Ensuring the Story is Complete

And the Potential End of the Collateral Source Rule – An Unintended Tort Reform

Knowing the “Rules of the Road” to Defend this Transportation Group

Is the Bright Light Marked by a Bright Line?

Oversized Load & Heavy Haul Operations

The Statute of Repose and the Construction Defect Claim

The Survival of the Affordable Care Act

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FROM THE Incoming Chair’s Desk

It is my honor to serve as the incoming chair of USLAW NETWORK and to work with our member firms, lawyers and valued clients to deliver the highest level of service and resources available for your various legal and business needs. I’m also proud to bring you the current edition of the USLAW Magazine. In the magazine, as with our lawyers, you will find insightful information that will keep you abreast of the current legal and practical issues facing us in business today.

The current topics in this edition cover a variety of industries and practice areas. As you peruse the pages you will see articles about how technology is helping to improve the quality of investigations to statute of repose and the construction defect claim as well as articles on cyber security and data breaches, indemnification provisions and additional insured endorsements, trademark, bankruptcy, ACA, information technologies for automobiles and trucks and much more.

In addition to the insightful information you can gain from these articles, USLAW also offers you the unique opportunity to have these authors and/or members of USLAW come to your offices and present information on a wide variety of topics which are relevant to your business model and industry. You select the topic or issue and we deliver! You don’t have to leave your office and the presentations are available to all on your staff or team. This concept – called LawsMobile – is available to you right now; just reach out to your relationship attorney at USLAW, to USLAW CEO Roger Yaffe or to me for more information to take advantage of this opportunity.

The lawyers of USLAW are client-focused and service-driven. Since day one, USLAW’s focus has been on the client’s needs and these legal needs are satisfied through highly competent and conscientious attorneys who are committed to developing a relationship with clients as well as members of our network. We very much appreciate the relationships we’ve developed to date and look to those in the future. If you ever have any questions about USLAW, please reach out to me.

I’d like to extend a special thanks to Erik Gustafson of LeClairRyan for his leadership as chair during the past year. His innovative ideas, energy, commitment to fostering strong networking opportunities and serving the needs of our clients provide a strong foundation we will be proud to build on in the year ahead.

Thank you for your continued interest in and support of USLAW.
To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court.

— Justice Sonia Sotomayor

For those of us who practice bankruptcy law, it’s oddly comforting to imagine that we might spend our final moments in a familiar courtroom surrounded by our colleagues instead of fighting a natural disaster. We realize, though, that for many of our fellow attorneys and clients, being forced to litigate in bankruptcy court is a fate to be avoided at all costs. If you’re in that camp, allow me to console you – a little.

If you normally stay as far away from bankruptcy as you can and think the Supreme Court’s recent ruling won’t affect you, think again. Here’s one example of how the issue can arise from a non-bankruptcy corporate transaction, although the possible ways this issue can arise run the gamut from product and premises liability cases to trusts and estates and domestic disputes. Say your company was the buyer in an asset purchase agreement with an unrelated company. Both companies appear to be solvent, and the deal is considered a success. Eleven months later, your company is served with a complaint filed in bankruptcy court (a.k.a. an “adversary proceeding”) by the plaintiff, the newly appointed bankruptcy trustee for the seller, which filed a chapter 7 bankruptcy petition. The trustee alleges claims for fraudulent transfer and civil conspiracy. Your company now realizes that it has claims against the seller (debtor) for breach of representations and warranties in the asset purchase agreement. Can and should all of these claims be tried in bankruptcy court? What if there is a jury demand on certain claims?

In Wellness International Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015), the Supreme Court continued to outline the contours of judicial power that can be exercised by bankruptcy judges. The debate arises because bankruptcy judges are appointed under Article I of the United States Constitution rather than Article III, which controls appointment of federal district court judges. Bankruptcy judges, like federal magistrate judges, are judicial officers of the United States district courts under which they serve. District courts have original jurisdiction over bankruptcy cases and related proceedings, and universally enter standing orders referring all such cases and proceedings to the bankruptcy courts in their district. 28 U.S.C. § 1334. The reference is automatic, so debtors file their bankruptcy petitions directly in the bankruptcy court. Subsequently, the district court can withdraw from bankruptcy court the reference of the entire case or a single matter in controversy. Such withdrawal can happen at the court’s initiative or upon the request of a party. You can bet, though, that it would be a rare district court judge who would want to preside over an entire bankruptcy case from start to finish.

Once a matter is in bankruptcy court, the Bankruptcy Code provides that a bankruptcy judge’s authority depends on whether the matter is a “core proceeding” or a “non-core proceeding.” In a core proceeding, the Code provides that a bankruptcy judge can enter final orders and judgments subject to ordinarily appellate review by the district court. 28 U.S.C. § 157(b). In a non-core proceeding, a bankruptcy judge’s authority is limited to hearing the matter and submitting proposed findings of fact and conclusions of law to the district court for de novo review. 28 U.S.C. § 157(c)(1); Rule 9033, Fed. R. Bankr. P. However, if all the parties to a non-
core proceeding consent, the bankruptcy court can enter a final judgment subject to ordinary appellate review by the district court. 28 U.S.C. § 157(c)(2).

This is where the law starts getting complicated. There is a non-exclusive statutory list of matters that are classified as core proceedings, 28 U.S.C. § 157(b)(2). Core proceedings generally involve management, identification and distribution of property of the bankruptcy estate. The line between core and non-core proceedings is often blurry, though, and subject to dispute. Before you even get to that distinction, here’s what you should know.

In Stern v. Marshall, 131 S. Ct. 2594 (2011) (Marshall being better known as Anna Nicole Smith), the Supreme Court told us that a bankruptcy court’s authority is limited even in core proceedings. Specifically, the Court held that the bankruptcy court could not enter final judgment on the debtor’s counterclaim for tortious interference with a gift, even though it was a core proceeding, because the parties had not consented to adjudication in bankruptcy court and the counterclaim did not fall within the “public rights exception” category of cases that the Constitution allows to be delegated to an Article I tribunal. However, the Court did little to explain which claims come within the public rights exception. As a result, the core versus non-core proceeding distinction is no longer as reliable an indicator of a bankruptcy court’s core proceeding distinction is no longer as reliable an indicator of a bankruptcy court’s bankruptcy court’s authority as it once was.

Not long after Stern, in Executive Benefits Insurance Agency v. Arkinson, 134 S.Ct. 2165 (2014), the Supreme Court answered one unresolved question. When faced with a non-delegable core proceeding as in Stern, it is constitutional for a bankruptcy court to treat the proceeding like a non-core proceeding and submit proposed findings of fact and conclusions of law to the district court for de novo review, regardless of whether the parties consented to adjudication in bankruptcy court. Although the bankruptcy court may not enter a final judgment in such cases, its authority does extend to pre-trial proceedings including disposition of motions to dismiss and motions for summary judgment. This is where it gets confusing. While we wait for lower courts to develop the law on these issues, parties must proceed with caution when they have a matter in bankruptcy court that they want adjudicated elsewhere. Consent to adjudication of certain types of counterclaims may be implied from such routine actions as filing a proof of claim in the bankruptcy case. If bankruptcy court is not your preferred forum, object early and on the record to adjudication there. Promptly file the appropriate motion requesting another forum. In some circumstances, a motion asking the bankruptcy court to abstain from hearing the matter will be the most appropriate strategy. 28 U.S.C. § 1334(c). Alternatively, you may have grounds to support a motion to withdraw the automatic reference to the bankruptcy court so the matter returns (theoretically) to the district court. Rule 5011, Fed. R. Bankr. P.; 28 U.S.C. § 157(d). Waiting a while to file a motion to withdraw the reference may support an argument that you consented by implication to final adjudication in bankruptcy court.

The flowchart accompanying this article attempts to distill the current law regarding bankruptcy court authority into shorthand format. With many legal questions unresolved, the flowchart provides only minimal consolation. However, until these questions are answered, remember that comfort can be found in the hands of an experienced bankruptcy practitioner who isn’t afraid of the dangers lurking in these Article I waters.

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An insured plaintiff calls various experts to the witness stand who testify that he will need $5 million in future medical care. In reality, the plaintiff has health insurance and will pay, at most, a deductible and his premiums. Should the defendant still pay $5 million in damages? The Collateral Source Rule says he should.

The concept behind the Collateral Source Rule dates back to the 1800s with the proposition that a tortfeasor should not benefit from the “fortuitous existence of a collateral remedy.” Courts had to choose between granting a windfall to a defendant (who escapes liability to pay for some of the injuries he caused) or a plaintiff (who receives a double recovery). Courts chose to grant the windfall to plaintiffs, and the Collateral Source Rule was born.

The rule is still followed in many states in one form or another, but has been under attack. Many believe that the passage of the Patient Protection and Affordable Care Act (“ACA”) has changed the playing field and rendered the rationale that originally supported the rule outdated and meaningless.

The ACA has generated much political debate, with liberals in support and conservatives against. In a strange political irony, however, the survival of the ACA may be key to the death of the Collateral Source Rule, resulting in an unintended tort reform.

**IS THE RATIONALE BEHIND THE COLLATERAL SOURCE RULE OUTDATED?**

The overriding purpose of tort law is to make the plaintiff whole. Allowing an award to compensate a plaintiff for future medical expenses that he will never incur does far more than make him whole—it acts as motivation for “jackpot-lottery” litigation.

Still, the Collateral Source Rule was developed when health insurance was rare. Such windfalls and double recoveries occasionally occurred, but it was not the norm. This is no longer the case.

Statistics show that 85% of the U.S. population in 2012 had some form of health insurance, and many states have already begun to modify the Collateral Source Rule in one way or another.

With the passage of the ACA, which contains no subrogation provisions, the outdated rationale behind the rule is magnified. Today, the ACA requires that Americans purchase health insurance (the “Individual Mandate”) and it sets forth basic minimum coverage that must be afforded without regard to preexisting conditions (the “Guaranteed Issue”). No longer is health insurance “fortuitous” or “rare.” It is mandatory and coverage cannot be denied.

**WEAKENING OF THE COLLATERAL SOURCE RULE THROUGH STRENGTHENING OF THE ACA**

Some in favor of maintaining the status quo of the Collateral Source Rule argue that the ACA will face legal challenges and may not survive into the future. After all, even jurisdictions that allow for reduction of future medical expense awards usually require defendants to establish with some level of certainty that the plaintiff will continue to receive such collateral sources. If the future of the ACA is uncertain, so, too, one may argue, is the assumption that a plaintiff’s receipt of insurance will continue with any consistency.

On June 25, 2015, this position grew much less convincing. On that date, the Supreme Court decided the case of _King v. Burwell_, which involved a challenge to provisions of the ACA that granted federal tax credits to those who meet certain income criteria. _King_ is a controversial decision which, some believe, is a statement by the Supreme Court that the ACA will survive at all costs.
THE “DEATH SPIRAL”

King centered around the fact that the ACA’s Individual Mandate does not apply to those who would need to spend more than 8% of their income to purchase coverage. Millions of Americans fall into this category and, if such people remain exempt from the Individual Mandate, they would likely elect not to purchase insurance until and unless they become sick. Because of the “Guaranteed Issue” as per the ACA, a plan cannot deny coverage based on a preexisting condition exclusion, and these people would obtain covered health care at that time. However, they would likely stop paying the premiums and drop their plan once they recover, only to return if they become sick again.

In this repeating cycle, the health insurance pool will be eroded by extensive costs without a consistent inflow of premiums. Costs would continue to increase and insurers would leave the market, resulting in a collapse of the healthcare system. This was described by the Supreme Court in King as a “death spiral.”

PREMIUM TAX CREDITS

To avoid this calamity, the ACA provides for tax credits to individuals whose household income falls between 100% and 400% of the federal poverty line. These tax credits are provided directly to the insurance carriers and applied to the insurance premiums, lowering the cost of insurance for these individuals to below 8% of their income. Such individuals are now subject to the Individual Mandate and are required to purchase a plan or be forced to pay an additional tax. In theory, the tax credits infuse the system with premiums necessary for the ACA to function.

“EXCHANGE ESTABLISHED BY THE STATE”

At the heart of the King case were two provisions that provide for these tax credits to be issued to those who purchase insurance through an “Exchange established by the State.” The problem is that states can elect not to establish an Exchange at all, and 34 states have chosen not to do so. In those states, qualified individuals must purchase insurance through a Federal Exchange, but there is no provision anywhere in the ACA that expressly provides for tax credits for those persons. A plain reading of the ACA, therefore, would prohibit the Federal Government from issuing credits to millions of Americans in the 34 states with federal Exchanges, potentially resulting in the feared “death spiral” to take place throughout most of the U.S.

In an already-controversial decision, the Court found the phrase “Exchange established by the State” ambiguous and, in a 6-3 decision, interpreted the otherwise plain language to refer to all Exchanges, State or Federal.

