managing Director Ari Pollack of Gallagher, Callahan & Gartrell, P.C. (Concord, NH), was recently recognized for his leadership and ac-
complishments in New Hampshire’s “40 Under Forty” awards. Mr. Pollack was commended for winning passage of construction projects that brought thousands of jobs to NH and for help-
ing oversee an affordable housing agency ben-
efiting hundreds of local residents.

Huddleston Bolen LLP (Huntington, WV) has created Education4Business, a new web portal providing news, information, and tips for business people. Guests can access information, Huddleston seminar materials and videos, and other online resources on sales and marketing, public relations, human resource issues and em-
ployment law, accounting and finance, business banking, and more. The free Education4Business portal is at www.e4b-huddlestonbolen.com.

Klinedinst PC (San Diego, CA) shareholder Heather Rosing has been elected to serve on the State Bar of California’s Board of Governors starting in 2011. Ms. Rosing will serve a three-
year term as representative for the District 9 seat, which includes Imperial, San Diego, Riverside, and San Bernardino counties.

Kelly Swanon of Larson • King, LLP (St. Paul, MN), has been named a partner at the firm. Kelly is a recognized resource on topics such as the Fair Labor Standards Act and state wage and hour laws, particularly in the context of don-
negation and misclassification claims, as well as litigation strategies in such actions.

St. Louis law firm Lashly & Baer, P.C. (St. Louis, MO) marks 100 years of service in 2012. The firm, known for its involvement in civic ac-
tivities and for handling a number of landmark legal matters, plans to continue its tradition of volunteerism and support of initiatives that ben-
efit downtown St. Louis as well as the entire met-
ropolitan area.

Marjorie Rogers, a shareholder in the law firm of Modrall Sperling, (Albuquerque, NM) was elected as a Fellow of the American College of Trust & Estate Counsel. The College is an organ-
ization of more than 2,600 trust and estate lawyers and law professors who have been elected by their peers in recognition of their outstanding contributions to the practice of estate and trust law.

Steven C. Sprosz, Murchison & Cumming, LLP (Los Angeles, CA), volunteered for pro bono work with the International Senior Lawyers Program (ISLP) Commercial Law Program, which has previously included representation of hundreds of South African attorneys.

John E. Tull III, of Quattlebaum, Grooms, Tall & Burrow PLLC (Little Rock, AR), was inducted as a Fellow of the American College of Trial Lawyers at its recent annual meeting in La Quinta, California. The American College of Trial Lawyers is composed of the best of the trial bar from the United States and Canada and is widely considered to be the premier professional trial organization in America.
Successful Recent USLAW Law Firm Verdicts

Clark Hill PLC (Detroit, MI)
Tony Agosta, Dan Scully, Dan Graham, Rich Chapman and Cynthia Filopovich secured summary judgment for a computer manufacturer in a matter pending in U.S. Dist. Ct. for the N.D. of III. Plaintiff alleged she suffered third degree burns from a computer power adapter. Clark Hill was brought into the case at the close of lay witness discovery and worked with the manufacturer to develop an expert witness strategy, implement the strategy and utilize its expert witnesses to establish Plaintiff’s expert witnesses’ lack of credibility. Following expert discovery, Clark Hill moved for summary judgement. Judge Chang granted the summary judgement motion as to all of Plaintiff’s counts, finding the opinions of the manufacturer’s expert witnesses to be dispositive, and determining that no reasonable jury could find for the Plaintiff.

Connell Foley LLP (Roseland, NJ)
In October 2011, the U.S. Supreme Court called for the views of the U.S. Solicitor General on whether a pending Certiorari Petition filed by Connell Foley attorneys, Karen P. Randall, Andrew C. Sayles, Thomas S. Cosma, Thomas J. O’Leary, M. Trevor Lyons, and Meghan K. Musso involving the Fair Debt Collection Practice Act should be granted. The CVSG, which requires the votes of at least four Justices confirmed a strong interest by the Supreme Court in the issue presented. In November 2011, Randall and Sayles argued in favor of having cert. granted in a formal meeting with representatives from the SG, FTC, Consumer Financial Protection Bureau and Department of Justice present.

Fee, Smith, Sharp & Vitullo, LLP (Dallas, TX)
Mike Sharp and Clint Cox obtained a trucking defense verdict in Dallas’ 44th Dist. Ct. Plaintiffs sought over $9MM in past/future damages against Defendants Genuine Parts Co. (NAPA Auto Parts) and their driver. Plaintiffs argued the Defendants were grossly negligent in the operation of an 18-wheeler that struck Plaintiff, causing catastrophic brain and bodily injury. Plaintiffs presented testimony as to liability and damages, through five experts, seeking a life care plan in excess of $2.4MM. With only one dissenting juror, the verdict placed 100% of the negligence on Plaintiffs, thereby denying the Plaintiffs any recovery.

Hinckley, Allen & Snyder LLP (Hartford, CT)
Michael McCormack and Michael Sorensen obtained summary judgment for a manufacturing client in two separate product liability cases, one of which included a successful Daubert motion to exclude plaintiff’s expert witness’s product defect testimony. In Fireman’s Fund Ins. Co. v. Tecumseh Prods., 767 F. Supp. 2d 549 (D. Md. 2011), Plaintiff sought damages arising from a fire causing hotel property damage. Plaintiff alleged product defect claims against the manufacturer, the distributor, and the manufacturer of a component part of the product. After dismissing its claims against two defendants, Plaintiff pursued its claim against the component manufacturer. Granting a Daubert motion precluding plaintiff’s expert witness’s testimony, and finding also that the expert improperly formed a causation opinion through speculation and not the required testing, the court then granted summary judgment in favor of the component part manufacturer due to lack of direct evidence of a defect or through any unspecified or indeterminate defect theories.