THE DECISION

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CRITICISM

King demonstrates that the ACA has the backing of a controlling majority of the Supreme Court, and this majority might just refrain from doing anything contrary to the survival of the ACA. After all, King involved the third set of ACA provisions challenged at the Supreme Court level, and the ACA has survived every time.5 But this did not occur without controversy.

In a scathing dissent joined by Justices Thomas and Alito, Justice Scalia accused the majority of going far beyond mere interpretation and, instead, into the realm of rewriting legislation. He admonished that the law should be renamed “SCOTUScare” and lamented what he calls a “discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.” If this accusation is accurate, King is a judicial declaration that the ACA is not going anywhere for a long, long time, like it or not.

WHAT KING V. BURWELL MEANS FOR THE COLLATERAL SOURCE RULE

Viewed in a vacuum, the King case only deals with the continued survival of the ACA, not the Collateral Source Rule. However, the rationale for the Collateral Source Rule is undermined by the existence of the ACA, raising the question of how the two can coexist. Thus, so long as the ACA is alive and kicking, the Collateral Source Rule will become more and more susceptible to attack.

CONCLUSION

King v. Burwell is a statement that the ACA might just survive whatever challenges are thrown its way. However, the continued survival of the ACA could lead to an ironic and an unintended tort reform by weakening, or even eliminating, the Collateral Source Rule and the double recovery windfalls so frequently provides to plaintiffs in personal injury litigation.10

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4 Joshua Congdon-Hohman and Victor A. Matheson, Life-care Awards in the Age of the Affordable Care Act, College of the Holy Cross, Department of Economics Faculty Research series, Paper No. 14-06 (2014).
10 Thomas Geroulo, Esq., of the law firm of Weber Gallagher Simpson Stapleton Fires & Newby, LLP, has acted as a consulting attorney in numerous cases where the ACA has been implicated. He and his firm have been a great source of information.
Every motorist has likely encountered a truck hauling an oversize or overweight shipment on the highway. These trucks often have signs warning of “oversize load” and other warnings, such as flags and flashing lights. Sometimes, these loads seemingly consume the whole travel lane or even protrude outside the designated travel lane. Depending on their size, oversize loads are occasionally escorted by pilot vehicles or the police.

For obvious reasons, oversize and heavy shipments can pose an increased danger to the motoring public and strain the public infrastructure by causing the premature deterioration of the highway structures. The types of accidents involving oversize and overweight loads vary from routine traffic accidents to accidents caused by the load itself.

For instance, an oversize load may strike a bridge overpass or sideswipe another vehicle, or could become detached if improperly fastened. Accidents can also sometimes arise when the oversize load is simply traveling down the highway, and a driver of an oncoming vehicle attempts to steer away from the oversize load to allow more space and then inadvertently loses control. Often, claims involving oversize and overweight loads involve questions of whether the load was being legally operated at the time of the accident.

When accidents occur, motor carriers that perform oversize load and heavy haul operations frequently face legal issues beyond those typically encountered by motor carriers transporting normal goods. Handling cases involving oversize and overweight shipments often necessitates special attention because heavy haul and oversize shipments are subject to stringent regulations.

SPECIAL REGULATIONS GOVERNING OVERSIZE AND OVERWEIGHT LOADS

Not only do trucks hauling oversize or overweight shipments have to follow the “rules of the road,” but they must also generally follow the Federal Motor Carrier Safety Regulations (FMCSR), as well as state laws and regulations governing heavy haul and oversize load operations. Accordingly, the FMCSR and state laws governing heavy haul and oversize load operations regularly play a significant role in these types of cases.

For example, the FMCSR forbid the obscuring of brake lights, reflective devices, or other conspicuity treatments by the load being hauled (49 CFR § 392.33); the FMCSR require that a commercial truck parked along a highway have warning triangles placed around it (49 CFR § 292.22); and the FMCSR forbid the operating of a commercial truck during hazardous road conditions (49 CFR § 392.14).
In addition, the FMCSR require that cargo being transported is properly distributed and adequately secured and that the load securing devices be periodically inspected and adjusted, if necessary (49 CFR § 392.9). Beyond the FMCSR, however, the federal government has tasked each individual state to enforce vehicle size and weight laws to assure that vehicles traversing the highway system do not exceed the size and weight limits specified by law (23 CFR § 657.5). Therefore, it is critical to understand the state regulations governing oversize and overweight shipments, which can vary from state to state. A summary of the state regulations governing oversize and overweight shipments can be found at www.wideloadshipping.com.

The state regulations typically detail special warnings and markings that must be placed on oversize shipments. Importantly, individual states, as opposed to federal government, issue special permits for oversize or overweight loads, to which strict adherence is required. The special permits control the shipment’s width, height, weight, speed, route, date, time and other related matters. Also, the permits may detail when and how the shipment must be escorted by qualified pilot vehicles or the police. Further, state regulations governing the oversize and overweight shipments often require the motor carrier to:

- comply with all restrictions on the oversize or overweight permit (otherwise the permit is void);
- indemnify the state for all claims;
- assume all responsibility for injury or damages to public property; and
- have more insurance than is required under the FMCSR.

States are often immune from liability on claims related to issuance of oversize load permits.1 On the other hand, the penalties for motor carriers and drivers violating the state laws and regulations can be harsh. As mentioned above, the motor carrier may be strictly liable for any damage caused to public property during the course of the shipment, even if the state dictates the route. State regulations that require the motor carrier to indemnify the state for claims are typically enforceable, unless the state agency exceeded its statutory authority in making said regulations.2 Where state regulations are silent as to the violation to third parties, courts have held that such regulations do not impose strict liability upon the motor carrier and driver.3

However, if a motor carrier and its driver fail to comply with all the permit restrictions, the permit is typically void, and the shipment is deemed illegally on the road. Obviously, this can have profound ramifications on a lawsuit brought by a party injured in an accident involving an oversize or overweight shipment. Thus, when handling such a third-party lawsuit, it is extremely important to confirm that all the permit requirements have been fulfilled (i.e. that the correct load was on the correct route on the correct date and time and with all the correct warnings and markings, etc.).

CONCLUSION

Defending cases involving motor carriers performing oversize load and heavy haul operations presents unique challenges. Often, the motor carrier will be held liable for property damages caused by the shipment to the public roadways and bridges. In personal injury cases, it is important to determine whether the truck hauling the oversize or overweight load was violating any laws at the time of the accident, especially under the permit for the oversize or overweight shipment. If any violations did occur, then it might be necessary to prove that such violation was not the proximate cause to the accident. In the end, handling these types of claims requires careful attention.

6 Marich, 880 N.E.2d at 915.
Eric Cotton serves as deputy general counsel & corporate compliance officer for DDR Corp., a publicly traded real estate investment trust based in Cleveland, Ohio, where he oversees the company's litigation, risk management and compliance matters and provides legal support for its operations. Eric was previously general counsel for Equivest Finance, Inc., a publicly traded real estate development and finance business based in Syracuse, N.Y. He has also held positions in the legal departments of the Pyramid Companies and the Edward J. DeBartolo Corporation. Eric, a member of USLAW’s Client Leadership Council, recently shared some thoughts with USLAW Magazine about his experiences with USLAW.

IN THE BEGINNING
My first connections to USLAW go back to the early years of the network: Ken Alweis from Goldberg Segalla (New York) and Chris O’Connell from Sweeney & Sheehan (Pennsylvania). I’ve been working with Ken for more than 20 years; Chris was already representing DDR when I joined the company 13 years ago. That probably makes all of us very old. But, what all of this says is the business relationships with Ken, Chris and many others in the NETWORK combined with the consistently strong client service delivered have proven to be an important legal resource for DDR throughout the years.

LAWYERS WHO TAKE TIME TO UNDERSTAND NOT JUST OUR BUSINESS, BUT HOW OUR ORGANIZATION WORKS
DDR Corp is a publicly traded shopping center developer/manager with real estate holdings in 40-45 states, and typically in the major markets within those states. This geographic breadth has us involved in legal issues in many different jurisdictions. The USLAW organization lines up neatly with our footprint, and gives us the ability to quickly find a lawyer in a place we’ve never litigated before. And the fact that I’ve most likely had an opportunity to meet the person I’m reaching out to before I’ve ever needed his/her help is a real testament to the group’s focus on constantly putting its members in front of clients. While the quality of the legal representation is high, I don’t really see that as necessarily unique to USLAW – in my view (and not to suggest law is a commodity) that’s the threshold standard we set that just gets any lawyer through our door. The real value, even if it’s intangible, comes from building relationships over the years with a “network” of lawyers who take the time to understand not just our business, but how our organization works.

WHEN YOU MAKE THAT EMERGENCY CALL, WHAT HAPPENS NEXT IS KEY
We’ve had plenty of successes in courtrooms and mediators’ offices, but I wouldn’t necessarily list them as the kind of “wins” that define the value of an organization like USLAW. We’re supposed to win. To me, the real wins have come when I’ve had an emergency come up while I’m on out of the office, and I track down a USLAW lawyer that I’ve met but never worked with before, and we’re off and running like we’ve been doing it for years. That is really important to us, and shows the real value of the network.

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OUR GOAL IS TO EXCEED YOUR EXPECTATIONS
This past summer, Justice Kennedy, delivering the United States Supreme Court opinion in Obergefell v. Hodges upholding the right of same-sex persons to marry, called the identification and protection of fundamental rights "an enduring part of the judicial duty." Among the privileges that marriage now affords same-sex couples is damages in tort suits where one partner has been injured or killed.

We have come a long way. The common law imported from the English system in 18th century America prohibited anyone from recovery for the death of another, however wrongful. "[I]n civil Court, the death of a human being could not be complained of as an injury," When the English Colonies became the new United States, some states ignored the English rule, allowing money damages where masters, husbands and fathers sued for recovery of the economic loss suffered through the deaths of servants, wives or children. Other states, while allowing suits arising out of injury by negligent conduct, prohibited suits for damages when someone died as a result. Putting aside the bad public policy that encouraged negligent parties to "finish the job," rather than just injure someone, the basis upon which a court might grant relief, if at all, for a wrongful death was hard to decipher. With differences among the states proliferating, in early America where you died mattered.

Beginning in the mid-19th century, legislatures responded to the chaos by adopting wrongful death statutes. Each state harmonized, or created, legislatively what the courts had not. The statutes shared commonalities: defining the length of time a survivor had in which to file a wrongful death lawsuit, specifying the types of recoverable damages and, importantly, delineating who could benefit from the proceeds of the lawsuit.

From about 1840 onward, states generally adopted wrongful death statutes that protected close family: surviving spouses, children, and, sometimes, parents. The commonality was that legislatures abandoned earlier court rulings that compensated males for loss of services they, as surviving masters, husbands or fathers endured when a slave, a wife or a child was lost to the male's small economic unit. Instead, lawmakers created causes of action allowing recovery for those who were economically dependent on the person who died. Not surprisingly, the initial scope was narrow. Women and children could recover for the deaths of husbands and fathers because of their economic dependency arising from the duty that a male owed to support his wife and children. Men, on the other hand, could claim no such right for the loss of a wife or child.
As time passed, courts and legislatures have reshaped wrongful death statutes in ways to reflect economic and emotional reality. A wrongful death action by one spouse for the death of another is now universally recognized, regardless of the gender or of the economic dependence or independence of the survivor.

So too, courts, voters and legislatures have moved, albeit more slowly, to craft a broader, more inclusive definition of "family." By 2015, 16 states and the District of Columbia recognized the validity of a same-sex union and, correspondingly, the right of the same-sex family member to recover when his or her partner died due to negligence. Then Obergefell made same-sex marriage the law of the land. But there are other non-traditional family arrangements yet to be considered. And with respect to these, the laws in the various states differ dramatically. In terms of recovery in wrongful death actions, it still matters where some people die.

COMMON LAW MARRIAGE

In 14 states and the District of Columbia, when a couple lives together the couple may have a common law marriage even though the couple has not obtained a marriage license and no civil or religious marriage ceremony has been performed. Each of these jurisdictions has specific rules for the behavior required for a couple to perfect a common law marriage.

In four of these states, the common law right is effective only prior to a given date. In other states, like Texas, for example, an informal marriage is recognized where the couple "agreed to be married and after the agreement they lived together in this state ... and there represented to others that they were married." In New Hampshire "[p]ersons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of three years, and until the decease of one of them, shall thereafter be deemed to have been legally married." In Montana, the statute simply reads "[c]ommun law marriages are not invalidated ..." In these states, a common law spouse can sue for wrongful death of the other.

Other states have created means, beyond common law marriage, to allow recovery for a wrongful death. Examples of these are:

- Colorado’s Designated Beneficiary Agreement Act allows two unmarried people to sign a document stating that both have different legal rights, including the right to be the beneficiary of a wrongful death claim. A designated beneficiary can benefit form a wrongful death claim like a spouse or the heirs of the deceased.
- Michigan’s Wrongful Death Act is more expansive than most states. Not only does it list the deceased spouse, children, descendants, parents, grandparents, brothers, sisters, and children of the deceased, but it also includes devisees in the deceased’s will as a person who can recover for wrongful death. This means that a beneficiary under the deceased’s will can benefit from a wrongful death claim just like any of the family listed in the statute, even though the devisee may not be part of the family.
- In an additional 14 states, legal effect is given to marriage that is recognized in the state in which it was formed.

In 22 states a faithful, longstanding relationship between a man and a woman or between same-sex partners that is not licensed as a marriage creates no right of recovery for the death of the other half of the relationship. As in early America, it still matters where you die, at least as far as recovery in a wrongful death action is concerned.

THE POSSIBLE IMPACT OF OBERGEFELL

Under the reasoning of Obergefell v. Hodges it is not illogical to think that the number of beneficiaries of wrongful death actions will increase. The Court’s ruling is retrospective as well as prospective. Courts may therefore be asked to determine whether pre-Obergefell common law marriages among same-sex couples will be recognized as creating a valid wrongful death action in the surviving partner now where one partner died due to negligence occurring before the Obergefell decision.

Courts may also be asked to decide whether the Obergefell ruling will apply beyond the confines of same-sex licensed marriage to heterosexual and same-sex couples in states where the unlicensed union has not yet been recognized. There is plenty of language in the majority opinion to suggest that these relationships may be recognized in some circumstances. The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right," Justice Kennedy wrote. "The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." Indeed, the language of Obergefell is so broad that the dissenting opinion of Chief Justice Roberts wondered whether “States may retain the definition of marriage as a union of two people,” and questioned "why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?” Validating long-standing relationships among couples who cannot claim common law marriage status in their state of residence may be an even easier extension.

Same-sex marriage may prove the catalyst to removing barriers to wrongful death recovery for an even broader class of plaintiff. In the not too distant future, at least with respect to wrongful death actions, it may not make a difference where you live.

3 Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas and Utah.
4 Georgia, Idaho, Ohio and Pennsylvania
5 Tex. Family Law §2.001(a) (2). This statute now applies only to an informal marriage of a man and a woman, but arguably will be amended by the rationale of Obergefell v. Hodges
6 N.H. Stat.§457:39. This appears to recognize the marriage for purposes of inheritance only, but appears to apply, in fact to wrongful death.
7 Mont. Stat.140-1-405
8 California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maryland, Missouri, Nebraska, Nevada, New York, Oregon, Tennessee and West Virginia.
Construction defect claims are time consuming, expensive and often daunting to defend. The Statute of Repose is a draconian doctrine unique to construction claims. It is not a statute of limitations. By its definition, it provides a date upon which an action no longer exists. It is generally impervious to the discovery rule, the favored savior of sleeping claimants. Most states provide exceptions for latent defects or fraudulent concealment. It may be the light at the end of tunnel for design and construction professionals involved in large scale projects with damages occurring over years. Often the design and construction defendants responsible for the actual construction are gone, and key witnesses such as project managers are missing. Piecing together a time-line of who completed the work and when, can be a challenge. The purpose of the Statute of Repose is to limit the expanding liability of contractors, builders, planners, and designers of a property improvement. Recently, several jurisdictions have expanded their analysis as to who may seek its refuge, and when the doctrine begins to run.

The Statute of Repose is codified, or if permitted, defined by the construction contract, and provides a “bright line” for determining whether or not there is an action available to recover damages against a construction or design professional. It is an affirmative defense and provides a complete bar to recovery. It may not be applied equally to all defendants and is often not available to product manufacturers. It is unlike a statute of limitation. Many jurisdictions apply different trigger dates for the Statute of Repose to defendants who provided services on the same project.

Some states provide remarkably short periods for claims involving improvements to real property. For example, Arkansas provides that a tort or contract action for personal injury or wrongful death involving an improvement to real property may be brought within four years from substantial completion of the improvement, or within five years for a claim involving property damage. A.C.A. § 16-56-112. Some states
allow for much longer periods. Maryland provides a 20-year period for actions for damages involving improvements to real property, but shortens the period to 10 years for actions against architects, professional engineers or contractors. Md. Code Ann. § 5-108. The 10 year period is far more typical of the period allowed by most states for actions for damages involving improvements to real property.

At first glance, it would seem easy to determine whether or not the Statute of Repose precludes a claim. Where the construction project is relatively simple with only a few design and construction professionals, subject to one certificate of substantial completion and one certificate of occupancy, determining when the Statute or Repose is triggered is generally straightforward. However, where the claim involves a complex project, the million dollar question becomes what is “substantial completion” and when is it triggered?

Generally, substantial completion does not mean that the design professional or construction contractor has completed every last task under the contract. Owners typically occupy the project when the project is substantially complete and punch list items are pending. Many states allow separate trigger dates to apply to subcontractors that have substantially completed their work, even if the project as a whole is not substantially complete and there is not certification of occupancy. Tennessee’s statute defines substantial completion to mean that point in the construction project at which the owner can use it for which it was intended, or as it is defined in the contract. TCA 28-3-201.

The State of Washington, similar to Tennessee, also allows contractual accrual provisions to define the Statute of Repose. In the case of Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co., 170 Wash. 2d 502 (2013), the Washington Supreme Court upheld a contract between a general contractor and a municipal corporation for the construction of a baseball stadium, which provided that the Statute of Repose accrued at the time of substantial completion. The Court held it did not violate public policy, despite an express construction statute which applied the Statute of Repose to the State and permitted the parties to set the time of accrual and alter the statutory allocation of risks.

Years ago, I inherited a large scale New Jersey construction file which, to date, remains my study on the Statute of Repose. The file was assigned to me passing with the famous last words of “don’t worry, its dead, we’re out on the Statute of Repose. It’s pending a Motion for Reconsideration, but we are out.” This was of some comfort to my assistant given the file had its own wing. How could we know that a slow faint pulse remained under five feet of pleadings and damage reports? My client’s project file was thin. The business was no longer a viable concern and the project foreman was unavailable.

The litigation concerned a large scale multimillion dollar County facility which was a favorite political topic and garnered regular media coverage. The multi-building facility was contracted and constructed as a “phased project,” which means it involved multiple buildings, which were ready for use at different times and subject to separate certificates of substantial completion. Each building was required to be completed by a certain date and occupied, or the general contractor would be penalized. One certificate of occupancy was issued for the entire project months after the last building was complete.

In what is more often the rule, rather than the exception, the plaintiff waited to file the action, despite years of notice concerning the alleged defects which were the basis of the complaint. The litigation was filed more than a decade from the last certificate of substantial completion, but just prior to the 10-year anniversary of the issuance of the certificate of occupancy. The New Jersey Statute of Repose is loosely defined, and as expected, the definitions and terms are the subject of constant interpretation. It precludes an action for damages for injuries to property, real or personal, related to the design or construction of an improvement to real property brought more than 10 years “after the performance or furnishing of such services and construction.” N.J.S.A. 2A:14-1.1(a). The statute itself does not provide a “bright line” trigger date. In some instances the certificate of occupancy is the trigger date for purposes of the Statute of Repose, and in other actions involving phased projects, it has been interpreted to commence one day after issuance of the certificate of substantial completion for each phase.

The design and construction defendants immediately raised the Statute as an affirmative defense, asserting that each building was subject to a separate certificate of substantial completion and those certificates were the “bright line” which triggered the Statute of Repose. The plaintiff asserted that the certificate of occupancy was the “bright line” trigger date. The Court initially agreed with defendants but ultimately granted reconsideration and ordered additional discovery on the issue, which remains ongoing and staves the judiciary from the political quagmire.

The lack of a “bright line” within the Statute has resulted in ongoing litigation concerning a project that was completed nearly 22 years ago. The recent New Jersey Supreme Court case of State v. Perini Corp., 221 N.J. 412 (2015), which involved a defective heating system servicing a multi-unit facility, promised to clarify the question of substantial completion for a phased project. The plaintiff filed an action 10 years after the first certificate of substantial completion was issued for the first building serviced by the heating system, but within 10 years of the last certificate of substantial completion. The Court determined that because the heating system serviced all the buildings, the action was timely. This has done little to brighten the line for phased projects in New Jersey.

Not all Statutes of Repose are vague. Florida’s statute provides more guidance as to the trigger date. It provides that an action concerning the design, planning, or construction of an improvement to real property must be filed within 10 years from the owners actual possession, the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between design professional or licensed contractor, whichever date is latest.

When a construction defect claim is filed it is important to gather as much information as possible to determine the time-line of the project and the client’s scope of work. The Statute of Repose is an affirmative defense, available equally to a roofer who provided services on a single family home in Alabama in 2002, or an architect who designed 500 condominium units for a developer in California in 2005. Practitioners must be well versed in the nuances of their home state’s statute and evolving case law to see when it is a viable defense.

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As one of the largest providers of structured settlements, Galaher Settlements offers clients integrated claims solutions from a team of more than 50 industry experts nationwide. With coast-to-coast support, we provide important insights into local jurisdictional issues, as well as national strategies such as the use of Medicare set-aside allocations. Our leading-edge technology, including SPIN – Settlement Processing Information Network – diary-based file management, helps us lower costs and bring administrative efficiencies.

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We have all been there – significant case, large future damages, questionable liability. You may have brought up the concept of a structured settlement and plaintiff said "not interested." Now the case has settled and plaintiff says "we would like to structure a portion of this settlement and we have a structure broker we would like to use." How do you respond? You insist on retaining your own broker, and here’s why.

First, a quick review of the tax law behind structured settlements is in order. The result of a properly structured settlement is an income tax-free stream of payments to the claimant and a release of future liability for the defendant. To achieve this result the structured settlement must comply with Internal Revenue Code Sections 104 and 130. In a nutshell Sections 104 and 130 say: there must be a physical injury, the claimant cannot have receipt or control of the money used to buy the annuity, and the defendant assigns away future liability to make payments and assigns away ownership of the annuity to a subsidiary of the annuity company by way of a qualified assignment.

Since the claimant cannot have control of the money in order to achieve the desired income tax free payments, this means the defendant has to buy the annuity. The structured settlement broker is the agent for this transaction. In addition the structure broker prepares the qualified assignment document. The qualified assignment is the mechanism whereby the defendant assigns away ownership and the liability to make the structured payments. Do you want these tasks in the hands of plaintiff’s structure broker? We don’t think so.

In addition to the post settlement work performed by the defense broker, be aware of the pre-settlement service you can get from a good defense broker. Settlement brokers look at settlement packages all day, every day. He or she can be an excellent resource when you need a creative way to bridge a gap. A good broker is also an expert at helping address and mitigate future damages. For example a structure broker can be particularly helpful with serious injury claims involving significant future damages. Frequently with such a case, there will be a difference of opinion on the life expectancy of the claimant. A structured settlement annuity is the perfect tool to address this issue. The annuity can be designed so that the plaintiff will receive benefits for life, which can eliminate the need to argue about the plaintiff’s life expectancy. Often the annuity cost will be discounted by the annuity company based on the plaintiff’s medical condition. The result is a classic win-win. The plaintiff gets payments for life and the cost to the defendant reflects the plaintiff’s realistic life expectancy.

A knowledgeable broker will be aware of additional tools that can create leverage. Funding sources created by the Individuals with Disabilities Education Act (IDEA) or state laws that allow for periodic payments to be used when calculating the present value of future damages are a couple examples.

Moreover, structured settlements may save the client money if they are structured in a manner that would entail the client paying less taking into account the time value of money. This is particularly true when it is necessary to fund a Medicare Set Aside account. As such, defense counsel should proactively raise the issue of structured settlements in cases involving sizeable monetary exposure.

What if plaintiff’s counsel rejects outright the notion of a structured settlement? Defense counsel always has the option of drafting a structured settlement proposal and conveying it to plaintiff’s counsel who is obligated to convey it to his client (granted, he can spin it to his client as a “nonstarter”, but at least the concept of receiving payments over time, has been communicated to the client). Some plaintiff’s counsel may find a structured settlement appealing for the additional reason that they would want their attorney’s fees paid over several years via an annuity (in order to attempt to spread the counsel’s income tax burden over time).

Keep in mind that hiring your own broker will not cost you a dime. Structured settlement brokers are paid by the annuity company that writes the structured settlement annuity.

Getting back to our initial question of how you respond to plaintiff’s request to structure a settlement using their broker. We suggest the answer is that you need your own broker involved to protect your interests, as plaintiff’s broker will certainly be looking out for only plaintiff’s interest. Given both sides’ insistence on using their own brokers, frequently, both sides will employ a broker to advise their respective clients, and then the brokers will split the relevant commission (conceptually similar to a real estate deal involving real estate agents representing each party, where the agents in turn split the commission).