Huddleston Bolen, LLP (Huntington, WV)
Kevin Nelson and Ashley French obtained a jury verdict on behalf of a major global publishing company in a wrongful discharge and wage payment act case in the U.S. Dist. Ct. for the S.D. of W.Va. late last year. Plaintiff, who had been laid off as part of a reduction in force, claimed he had been terminated in violation of public policy due to alleged complaints about the company’s sales practices. Plaintiff claimed he was entitled to payment of all wages and other compensation as a discharged employee, which under WV law must occur within 72 hours of discharge. The former claim was dangerous because of the jury’s ability to award non-economic and punitive damages along with back and front pay, and the latter because WV law provides for treble damages and attorney’s fees to a plaintiff who successfully prosecutes a wage act claim. After a six-day trial the jury deliberated for five hours before returning a unanimous verdict on liability on behalf of the employer on both claims.

Klinedinst PC (San Diego, CA)
Klinedinst PC, successfully represented Regal Entertainment Group during a 4-week trial in a multi-million dollar personal injury case involving a minor Plaintiff who claimed traumatic brain injuries after a bathroom stall door at a Regal movie theater fell, striking her in the head. Defendant’s counsel Ernest L. Weiss contended that Regal performed proper maintenance and inspection throughout the restroom, and, that based on the grandmother’s testimony and physical evidence, the door was forcibly pushed in the wrong direction, causing it to separate. The defense contended that Plaintiff had not suffered any brain
injury whatsoever. In fact, an examination revealed a normal CT scan. Plaintiffs argued that future medical/neuropsychological costs, and loss of future earning capacity, warranted a $23MM award. After less than 90 minutes of deliberation, the jurors returned a unanimous 12-0 decision for the Defense.

**Modrall Sperling (Albuquerque, NM)**

Martha Brown and Deana Bennett recently won an appellate victory for the NM long-term care community in Barron v. Evangelical Lutheran Good Samaritan Soc’y, 2011-NMCA-094, in which Plaintiff opposed arbitration of her claims alleging inadequate care during a stay at Betty Dare Good Samaritan nursing home. Plaintiff opposed arbitration on multiple grounds, despite the competent resident’s delegation of actual authority to her granddaughter, who was neither a general nor healthcare power of attorney designee. The NM Ct. of Appeals reversed the trial court’s denial of arbitration absent such a designation, relying on principles of agency law and NM’s well-established public policy preference in favor of resolving disputes through arbitration where agreed to by the parties. The Court also rejected the Plaintiff’s unconscionability claims.

**Murchison & Cumming, LLP (Los Angeles, CA)**

Guy Gruppie and Gregory Sargenti won a defense verdict after a nine-day jury trial and 50-minute deliberation in a personal injury case where plaintiff sought over $2MM in damages. Plaintiff sued two defendants following a 2007 accident on property leased by defendant Sam’s East, Inc. and managed by defendant Vestar Property Management. Plaintiff claimed significant orthopedic injuries due to a negligently maintained storm grate. Following the Supreme Court’s recent Howell decision, the surgeries resulted in recoverable damages of $108,017.19. Denying liability, defendants offered evidence that the on-site property manager personally walked the property, the management company retained continuous security, and that Sam’s employees were frequently present to assist customers loading their vehicles. The jury returned a verdict finding that neither of the Defendants were negligent.

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

The Arkansas Supreme Court unanimously reversed a $2.5MM judgment against Quattlebaum’s client and dismissed Plaintiff’s complaint alleging product liability claims. Plaintiff alleged that Yanmar Co., Ltd., a Japanese company, designed, manufactured, and sold a defective and unreasonably dangerous agricultural tractor in 1977 that caused the death of the tractor user in 2004. On appeal the Arkansas Supreme Court reversed and dismissed as to Yanmar Co., Ltd., finding the lower court had erred in finding that Arkansas courts have personal jurisdiction, and, reversed and dismissed as to another defendant, Yanmar America Corp., finding it owed no duty to decedent as a matter of law.

**Snyder Law, LLP (Santa Barbara, CA)**

Diana Lytel and Barry Snyder successfully defended an owner operator whose Freightliner tractor slid on gravel through a stop sign into an intersection, causing a collision with plaintiff’s vehicle. Plaintiff surgeries and accrued medical bills exceeded $280,000. Defendant admitted the driver’s negligence and tried the case to a jury on causation and damages. Based on biomechanical expert and orthopedic surgeon testimonies, the jury found that the forces were insufficient to cause Plaintiff’s injuries. Plaintiff’s $650,000 demand was also proposed to the jury by plaintiff’s counsel at closing argument. An earlier $25,000 statutory offer, and a generous $140,000 offer were made to Plaintiff months prior. After two hours of deliberation, the jury returned a verdict of $5000 in medical bills and $2000 in pain and suffering. Because of the earlier statutory offer, the defendant will be entitled to costs resulting in a net zero dollar verdict to plaintiff and counsel.

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

Shelley H. Leinicke successfully preserved a defense verdict on appeal from a final judgment based on a jury verdict finding that an obstetrician properly used a vacuum extractor in a twin delivery and did not cause an ischemic stroke during delivery. The appellate court affirmed the trial court’s ruling that Plaintiff’s expert was not qualified to give opinion testimony that the obstetrician’s care created circumstances leading to brain injury. The appellate court also determined that defense expert’s reliance on a NIH study did not constitute improper bolstering. The jury’s defense verdict and the final judgment were affirmed.
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