All in all, when you consider the services and value you can get from an experienced structured settlement broker, the concept of hiring your own broker is a “slam dunk.”
OVERVIEW

Let’s boil it down: All jokes aside, a litigation lawyer’s job is to tell stories to the jury during a jury trial. The story-teller supports his/her stories with allegations of fact. The “facts” are supported by testimony or physical evidence accumulated over the life of the claim. More often than not, the physical evidence includes business records. These records are produced to the parties before and/or during the litigation.

Therefore, business records are almost always at the center of every story-teller’s narrative. The ability to establish or refute liability and/or causation often hinges on what is reflected in the records. Your company’s or client’s ability to competently produce business records when requested is vital to the success of your risk management program. This should not come as an Earth-shattering revelation, but the importance of producing a complete set of business records is routinely overlooked until it is too late.

In no other industry is this issue more evident than the healthcare industry and its release of medical records. Therefore, this article will highlight medical records release in various examples. However, the repercussions are equally applicable to records released pursuant to governmental “Sunshine” laws, subpoenas for personnel records, or any type of corporate compliance requirement. This article addresses the problem, the consequences, and how entities can solve the problem through drafting appropriate internal policies and adopting system audits.

THE IMPORTANCE OF THE CERTIFIED LEGAL HEALTH RECORD

With regard to the healthcare industry, a patient’s legal health record (“LHR”) is central to all personal injury litigation. Failure to produce a certifiably complete LHR can have consequences for the provider, regardless of whether the provider is involved in the suit. The success or failure of a personal injury claim is dependent on the completeness of the documentation produced by the treating providers. In essence, the story-tellers need to know what the facts are in order to tell their story effectively.

THE IMPLICATIONS OF INCOMPLETE RECORDS PRODUCTION

The pre-litigation chain of events generally follows the same order: an injury occurs, the injured party consults an attorney, and the attorney requests records to determine whether to file suit. If the records released by the medical provider are not complete, the plaintiff may file suit erroneously based on the lack of information that would have been included in the omitted records. Alternatively, if the plaintiff received a complete copy, but, once the defense attorney got involved, the version he/she received from the provider was not complete, the defense attorney’s evaluation would be based on deficient facts. As a third scenario, assume neither set were complete, a scenario that has unfortunately become increasingly prevalent. In this scenario, neither of the parties can properly evaluate the case. Once the records are located, the problem escalates, regardless of whether the provider is a party to the suit. Story-tellers don’t like to change their story mid-stream and will seek sanctions against the offending party.
In a recent decision, the District Court for the Southern District of Illinois required the defendants to produce all portions of the metadata embedded within medical records.1 Metadata contains information about the date the electronic documents were created, who created or modified the document, and, importantly, when the document was modified. The plaintiff sought production of the metadata after receiving two “different” copies of her medical record and claimed the records were improperly altered. Over the defense’s objections that metadata contained privileged information and would show evidence of their risk management processes, the court held that the metadata be produced. This information was damaging to the defense because it uncovered protected peer review and risk management activities that the plaintiff would otherwise not have known about and also perhaps gave the plaintiff evidence it could use to support his story of medical record alteration.

Most importantly, records that are produced late or cannot be located can create a claim for sanctions. Even though a provider may not be involved as a party, a party may file a motion seeking sanctions against the provider if the records are located late or existed at one time but cannot be located. Of course, being drawn into any legal action that the provider is not a party to results in an unnecessary accumulation of attorneys’ fees regardless of whether sanctions are imposed.

In the alternative, harsher penalties can be imposed when records cannot be found and the company is a party to the action. When this situation arises, a plaintiff can seek a spoliation charge and a judge can impose sanctions on the company, including striking their pleadings. At that point, the story is never told and it is all over but the crying…and the assessment of damages.

Of course, all of the above sanctions are in addition to whatever civil penalties can be imposed by HIPAA, Sunshine laws, or the like.

TECHNOLOGY, THE SOURCE OF EMERGING ISSUES

So, what is the cause of a company’s inability to produce a complete record? Technology continues to enhance productivity and “paperless” companies and industries continue to proliferate. Hospitals, banks, insurance companies, etc. continue to become less reliant on paper in favor of electronic records. Many medical providers have converted to electronic medical records (EMRs) for point-of-service entry and storage of records, and most have adopted short or long term initiatives to evolve to completely paperless record-keeping.

Although technology promises to improve industry standards, it also serves as a source of many pitfalls in record release. Your information technology (IT) department can be your worst enemy in a records release scenario. Each department within a company may use a different records system with differing capabilities and your IT department needs to be cognizant of your record release activities. Is your custodian of records being informed by IT of the routine changes within each system? In addition, are old records being maintained physically or being scanned into the new system? Are they being scanned fully or in abstract? Is each department’s system communicating with the central record release system? If the answer to any of these questions is “no”, what steps does your custodian take to produce the complete record and are those steps creating more of an opportunity for failures in the system?

SOLUTIONS

A good story needs a solid factual footing, otherwise, it becomes fiction. Overall, effective policies and checks and balances during the creation and release of documents are potent preventative measures needed to avoid the costly alternatives.

The basic question your release policies should answer is: “What is our Legal Record?” The policies define what is routinely included and excluded in the released records. Are summaries sufficient or are original or itemized documents necessary? Certainly, satisfying regulatory requirements should be at the forefront of developing this policy.

Further, the policies should outline the process used by IT in the creation of new systems and who should be notified of the changes and implications thereof. IT is usually worried about ensuring that everything runs smoothly and efficiently and sometimes can lose sight of how their system changes affect other areas of the company.

Additionally, the policies should govern the maintenance and gathering of documents. Policies will differ across industries and companies and depending on the requirements of law. Defining the Legal Record and the processes taken during release will allow the department managers, the records custodian, and the requesting party to have a consistent understanding of what documents are maintained and how they are gathered and released.

Further, it is imperative that the company have a strong system of checks and balances to confirm that the record is complete before release. Once your custodian signs a certification of completeness, it can, and will, be used against you if the custodian is wrong. The custodian should work with IT and the various departments to create checklists that identify the different types of documents that exist throughout the company. A thorough checklist will allow the records custodian to identify what records should be included and identify the records that are missing.

Of course, any good system requires adequate follow up. Companies should conduct system audits to uncover potential lapses. During such audits, the custodian should be able to confirm that all records the company anticipates being produced are in fact available. The policies should be revisited after each audit to ensure the policies are evolving with your company.

Overall, a company’s practice governing the maintenance and release of the legal record must be monitored, as these records are the crux of trial stories. You do not want what should be a fairy-tale ending to turn into a horror story. From a business and risk management perspective, ensuring that the legal record is properly maintained and released can save a lot of unnecessary litigation expense. And you and your attorney can live to tell another story.


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Kawania B. James concentrates her practice in the areas of General Liability, Medical Malpractice and Workers’ Compensation. While her practice is primarily litigation based, she also advises her clients to minimize risk and adopt safe practices that are consistent with the safe and effective operation of their facilities.
Here are a few facts of litigation life:
1. Everyone has large amounts of email and other electronically stored information (ESI).
2. Sooner or later you need to find the ones that are important to your case.

Unfortunately, this is harder than it seems. Even in small cases, attorneys are often faced with very large volumes of email from which they must identify the relevant ones. Whether the case is large or small, trial lawyers know that, when it comes to the courtroom, only a handful of documents really matter. Getting to those documents, however, is becoming increasingly difficult.

Consider the following statistics: In 2011, The Radicati Group estimated the total number of corporate email accounts to be 788 million. It estimated that by the end of 2015 the number will increase by nearly 36% to over 1 billion. Further, the estimated number of business emails sent and received per day in 2011 was 105, and was expected to increase by about 20% before the end of this year. For you and me, that equates to about 125 emails sent and received each day.

Perhaps 125 emails doesn’t sound so bad. That is, until you consider that most people don’t delete many of their emails and even if they do, those emails often sit for extended periods in the deleted folder. The accumulation can be impressive. Let’s take my email for instance: On June 10, 2015, I checked the number of emails on my laptop (Outlook) and our Exchange server. On my laptop, I had approximately 2.9 GB of email. On our server, that volume balloons to 4.9 GB. Gigabytes, unfortunately, don’t mean very much to most people. Emails can vary in size from the small lunch invite to those with large files attached. Ask your average eDiscovery vendor how many emails are in a gigabyte and you will usually get a range from 5,000 to 15,000. Some have found that the number is actually significantly smaller – in part due to the larger size of individual documents. For example, John Tredennick of Catalyst performed an analysis on over 10 million documents and found that the average number of emails per gigabyte was between 3,500 and 5,000. Let’s just assume the lower end – 3,500. Where does that leave me with my email account? Take a look and see:

No matter how you look at it, that is a lot of email. And if I am not one of those individuals who compulsively folders their email by topic, then a lot of them will be sitting in the Inbox. So the question is, how do you find the three that you need? The simple answer is that there is no simple answer. However, there are strategies that you can use to make the job manageable and ultimately reduce the overall cost of the effort. First, you can target your collections to minimize the volume of documents that you collect. Second, you can leverage technology to find the really important documents.

TAKE AIM WITH YOUR COLLECTION

Whenever I hear someone say, “We need to image the computers,” I cringe. Then I sigh. Though perhaps it shouldn’t, it still surprises me when lawyers don’t understand the difference between a forensic image and a forensically sound targeted collection. Unfortunately, many lawyers learned everything they know about ESI collection from a forensic examiner. Now, I don’t in any way want to denigrate forensic examiners. There are situations when their specialized skills are absolutely critical. Investigations of criminal or fraudulent conduct come to mind. But in routine litigation, forensic imaging of computers is simply overkill. Here’s why: the forensic image of a computer hard drive is literally a mirror image – everything on that hard drive, including programs like Word and Excel, private information like photos of the kids, and even blank space, are captured in the image. In most cases, that is unnecessary, unused information. What you actually need is the project folder that the user cre-
ated. And it is possible to collect just that folder – or even a single file – in a completely defensible, forensically sound manner – with all metadata intact.

How is it done, you ask? Old-fashioned lawyering. After all, how do you find out anything about your case? You speak to those with knowledge. A targeted collection begins with interviews of the individuals knowledgeable about the case, during which you find out how each individual organizes their information and where on their computers and the company network relevant information is likely to be found. Then, using appropriate tools, such as Granite’s eCollector Portable software, you collect those files and only those files. You can even perform the collection remotely, saving on travel costs and minimizing disruption to the company.

Of course, some people are more organized than others, and even within that project folder that I mentioned, there are going to be duplicates and documents that are more important than others, as well as documents that really have no value. Targeted collection will help you get closer to the goal of identifying the really important documents, but you will still have more than you need – sometimes significantly more. Think about it this way: If I were your custodian, and you only collected 1% of my email, you would still wind up with 14,000 documents. If all of those documents were sitting in boxes in a warehouse, you’d have a problem on your hands. Fortunately, the vast majority of documents are now created and maintained electronically, which means that we can leverage technologies to organize and filter those 14,000 documents and allow trial lawyers to focus on the ones that really matter.

How is it done, you ask? 21st century lawyering – which translates to a little help from some technical experts. Everyone seems to understand these days that basic search methods such as keyword searching and date filtering can help reduce the volume of documents needed for review. Most don’t understand, however, that keyword searches and date filters are just the tip of the technological iceberg. Advanced technologies actually analyze the content of the documents for you, organizing them by concept and subject matter, pulling out terms and phrases that you may not have thought of and dramatically reducing the number of documents that you need to review. One such technology is Brainspace Discovery 5.

These are actual search results from the Enron data set in Brainspace Discovery 5. These are actual search results from the Enron data set in Brainspace Discovery 5. Running a simple query against the 449,900 documents for the term “football” yields concepts such as “Kawmi Cavil” (a former University of Texas player) and “quarterback controversy,” terms that I might not have thought of on my own. Though the interface may appear complicated at first glance, it is incredibly intuitive and easy to use, and can help quickly focus and narrow your inquiry.

Brainspace Discovery 5 is but one of a number of technologies available that can turn a daunting “needle in the haystack” hunt into a productive analysis of the issues and concepts contained in a set of documents.

CONCLUSION
Like it or not, litigation is changing. Given the exponentially increasing volumes of data that the average individual creates and stores on their computers (not to mention other devices), trial lawyers will be increasingly challenged to find the handful of key documents that form the core of every trial. The good news is that through a combination of old-fashioned lawyering and new technologies, you can get the information you need to win your case.

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From informal emails to the most technical written instruments, drafters often use the term “and/or,” usually without thinking too much about it. Generally, it is intended to mean “either, as applicable,” or “both if possible.” But considering the meaning of the words as written, how can you choose one of two options (thereby rejecting one) but at the same time choose both? Or as one court so aptly put it, what exactly does the “/” mean?

Let’s consider the proverbial piece of cake. You can have your cake, or eat your cake. You can’t both have it and eat it, too. Rather than clarify the available options, many people quickly shortcut the issue by reverting to “and/or.” However, later on, when the meaning of “and/or” must be determined it is often unclear, leading to unintended results.

The use of this phrase dates back to at least the mid-1800s, and is fairly well-accepted in our vocabulary. Yet, it often does not make sense and is inherently ambiguous, particularly in the courts, where litigants essentially ask judges to decide what “/” means.

Courts have lambasted parties because of poorly drafted instruments and pleadings. Judges nationwide have written that “and/or” is “neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean.” It is a “lin-
the fraud exclusion, and denied the wife’s
life while it was in flames, the insurer raised
by both he and his wife, and took his own
tentionally burned down the home owned
policies or claims situations, this may have
the husband “and/or” his wife. In many
insurance policy listed the named insured as
landlord. The Appellate Division affirmed,
York trial court ruled that the insurer had a
motion case against an insured landlord, a New
indemnify. The insurer appealed. The court
decided in the insured’s favor on an insurance
coverage matter and declared the insurer
landed for negligent medical treatment
related incident of poor word choice. But it
issue in that case, and I presumed an iso-
“We hereby accept your tender of defense
file where one adjuster wrote to another:
“We hereby tender the defense and/or in-
demnity of our named insured to you.” Did
the adjuster want defense and indemnity, or
was either of the two acceptable? Incredibly
(or perhaps sarcastically, I thought) the ad-
juster from the other carrier wrote back:
“We hereby accept your tender of defense
and/or indemnity.” It never became an
issue in that case, and I presumed an iso-
lated incident of poor word choice. But it
turns out it was not an isolated incident.

When an Alabama widow sued the
County for negligent medical treatment
given to her husband while incarcerated, the County sought a declara-
tion that the insurer must defend and/or
indemnify the County. The trial court de-
cided in the insurer’s favor on an insurance
coverage matter and declared the insurer
had an obligation to defend “and/or” in-
demnify its insured. The insurer appealed.
The Supreme Court affirmed the same
holding.

Similarly, in an infant lead paint inges-
tion case against an insured landlord, a New
York trial court ruled that the insurer had a
duty to defend “and/or” indemnify the
landlord. The Appellate Division affirmed,
declaring that the insurer had a duty to de-
fend and/or indemnify the landlord. So
does the insurer then get to choose an op-
tion, to defend or to indemnify?

Another example deals with the use of
“and/or” in a policy with regard to who the
insured was. In that case, a homeowners’ in-
surance policy listed the named insured as
the husband “and/or” his wife. In many
policies or claims situations, this may have
gone unnoticed. But when the husband in-
tentionally burned down the home owned
by both he and his wife, and took his own
life while it was in flames, the insurer raised
the fraud exclusion, and denied the wife’s
claims for lost personal property. The issue
was whether the innocent spouse was bound
by her husband’s intentional act, or whether
she could recover. Contrary to most states,
the New Jersey court ruled that the inno-
cent spouse could recover because the hus-
band or wife was the insured, in large part
due to the use of the “and/or” phrase by the
policy drafter.

In another instance, a policy insured
an individual in Wisconsin, “and/or” his
company. The insurer raised the “employee
exclusion,” arguing that the exclusion ap-
plies to both insureds together for an em-
ployee of either, while the individual
insured argued that the two insureds should
be treated separately, and an employee of
one was not necessarily an employee of the
other. The court referred to “and/or” as a
“verbal monotrophy” that is “Janus-faced,”
for it imputes to it more than two faces.
The court ultimately held that the two in-
sureds were to be treated separately, so that
the insured was either the principal or the
company.

One Michigan court considered
whether a policy endorsement that added
coverage for an injury “arising out of sexual
abuse and/or misconduct” included cover-
age for a non-sexual attack. The policy de-
defined “sexual abuse and/or misconduct” to
include “sexual and/or physical abuse or
misconduct.” These words raised the ques-
tion: Did this add coverage only for sexual
misconduct or did “misconduct” stand alone
so that either was covered? The insured ar-
gued that “sexual abuse and/or miscon-
duct” referred to two different coverages.
The court disagreed with the insured, find-
ing that the clauses were meant to be read
together, in conjunction with each other.
Thus, the court interpreted the endorse-
ment as “sexual abuse and misconduct.”

In another example, a policy exclusion
(that seems counterintuitive) for any injury,
“while downhill skiing except for recre-
ational skiing and/or cross country skiing
away from marked territories and/or
against the advice of the local ski school or
authoritative body” a court found this was
not ambiguous at all. Finding in favor of the
insurer, the court ruled that under Indiana
law, “and/or” does not render the exclusion
ambiguous, and must be read as “and.”

OTHER CONTEXTS

“I hereby bequeath my estate to my
niece, and/or my grandniece” was actually
drafted into a will, and would become the
subject of litigation some years later. Both
niece and grandniece were alive when the
will was probated. The New Jersey court
struggled with the “illiterate” drafting, say-
ing: “there is no known understanding as to
what ‘/’ means.”

Fortunately, the attorney who drafted
that will was also alive, and testified that
the intent was both devises would share equally
if still alive, and to the survivor if not. The
court decided the issue “not by giving force
to the accepted definition of each word, but
to extract from the document or from other
relevant evidence, the probable intention”
of the benefactor. After much discussion,
the court divided the assets equally between
the niece and grandniece, based on the at-
torney’s testimony, which was the only evi-
dence of the decedent’s intent.

In another example, the directions in
a will were that it was to be interpreted
“under the laws or the State of New Jersey
and/or the State of New York.” The court
determined that the intent must be gleaned
from the document itself or from extrinsic
evidence, and as “such the word ‘and’
should be disregarded” to allow the trustee
to choose the law of either state. Thus, this
court read “and/or” to mean “or.”

Finally, on an action on two promissory
notes executed in favor of “A and/or B” and
subsequently assigned to a third party, a
Colorado court wrote that such “misuse” of
the English language has been “severely and
properly criticized in times past” but “that
does not relieve us of the necessity of work-
ing with the term as used by the parties.” The
court looked to the Uniform Commercial
Code, which allows either of the payees to as-
sign the notes. Thus, at least to that court,
where “and/or” was used in the context of
promissory notes, it meant “or.”

CONCLUSION

Whether “and/or” actually means
“and” or “or” is fairly evenly split in these
decisions on the issue. Given that uncertainty,
one may be best served by avoiding
“and/or” and clarify for the reader the al-
ternatives presented.

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This article will ask you to imagine that the unthinkable has just happened to you. For the last two years, you have been a defendant in a lawsuit along with the other shareholders in your business, Acme Manufacturing, Inc. Your working capital lender required all of Acme's major shareholders to sign personal guarantees of the corporate debt. Business was good for a while, but the fallout following the financial crisis of 2008 was too much for the business to survive and in 2012, Acme defaulted on the loan. The lender foreclosed and obtained judgments against all of you.

That was bad enough. Over the last few months however, you have come to realize that the lender has chosen to proceed only against you rather than any of the co-guarantors. Your attorney has explained to you that the liability from the guarantee is joint and several so the lender has the right to collect its debt from any one or more of you. In an effort to cheer you up, your attorney says that you have rights of contribution against your fellow co-guarantors so that after you pay the entire debt to the lender, you may recover a pro rata share from all of them.

That makes you feel a little better until you ask your attorney why the lender chose to proceed only against you. “Oh that’s easy,” he says. “All of the other co-guarantors took steps to make collection of a debt against them difficult. You didn’t do anything to protect yourself. It’s nothing personal, the lender just made a rational decision on who would be easiest (and least expensive) to pursue.”

It dawns on you that you will have a difficult time pursuing a contribution remedy against the co-guarantors. The same techniques that they used to discourage the lender from going after them will be just as effective against you. Let’s take a look at those techniques that the co-guarantors have used to make debt collection against them difficult.

TENANTS BY THE ENTIRETY

Co-Guarantor No. 1, Alan, lives in one of the states that recognize a form of joint ownership between a husband and wife, called “tenants by the entirety” (“TBE”). Alan titled his residence and his mutual fund account (most states that recognize TBE allow both real and personal property ownership in the form TBE) with his spouse Zoe. Zoe was not a shareholder, a co-guarantor or in any way involved with Acme. Creditors of an individual spouse may not attach the interest of that spouse in assets held in TBE. Therefore, unless a creditor has both spouses obligated under a loan or credit arrangement, the property owned as TBE is protected from such creditors.

Certain states with TBE also have enacted statutes that expressly allow TBE property to be transferred to a Joint Revocable Trust and still retain this very desirable form of creditor protection of TBE property. This allows couples in those states to utilize the favorable estate planning aspects of a

COVERING YOUR ASSETS: A PRIMER ON ASSET PROTECTION

Stephen J. Bahr, H. Joseph Price, Jr., and Matthew T. Kincaid Dysart Taylor Cotter McMonigle & Montemore, PC
Revocable Trust as part of their estate plan, while retaining the effective creditor protection aspects of TEB.

401(k) PLANS/IRAS
Co-Guarantor No. 2, Brent, has a large 401(k) account. Unlike some of the other co-guarantors, he did not borrow against his account when Acme started to fail. Brent knew that his 401(k) account would be an exempt asset in the event any creditor came after him, so he maxed out contributions to the 401(k) account and never took any distributions or loans from it. Overall, Qualified Retirement Accounts (401(k) Plans, Pensions and IRAs) have very good creditor protection attributes, including exemptions in bankruptcy. However, such security was jolted in a 2014 Supreme Court ruling in which the Court ruled that inherited IRAs (where one is a beneficiary of an IRA rather than the owner) were not “retirement funds” and therefore lack the creditor protection afforded under Federal law.

HOMESTEAD
Co-Guarantor #3, Caroline, resides in one of six states – Florida, Iowa, Kansas, Oklahoma, South Dakota and Texas – that recognizes a very generous homestead exemption. That is, if Caroline lives in an urban area, her residence, including up to one acre of land (less in Florida and Iowa), is exempt from creditors, regardless of its value. Similarly, if Caroline lives in an unincorporated area, her residence, including up to 160 acres of land (less in Florida and Iowa), is exempt from creditors, regardless of its value.

Your attorney points out that, even in the six states with very generous homestead exemptions, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 restricts homestead exemptions in bankruptcy: individuals who have acquired their homes less than 40 months prior to filing for bankruptcy are capped at an exemption amount of $155,675. Because Caroline has resided in her home for five years, her potential filing for bankruptcy won’t cause her to lose her most valuable asset.

CASH VALUE LIFE INSURANCE
Co-Guarantor No. 4, Delia, lives in one of the 14 states that exempt substantial amounts of cash value in a life insurance policy from attachment in a civil suit or in a bankruptcy proceeding. In Delia’s state, 100 percent of cash value that has accumulated at least 12 months prior to the recording of a judgment or the filing of bankruptcy is exempt from creditors. Your attorney points out that in some states, the cash value is exempt only if the amount expended on life insurance premiums was not made with the intent to avoid, hinder or delay creditors. In other states, there is a limit on the dollar value of cash value that may be protected from creditors. Unfortunately for you, Delia lives in one of the states that allow for a 100 percent cash value exemption even if the life insurance was acquired with the intent to avoid, hinder, or delay creditors.

You tell your attorney to examine Delia’s policy closely to see how much of the cash value accumulated within the previous 12 months.

DOMESTIC ASSET PROTECTION TRUST
Co-Guarantor No. 5, Ethan, lives in one of the 14 states (a very different group than the states referred to in the Cash Value Life Insurance section) that have enacted statutes allowing the creation of Domestic Asset Protection Trusts (“DAPTs”). Essentially, DAPTs allow an individual to establish a trust, contribute property to it and retain a beneficial interest in that trust. In other words, a DAPT allows one to do what was until recently impossible to accomplish: Create a trust for one’s own protection. Your attorney points out that there are numerous state-specific rules that Ethan must follow in order for his DAPT to “work.” Those rules generally encompass such items as (1) the identity of the trustee; (2) the timing of contributions to the DAPT; the contributions must have been made a certain number of years prior to the creditor’s filing of a judgment or the debtor’s filing of bankruptcy in order for the DAPT protections to be effective; (3) the nature of the debtor’s beneficial interest; the trustee of the DAPT must have a discretionary right rather than a mandatory obligation to distribute trust assets to Ethan in order to be able to decline demands to make distributions to Ethan’s creditors.

You tell your attorney to examine Ethan’s DAPT and the contributions that he has made to it closely to determine if all or any of his contributions to the DAPT are protected.

CONCLUSION
So what conclusions can we draw from this unfortunate experience?
First, don’t assume that if your liability is joint and several (general partnership, tenants in common arrangement or a co-guarantor), that your liability is limited to your pro rata share of the total debt. Second, if your liability is joint and several, be proactive about protecting yourself. Ask to see the net worth statements that your co-guarantors provide to the lender. If those statements contain the type of assets or ownership arrangements described in this article, understand what impact that may have on you. You may wind up shuddering much more than your pro rata share of the liability.

Third, be aware of certain clues that will tell you whether your co-guarantors are using or are planning to use asset protection techniques. Some are obvious. If any of the co-guarantors live in a state with a very generous homestead exemption, find out when they purchased their homes and what their mortgage balances are. If they are paying down their mortgage balances faster than usual, understand why they might be doing that. Some techniques are less obvious. You would have no idea that a fellow co-guarantor had a life insurance policy with a large cash value accumulation unless you asked about it specifically or saw it on a net worth statement.

Fourth, learn what asset protection options are available to you and decide if you are comfortable using any of them. Keep in mind the old adage: “If you are playing poker and you don’t know who the mark is, it’s probably you.”
As the cyber security conversation increasingly shifts toward prevention and response, the liability issues facing company management should not be relegated to the background. Even where a company has the foresight to adopt and implement a comprehensive cyber security plan, management is not necessarily immune from liability in the event of a cyber breach. Unless the plan properly takes into account the legal duties owed by management to the company and the company to third parties, the plan could leave management vulnerable to liability. In other words, adoption and implementation of a cyber security plan alone does not necessarily provide adequate protection for management.

The general proposition that management’s legal duties extend to cyber security matters now should be unremarkable. As numerous data breach lawsuits filed in recent years have shown, cyber security is no longer considered a ministerial responsibility that is capable of being entrusted to IT professionals alone. Instead, it represents a significant business decision that should be reserved for management in the first instance. This, then, raises an important question: what steps can management take before a cyberattack occurs in an effort to insulate itself from liability?
MANAGEMENT’S FIDUCIARY DUTY TO THE COMPANY

Unsurprisingly, there are no hard-and-fast rules that management should follow when it comes to cyber security matters because the cyber risks that face every company are different. The risks that face a national health care company that collects patients’ protected health information, for example, will not be identical to the risks that face a small local business that processes credit card payments for its customers. Given this variability, management first and foremost should be mindful of its fiduciary duty to act in the best interest of the company when addressing cyber security matters. Failure to do so could subject management to liability to the company and its shareholders for breach of fiduciary duty.

In the cyber security context, management’s fiduciary duty generally imposes an obligation upon management to be informed and to act in a manner that is not grossly negligent or in bad faith. If management acts in a manner that satisfies these criteria, then it should be able to invoke the protection of the business judgment rule, which typically operates to insulate management from liability when making a legitimate business decision.

If management does not act in a manner that satisfies these criteria, however, then it could find itself subject to a breach of fiduciary duty claim for doing too much or too little in response to a cyber threat. For instance, if management were to adopt and implement a costly cyber security plan without any meaningful assessment of the threat posed, a disgruntled shareholder might attempt to assert a breach of fiduciary duty claim against management for corporate waste. Conversely, if management were to act carelessly and completely ignore a cyber threat, and the company subsequently were to sustain significant losses as a result of a cyberattack, then an upset shareholder might seek to hold management liable for breach of fiduciary duty on the basis that its conduct was grossly negligent.

The best way for management to protect itself against these worst-case scenarios is to treat cyber security as it would any other important business decision. This means that management should apprise itself of all material information relating to cyber threats before adopting and implementing a cyber security plan. Moreover, management should consider forming special committees or relying on outside professionals to assist in its evaluation of the cyber threat posed to the company. Under no circumstances, however, should management completely delegate its responsibility for cybersecurity matters to others inside or outside of the company if it wishes to avoid liability in the event of a cyber breach.

THE COMPANY’S DUTIES TO THIRD PARTIES

Separate and apart from its fiduciary duty to the company, management also needs to be mindful of any legal duties that the company owes to persons outside of the company when adopting and implementing a cyber security plan. Failure to account for the company’s duties to third parties not only could subject the company to third-party liability, but it also could expose management to liability under the personal participation doctrine if management was actively negligent or malfeasant in ignoring the duties owed to third parties.

The duties that a company might owe to third parties can vary extensively depending on the nature of the company’s business. For example, some companies might be subject to statutes such as the Gramm-Leach-Bliley Act or HIPAA, both of which protect certain types of personal information from disclosure and require notification in the event of breach. In other instances, however, the common law might give rise to tort- or contract-based duties on the part of the company to protect personally identifiable information (“PII”). Finally, companies also might owe a duty to safeguard PII under state consumer protection statutes.

In most instances, management’s fiduciary duty to act in the best interest of the company will be coextensive with the legal duties that the company owes to third parties. The reason for this is simple: if management is successful in preventing a cyber breach through the adoption and implementation of a cyber security plan, then the company has not caused any injury for which either the company or management can be held responsible.

Nonetheless, it is possible to conceive of a situation where management’s duty to the company is not closely aligned with the company’s duties to third parties. If management were to determine, for instance, that the cost of adopting and implementing a cyber security plan to protect third parties’ PII is grossly disproportionate to the cyber threat posed, management’s fiduciary duty to the company arguably would be at odds with the company’s duties to third parties. Although this potential conflict would seem to arise in only the rarest of cases, it is still helpful in illustrating why management should consider its legal duties and to whom they are owed before adopting and implementing a cyber security plan. Only by doing so can management meaningfully weigh the attendant risks and make an informed decision with respect to the cyber security plan under consideration.

CONCLUSION

Because cyber security litigation is still a relatively new phenomenon, management liability issues such as those identified here have not yet been explored carefully. This does not mean, however, that management cannot take steps now in an attempt to avoid liability in the event of a cyber breach. Ultimately, from management’s perspective, cyber security should be viewed no differently than any other business decision. To that end, management should act in a manner that is consistent with its legal duties to the company and others if it wishes to minimize the risk of liability to itself and the company. In addition, management would be wise to adopt resolutions and maintain records that document corporate actions and detail its findings with respect to cyber security matters. In observing its legal duties and adhering to well-established principles of corporate governance, management can put itself in the best position possible to defeat the various types of claims that might be asserted if the company is the victim of a cyber breach.

2 Id.
3 Id.
5 12 U.S.C. § 3329d, et seq.
7 See, e.g., In re TJX Cos. Retail Sec. Breach Litig., 564 F.3d at 897–98; In re Heartland Payment Sys., Customer Data Sec., 1370542057946, 2015).
8 See, e.g., In re TJX Cos. Retail Sec. Breach Litig., 564 F.3d at 897–98; In re Heartland Payment Sys., Customer Data Sec., 896 F. Supp. 2d 506, 603–09 (S.D. Tex. 2011).
Workplace wellness programs have become commonplace in corporate America, a development in part due to incentives in the Affordable Care Act (“ACA”). The influx of such programs has not gone without notice, however, as the Equal Employment Opportunity Commission (“EEOC”) has recently challenged wellness programs in an effort to ensure compliance with the Americans with Disabilities Act (“ADA”), and the Genetic Information Nondiscrimination Act of 2008 (“GINA”). In EEOC v. Honeywell International, the EEOC lost a motion for a preliminary injunction where it alleged the company’s wellness program violated Title VII of the Civil Rights Act (“Title VII”), and the ADA. Given the high burden of the preliminary injunction standard, the U.S. District Court for the District of Minnesota ruled that the EEOC failed to demonstrate that Honeywell employees would face irreparable harm, or that employees’ right to privacy in their protected health information (“PHI”) was compromised.

In response to this defeat, on April 16, 2015, the EEOC drafted new wellness regulations to address the concerns identified in the Honeywell case and others. These amendments relate specifically to wellness programs. The proposed rule provides new guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations, and the manner in which such programs may be offered. The time for public notice and comment on the proposed rule began on April 20, 2015, and closed on June 19, 2015.

The proposed rule has five main components employers should consider in creating or revising wellness programs. The proposed rule essentially requires that a wellness program: (1) be reasonably designed to promote health or prevent disease; (2) be voluntary; (3) not have incentives totaling more than 30 percent of the total cost of employee-only coverage; (4) provide adequate notice to employees; and (5) ensure confidentiality of PHI.

REASONABLY DESIGNED TO PROMOTE HEALTH OR PREVENT DISEASE

First, any wellness program that includes disability-related inquiries or in-depth medical examinations must be reasonably designed to promote health or prevent disease. To meet this standard, the wellness program must have a reasonable chance of improving the health of, or preventing disease in, participating employees. The program also must not be overly bur-
densome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.

For example, conducting a biometric screening of employees for the purpose of alerting them to health risks of which they may have been unaware would meet this standard, as would the use of aggregate information from employee Health Reimbursement Arrangements by an employer, if that information is then used to design and offer health programs aimed at specific conditions that are prevalent in the workplace. Conversely, if a wellness program collected PHI from a health questionnaire without providing employees follow-up information or advice, the program would not be reasonably designed to promote health according to the new proposed EEOC rule. Additionally, a wellness program would not be in compliance with the new EEOC rule if the program imposed, as a condition to obtaining a reward, an overly burdensome amount of time for participation, required unreasonably intrusive procedures, or placed significant costs related to medical examinations on the employee. The program may not be designed for the purpose of shifting healthcare costs from the employer to the employee based on their health.

VOLUNTARY

Second, a wellness program must be voluntary. To meet this requirement, the employer may not require an employee to participate in a wellness program, and may not deny coverage or other benefits under any of its group health plans or particular benefits packages within a group health plan as a penalty for non-participation. Generally, an employer may not limit the extent of such coverage, and may not take any other adverse action against employees who refuse to participate in an employee health program or fail to achieve certain health outcomes. Additionally, an employer may not retaliate against, interfere with, coerce, intimidate, or threaten employees for not participating in the wellness program by coercing an employee to participate or threatening to discipline an employee who does not participate.

THE 30 PERCENT LIMIT

The EEOC rule does not prohibit the use of incentives to encourage participation in employee wellness programs, but it does set limits on incentives to ensure that employee participation is voluntary. The total allowable incentive available under all programs may not exceed 30 percent of the total cost of employee-only coverage. Incentives include not only financial incentives, but also in-kind incentives, such as time-off awards, prizes, or other items of value. This 30 percent limit relates only to wellness programs that require disability-related inquiries or medical examinations in order to earn an incentive. A wellness program without such requirements, such as a nutrition, weight loss, or smoking cessation program, would not be subject to this rule, although it may be subject to a similar rule under HIPAA.

For example, consider a group health plan under which an enrolled employee has a total annual premium for employee-only coverage of $5,000, including the employer’s and employee’s contributions. If the wellness plan provides a $1,500 reward for participation in a program regarding cardiovascular health, that incentive is 30 percent of the employee-only coverage, and is permissible under the new EEOC rule. If, however, the program provided a $1,500 reward for the cardiovascular program, and an additional award of $500 for participation in a health risk assessment screening program, the total award would be $2,000, which would exceed the 30 percent limit and violate the proposed EEOC rule.

Additionally, reasonable accommodations must be provided for persons with disabilities regardless of whether the program includes disability-related inquiries or medical examinations. The program should provide a reasonable alternative, and notice to the employee of the availability of that alternative. For example, if a program required employees to have blood drawn, but one employee had a disability rendering such activity dangerous, the employer would need to provide an alternative test or certification requirement so that employee could participate and earn the benefit.

NOTICE

Fourth, if the wellness program is part of a group health plan and deemed to be voluntary, a covered entity must provide notice to the employee, clearly explaining: (1) what medical information will be obtained; (2) how the medical information will be used; (3) who will receive the medical information; (4) the restrictions on its disclosure; and (5) the methods the covered entity uses to prevent improper disclosure of medical information.

2 26 C.F.R. § 54.9802-1(d).
Taking the knowledge of old investigative techniques and combining that with new technology is creating a better investigation. Technology has provided the investigative world with leverage in identifying fraud at various levels. Social media, privileged database searches and high-definition cameras have revolutionized the investigative industry and will continue to do so as technology continues to advance.

When I started in this industry in 1985, surveillance was done with a super 8 movie camera. On the horizon was the video camera and the VHS bag recorder. We had very little information to start a case as the Internet was still waiting for Al Gore to invent it and social media had not been considered as Mark Zuckerberg was age 1. An investigation started by talking to neighbors and going door to door with a frayed dog leash and picture of a cute dog and asking, “Have you seen my dog? My dog ran into your neighbor’s yard, do you possibly know when they will be home or do you have a work number where I could contact them?” This would then transition into a conversation about the subject in question.

**POWER OF THE INTERNET**

Today the Internet provides us with information through social media, relevant database searches and a variety of other websites that can give us a profile of the subject’s activity level. We investigate insurance claims by starting with the Internet to develop leads, which we can then verify and produce a more substantive lead. The Internet has made it easier for an investigator to pull video from sites such as Instagram that serve as a “selfie surveillance” as demonstrated in this photo. Sites like Tumblr, YouTube and Flickr also provide photos and videos that can cast doubt on a subject’s case and help the client determine the merit of a claim.

**WHERE DO INVESTIGATIONS BEGIN?**

Profiling an individual under investigation is crucial in order to determine exactly where to look for social media. For example, if an individual was from Eastern Europe or Russia we would check Facebook, but also VK.com, which is one of the largest Russian social networks in Europe with almost 100,000,000 members. In fact, VK.com has become even more popular than Facebook in certain countries, like Israel, and others regions around the world. A comparison of the two sites is done to determine if the rhetoric used on Facebook is consistent with what is written on VK.com. Social media
monitoring is a method of investigation that can be advantageous to the client if used on the right individual. We monitor a subject’s social media sites daily for up to four months. Once the URLs are determined on a socially active site, we catalog them and they are reviewed daily in hopes of finding an upcoming event in which he/she will be participating. This type of monitoring should only be used for a subject who is a very active user of social media.

A major part of the activities check involves personal surveillance made by an investigator. This usually requires one or more days of stealth monitoring of the subject’s residence and/or place of business.

**EVOLUTION OF DRONE TECHNOLOGY**

Drone technology is revolutionizing the way we will fight in combat and how we may receive packages delivered to our homes and businesses. Drones are used primarily in investigations to get a better view of an area of the subject’s property that is not visible from the street. The drone provides an image that can determine the best location to set up our surveillance. These “flying cameras in the sky” vary from large noticeable units to small palm size ones. Size does matter when talking about drones. When a drone is much larger, it has the capability to carry larger, more powerful batteries which can accommodate longer flight times. When you are using smaller drones that are the size of your palm, but are covert, you might only get 7-10 minutes of flight time out of them.

**CAMERAS, SURVEILLANCE & NEW TECHNOLOGY**

Covert cameras have been around for many years. They started with heavy cumbersome equipment that had to be attached to your body in some way. Today technology has tape, a transmitter that was attached to the camera by a long wire. For example, a came with a transmitter that was attached to the pocket and a hole would be cut out inside the pocket to run a wire to the transmitter taped to your body. Today technology has eliminated all the wires mainly due to the ability to compress data onto small chips called mini SD cards. We can have a camera made out of just about anything today. Our agents carry key fob cameras, watch cams, phone cams, and hat cams plus a variety of others. These cameras usually run at a very low voltage so that they can operate for over an hour of recording time without a charge.

Traditional surveillance is used to determine a subject’s level of activity, but in some instances surveillance might yield very little information or perhaps no activity for the client at all. With the advent of state of the art video cameras, wireless communication, and specialized software, surveillance can now be accomplished with remote controlled video systems.

The Marshall Investigative Group has developed such a system called the R.O.V.R (Remote Operated Video Recorder). This system is comprised of four basic components.

1. The first element consists of a high resolution Axis PTZ (Pan, Tilt, and Zoom) video camera. The camera functions are remotely controlled from operating software provided by the camera manufacturer.
2. The second component is a web-based camera server. This allows additional functionality of the camera which is provided by specialized video recording software.
3. The third component is a cellular-based communication link which allows the remote system to connect to the Internet over the cell phone network and makes it available to one or more operators or monitoring stations.

These three components are powered by one or more standard 12 volt car batteries which are hidden in an unmanned vehicle parked at the observation site. Depending on the amount of battery capacity, the system can run up to five days for 24 hours a day or perhaps longer with no charging. The system is discreetly disguised so as not arouse suspicion and to prevent detection.

4. The fourth and final factor is client-based software in the investigator’s office or another remote location.

The client-based software is provided by a vendor who specializes in video surveillance and can use a range of Ethernet cameras from a variety of vendors. The advantage of this software is that it can be configured to provide several pieces of information. First the camera can be told to record video only when there is motion in certain fields of view. The video can be configured for various resolutions conserving cellular bandwidth and cost. Two-way audio can also be utilized if required in the setup or monitoring. After the video is recorded, investigators can visually see, on time lines, when and if there was activity during the surveillance. Only the video of the activity is reviewed, saving hours of time. After several days of video monitoring it may be possible to determine the subject’s activity pattern. Then, if required, a surveillance investigator can be at the site at specific times to document more detailed information and follow the subject.

**WORKING IN THE CLOUD**

All of the stored data on the camera can be monitored and activity can be pulled from the camera through the cloud. This can be done at any time. Activity patterns at night are determined from disturbances in the megapixels. When these disturbances occur we are alerted and that video can be reviewed and downloaded to any remote location that possesses the proper software.

This technology is going to be a key tool in the future, as cameras become more sophisticated they will be smaller for stealth advantages and still produce very high resolutions with low IR (infrared camera) capabilities. It is the improvement in the IR capabilities that will give us an exceptional image day or night.

**WHAT DOES THE FUTURE HOLD?**

Technology is always changing and improving. Investigators will need to stay on the cutting edge of those changes in order to provide the highest quality investigations. There are cameras in every urban area watching our every move. The way we police our streets and investigate real cases will continue to change with the continued improvements that are being made within the video and audio technology industry. We are truly going where no one has gone before.

Doug Marshall is the founder of Marshall Investigative Group and has been investigating claims for 30 years. Often invited to present at key industry events, he has been a guest speaker at TIDA, the Chicago TLA, Saint Louis Claims Manager, TLP & SA and USLAW NETWORK conferences among others. Marshall Investigative Group, a USLAW NETWORK corporate partner, specializes in insurance fraud investigations providing coverage throughout the United States.
The stark complexity of modern risk-allocation practices tends to be a source of great confusion – for contracting companies, for insurance carriers, and sometimes even for the attorneys asked to litigate the results. This is especially the case in instances where many parties (or potential parties) to a deal or lawsuit are involved, such as in construction defect cases. Often, reams of paper are dedicated to the musical chairs of allocating risk in a single deal. The reason is a singular focus for each party to avoid being the last one standing when the music stops – holding responsibility for indemnification, attorneys’ fees, or contribution to the other party or parties to the deal. We sometimes encounter situations in our practice when a client is close to a resolution, only to find out that poor contract drafting or unwitting negotiation regarding additional insureds will leave it with significantly more liability than the client originally anticipated. This leads to roadblocks in the settlement process, and by extension, more attorneys’ fees for the client.

What can be done to avoid these pitfalls? With some skillful contract drafting, effective negotiating chops, and understanding where and when to press on the enforceability (or lack thereof) of these provisions, fewer companies will be left wondering just how their liability got so disproportionately large in comparison to their scope of work, and how it happened so fast.

ADDITIONAL INSURED VS. CONTRACTUAL INDEMNITY

Many times, a contract for services will include contractual indemnity provisions as well as requirements that one party purchase insurance on behalf of the other, naming it as an additional insured. This belt-and-suspenders approach gives the party with potentially greater exposure (or deeper pockets) two discreet avenues to pursue protective coverage in a lawsuit.

The most common (and least-negotiated) risk-allocation device is contractual indemnity. Broadly, an indemnity agreement requires one party to reimburse another for any losses. Importantly, indemnification creates an obligation between the parties in contract privity with one-another. Therefore, a demand for indemnification is a demand for specific performance under the contract’s terms. Indemnification provisions, however, are sometimes rife with language that is over-inclusive as to liability and unenforceable due to nuances in state law, depending on the state and the type of contract.

Additional insureds, on the other hand, are added to the named insured’s policy. Similar to indemnification, a contractual term will dictate the necessity of adding additional insureds. As an additional insured, a party has contractual privity with the insurance carrier. Stated differently, the insurance carrier must treat both its named insured and the additional insured as independent, unrelated customers – as if each had separately purchased a policy. This gives the additional insured rights against the insurer, by the terms of the endorsement, apart from its right to seek reimbursement through indemnification from the named insured.

Generally, additional insured status on a policy gives rise to greater obligations and potential exposure due to defense costs. Contractual indemnity clauses often provide significantly more room for negotiation of fees and costs when it comes for settlement. Indemnity provisions tend to be easier to negotiate on a one-to-one basis between the parties to the contract. When entering into contracts, companies may wish to think twice before haphazardly adding additional insureds. Doing so may impact loss runs and increase premiums down the road.
Although a party with a contractual right of indemnification and protection as an additional insured will seek out both avenues of reimbursement, it will not recover twice for the same liability. For example, an allegedly negligent general contractor should tender a claim by a subcontractor’s injured employee to the subcontractor’s insurer (as an additional insured) and seek indemnification from the subcontractor itself as specific performance of their agreement. With both options at its disposal, the general contractor is unlikely to know at the outset of a claim which avenue might produce the more favorable result. The general contractor will eventually have to decide which provision it wishes to enforce. If an insurer covers all of the liability and attorneys’ fees on the general contractor’s behalf, principles of equity and common sense will not allow the general contractor to seek indemnity from its subcontractor for losses not actually sustained defending the claim.

DEFENDING AND LIMITING LIABILITY

Despite the general legal aphorism that “sophisticated parties dealing at arm’s length,” the reality is that one party is likely to be wielding significantly more leverage. For example, a small commercial electrician trying to expand its market share is not likely going to risk blowing the chance to win a bid by taking a stand against a general contractor on the language of an indemnification clause, when there are five other electricians waiting to step in on the general contractor’s terms as written. The general contractor is much more likely to have retained expert legal counsel negotiating on its behalf, possibly directly with the subcontractor’s business owner, who may have little knowledge of the nuances of risk allocation. Thus, the more powerful party will demand (and likely receive) the widest variety of liability protection and risk allocation that it desires. If the subcontractor does have slightly more negotiating room, it should question whether the net gain of a project is worth more negotiating room, it should question whether the net gain of a project is worth

1. Working directly with the carrier throughout the negotiation process will ensure that the named insured has all the coverage it needs, separate and distinct from whatever coverage is mandated for the additional insured.

Defending against indemnification provisions of a contract is often a matter of pinpointing linguistic problems with enforceability, and then using those drafting snafus as advantages in litigation. For example, in states such as Wisconsin,2 Pennsylvania,3 and California,4 the law strictly construes or voids indemnification clauses that require the indemnitor to reimburse the indemnitee for the indemnitee’s own negligence. In some states, the standard is that language of general import such as “any and all liability” will not suffice to allow for indemnification of one’s own negligence.5 Furthermore, in other states, indemnification provisions must have a monetary limitation with a reasonable commercial relationship to the size and complexity of the project under contract, and must have the indemnification provision included in project specifications or bid documents to avoid unfair surprise.6

Another defense strategy (especially in construction cases) is to pinpoint the “time on risk” of each party and its insurer(s). “Time on risk” is evaluated as the period of effective coverage under an insurance policy among several concurrent or consecutive policies.7 A dissertation could be written on this topic alone, including the various “triggering theories” of damage manifestations that implicate the coverage. This aspect of the law is unsettled in many states.8 Suffice to say that when multiple consecutive or overlapping insurance policies are at issue, the ambiguities in the law allow for defense attorneys to craft creative arguments. For example, by advancing facts that show a particular stucco subcontractor’s insurer was only “on the risk” for 30% of the period in which water damages occurred over time, the insurer may only be liable for that percentage of the total damages.

Defense attorneys also look at the time of tender as a means of reducing fees and costs of defense as part of a settlement. The insurer is likely only responsible for the costs of defending an action from the point of tender to the end of the claim. Thus, if a claim was defended by the general contractor’s insurer prior to tendering as an additional insured under the subcontractor’s policy, counsel for the subcontractor’s insurer should insist on proportionally reducing any contribution towards defense costs.

CONCLUSION

Liability exposure through risk allocation can be reduced by understanding how the contractual obligations of the parties may end up affecting their litigation posture if the relationship breaks down. An easy way to minimize potential exposure is to work with a representative of one’s insurance carrier or use counsel during negotiations to procure coverage that will provide sufficient liability protection as required by the contract. Another avenue is to give deeper consideration to disproportionate risk allocation in contracts that provide minimal economic upside in comparison. With sufficient study, the defense of incomprehensible exposure can become more sensible.

1. See Acceptance Ins. Co. v. Syroph Enter., 81 Cal. Rptr. 2d 557, 562-63 (Cal. Ct. App. 1999) (giving examples of limiting clauses in additional insured endorsements, and warning of the use of general language such as “arising out of the named insured’s work,” which will be construed liberally to provide coverage).
With rapid technological advancement in the connected vehicle realm, it is incredibly likely that investigators are missing out on digital evidence that could potentially make or break their cases. Vehicles have gone from simply a mode of transportation to essentially a computer on wheels. Stored within a vehicle’s infotainment and telematics systems is a substantial amount of user data (generally from a paired smartphone), navigation data and recorded vehicle events. A newer vehicle can potentially reveal far more than a few seconds of crash data. Depending on the system, days, weeks, or even months of data could be sitting, waiting to tell the story of what really happened. Because the concept of vehicle system forensics is quite new, many are still unaware of the capabilities, and important data often never sees the light of day.

A vehicle has the potential to become a star witness – if one understands how to communicate with it.

Many people in the digital forensics and accident investigation communities – including police officers, insurance adjustors, investigators, examiners, reconstructionists and attorneys – are aware that there are numerous modules within a vehicle, many of which are known data sources and many others that could be capable of recording data. The major roadblock is that they are unsure of exactly what that new data is and how to find and extract it.

Although infotainment and telematics systems have been supplied in many passenger vehicles since about 2008, little attention has been given to them in the accident investigation community until now. Why the sudden attention? Word is getting out about the enormous amount of data that infotainment/telematics systems are capable of storing. It is a common misconception that investigators can get the full range of data off a system simply by calling a dealer or manufacturer and using their proprietary tool. Certainly, some data might be retrieved, but the most effective route is to perform a forensic “deep-dive” of the system when possible. Before we review specific recoverable data types, let’s answer a few questions.

WHAT IS AN INFOTAINMENT SYSTEM?

The word “infotainment” is a combination of the words “information” and “entertainment.” In short, the infotainment system is what connects the operator to their digital world and is the central hub within the vehicle. Through the infotainment system, the user can do things such as sync their phone to take advantage of hands-free calling and texting, listen to the music stored on their phone, possibly access weather information, satellite radio, or even social media apps directly. Examples of infotainment systems include Ford SYNC, Toyota Entune, Chrysler UConnect, BMW ConnectedDrive, etc.

WHAT IS A TELEMATICS SYSTEM?

Telematics is the integration of telecommunication and information, and it is embedded into the vehicle. The system facilitates requests to and from the infotainment system; the user does not directly interface with the telematics system. Telematics is used for vehicle to infrastructure (V2I) communication, and vehicle to vehicle (V2V) communication. For example, in V2I communication, if the infotainment system receives an input to turn the seat heater on, that request is then passed on to the telematics system. For vehicles that incorporate V2V communication, sensors detect when a vehicle comes within a certain distance of another. The system will then respond with an alert that gets the driver’s attention; the alert could be in the form of a sound, a flashing light, a vibration of the steering wheel, etc.

What data is stored on these systems? The data set is both system-and phone-de-
pended, but here is a general list of information that can potentially be found:

**User Data:**
- Connected devices
- Bluetooth connections
- Wi-Fi connections
- Call logs
- Contact lists
- SMS Messages
- Emails
- Pictures
- Social media feeds

**Navigation Data:**
- Recent destinations
- Saved locations
- Tracklogs
- Trackpoints
- Waypoints

**Vehicle Event Data:**
- Headlights on/off
- Door Open/Close
- Gear changes
- Connections to/disconnections from Bluetooth and Wi-Fi
- Connections and disconnections of mobile devices and other media (USB drive, SD card, etc.).

If the system includes a navigation unit, many of these artifacts will include a timestamp and geolocation data. Such data can be especially helpful to investigators as they are trying to assemble a detailed timeline of events.

In order to retrieve this valuable data, specialized hardware and software is required. Berla Corporation has developed a forensic tool kit solution called iVe that currently supports 4,300 vehicles, and that list is growing quickly. Currently supported manufacturers include BMW, Buick, Cadillac, Chevrolet, Chrysler, Dodge, Fiat, Ford, GMC, Hummer, Jeep, Lincoln, Maserati, Mercury, Pontiac, Ram, SRT, Saturn, Toyota and Volkswagen.

The method by which information is extracted varies by make. Some systems require partial disassembly, some systems require very little disassembly and some systems require no disassembly at all. The software includes a detailed guide to identifying, removing, and acquiring data from specific modules. Regardless of the method needed, the solution is completely non-destructive. The vehicle can be put back together easily and it will start and run exactly like it did prior to the procedure. The software allows a computer to connect to the vehicle system and retrieve data using forensically sound methods and best practices. Essentially, the tool creates a copy of the data (called a forensic image) and the examiner works off of that copy. This way, there is no risk of alteration or damage to the original data. The forensic image is automatically parsed by the software and stored on a computer so it can be easily viewed, searched, bookmarked, graphed, reported, etc. It is also important to note that many vehicles can record data for days, weeks, or even months depending on frequency of use and the amount of memory within the system. This is in comparison to the mere seconds of data recorded on most EDR tools.

There is obvious value in having this type of data as part of an accident investigation. Since the software is only about two years old, most of the cases in which it has been used are still in progress and specific examples are not available. However, there are several success stories from investigators in the field who have agreed to share under the condition that any identifying details are omitted.

GPS data from vehicle navigation systems have been used on numerous occasions to determine a vehicle’s pre-impact speeds and positions. User data from the infotainment system was used by investigators to show that a driver sent a text message just before a vehicle collision, consistent with distracted driving. Another case involved the wife of a prominent person in the community claiming that she accidentally ran over her husband, but event logs were able to show that her automatic transmission vehicle shifted into reverse and then into drive again. Combined with a biomechanical analysis of the injuries, the data showed the possibility that she ran him twice, deliberately. A home invasion suspect claimed that he was alone during the commission of a crime, but inspection of the infotainment system showed the passenger side door opened at the house’s GPS coordinates. Historically, headlights incorporated incandescent light filaments, which can deform upon impact if in use. This allowed for post-accident analysis to determine whether headlights were in use at the time of impact. Today, most new vehicles incorporate light emitting diodes (LED), which do not sustain the same type of deformation. However, data from a vehicle’s telematics system can be used to determine the position of a vehicle’s headlight switch at the time of the accident.

These are just a few scenarios in which data from the infotainment system could make or break a case. Often, this invaluable data goes to waste because investigators are not aware that it exists, or they suspect it exists but are unsure of how to retrieve it.

Consumers demand more and more connectivity and capabilities within their vehicles, to the tune of an estimated 220 million connected cars on the road by the year 2020. Vehicle system forensics is the way of the future, but is very relevant and very possible right now for those who want to stay ahead of the curve.

Berla also offers hands-on training sessions in Vehicle System Forensics to fully understand the capabilities of the systems, hardware and software necessary to obtain vehicle data. Several members of S-E-A's engineering staff have attended Berla’s training and have been certified in Vehicle System Forensics. If you have any questions regarding infotainment/telematics systems and/or vehicle system forensics, please contact Mr. Cornetto at 410-766-2990 or Ms. McGee at cmcgee@berla.co / 443-333-9901.

**Anthony D. Cornetto, III, P.E.** is a licensed, mechanical engineer at S-E-A, Ltd. where he is responsible for managing and conducting the investigation and analysis of accidents involving vehicles, pedestrians, industrial equipment, and mechanical systems and equipment failures. He received his Master of Science and his Bachelor of Science in Engineering Science and Mechanics from Virginia Tech.

**Ben LeMere** is the CEO and co-founder of Berla Corporation. He is a widely recognized subject matter expert in digital forensics, GPS forensics and vehicle cybersecurity, with more than 15 years of military and federal government service. Under Ben’s leadership, Berla supports the DoD, Homeland Security and Law Enforcement communities while also beginning to establish roots in the commercial realm.

**Carly McGee** is a digital forensic analyst and marketing coordinator at Berla Corporation. She is an instructor of iVe and Blackthorn, Berla’s vehicle system forensics and GPS tools. She has been in the digital forensics field for about four years and is also a life-long car enthusiast. She contributes to and edits blog content, technical reports and literature.
The recent cyberattacks on large corporations such as Neiman Marcus, Target, eBay and Home Depot have brought cybersecurity to the forefront of mainstream pop culture, as the data stolen from these retailers exposed the personal identifiable information of millions of customers. Stolen credit card data typically is posted online and sold on the black market at prices ranging from $3 per Social Security number to as much as $1,000 per bank account login. While these figures seem modest, when multiplied by the millions affected, the financial and reputational damage inflicted can easily ruin any business. In fact, once a retailer suffers a major breach, consumer confidence drops, resulting in a significant drop in profit. As the total average cost of a data breach is now $3.8 million, up from $3.5 million the previous year, the question facing companies is not only how to prevent a cyberattack, but how to position themselves to sufficiently and quickly respond to same. In the second of a four-part series touching on various professional, business and insurance sectors, this article discusses cybersecurity and compliance issues facing the retail, restaurant and hospitality (RRH) industry in today’s rapidly evolving technological climate.

TYPES OF DATA BREACHES AFFECTING THE RETAIL, RESTAURANT AND HOSPITALITY INDUSTRY

The number of reported data security breaches continues to increase while the types of breaches are becoming more diverse and sophisticated. Retail companies are often targeted by cyber criminals because they possess voluminous financial data across their chain of stores throughout the country and overseas. Often these companies are victims of Point-of-Sale malware. In general, there are three basic types of data security breaches that affect the RRH industry and lead to the compromise of a business’ data: physical breach, electronic breach and skimming. The following is a brief overview of each type of breach.

PHYSICAL BREACH
The first type of data breach affecting businesses in the RRH industry relates to a physical breach. This involves the physical theft of documents or equipment containing cardholder account data, such as cardholder receipts, files, PCs and Point-of-Sale terminals. A physical breach can also involve terminal scams wherein an individual attempts to tamper with merchant Point-of-Sale terminals in order to gain access to card data contained in the device or to perpetrate fraud using the device. For example, a terminal scam may include phone calls received by merchants in which the caller attempts to reprogram client terminals.

Some best practices for a business in the RRH industry to employ to help prevent a physical data breach include: having a detailed security strategy that involves monitoring employees who use Point-of-Sale terminals and conveying clearly defined restrictions to them; installing cameras at computer room entrances and exits as well as check-out lanes where Point-of-Sale terminals are positioned; defining procedures to monitor the cameras and corporate networks and keep recorded footage for a reasonable period of time; requiring ID badges for access to sensitive data centers; and maintaining a log of visitors to sensitive facility areas.

ELECTRONIC BREACH
A second type of breach affecting the RRH industry is an electronic breach. This involves the unauthorized access or deliberate attack on a system or network environment (at a business or its third-party processor) where cardholder data is processed, stored or transmitted. This can be the result of acquiring access, via Web servers or Web sites, to a system’s vulnerabilities through application-level attacks. Some examples of system vulnerabilities include unsecured remote access, lack of proper password management, and lack of proper access restrictions to cardholder data systems.

There are a number of methods used by hackers in the case of an electronic data breach. For example, a “packet sniffer” is an application that intercepts and logs traffic passing over a digital network or part of a network. This is a standard tool that has been used in network troubleshooting and analysis for many years. Unfortunately, this...
tool is increasingly being used by hackers to collect card data in transit inside merchants’ networks. Another example among the most dangerous of so-called “spyware” is keylogging. This interjects programs into a merchant’s network systems using malware, which is then used to count and record data entry key strokes. Some more sophisticated programs can also capture screenshots containing data even though no data is typed. This allows hackers to obtain direct access to card data or to the system passwords that lead to it.

Once again, some best practices for businesses in the RRH industry include: never storing prohibited cardholder data, such as track data or card security codes on payment applications or in credit card processing environments; using only secure Web and database servers; and utilizing strong, up-to-date anti-virus, anti-spyware and anti-malware software. A business can also validate its payment applications’ compliance with the Payment Application Data Security Standard (PA-DSS) and undergo a Payment Card Industry Data Security Standard (PCI DSS) code review to ensure that its system is in compliance.

**SKIMMING**

The third type of breach affecting businesses in the RRH industry involves skimming. Skimming is the capture and recording of card magnetic stripe data using an external device, which is sometimes installed on a merchant’s Point-of-Sale system. Skimming can also involve a dishonest employee utilizing an external device to collect the card magnetic stripe data. The data is then used to create counterfeit credit and debit cards. Restaurants and bars are common victims for skimming because the perpetrator actually has physical possession of the victim’s credit card. In this situation, the perpetrator often uses a device so small it can fit in the palm of their hand to read and store data encoded in the magnetic stripe on the back of the victim’s credit card. The perpetrator may also use a small keypad device to record the three or four-digit security code printed in the signature box. Skimming may also involve tampering with vulnerable Point-of-Sale terminals and PIN-pad equipment. Typically, a perpetrator inserts a device into the terminal or PIN-pad at the merchant location, then uses it to collect credit card and PIN data.

Some ways to minimize skimming include closely monitoring the handling of cards when employees have frequent physical possession of credit cards out of view of the cardholder, closely monitoring activity on Point-of-Sale terminals and PIN-pad devices, and regularly checking equipment for attached skimming devices or evidence of tampering.

**WHAT BUSINESSES IN THE RRH INDUSTRY NEED TO UNDERSTAND ABOUT COMPLIANCE**

A regulatory body very active in regulating the RRH industry is the Payment Card Industry Security Standards Council (PCI SSC). Founded by American Express, Discover, JCB, MasterCard and Visa, the PCI SSC has promulgated a 12-part guide, the Payment Card Industry Data Security Standard (PCI DSS), for securing cardholders’ information that RRH businesses store, process and transmit. PCI DSS v3.1 is the current enforcement of a new payment card security standard, which calls for immediately ending the use of the outdated Secure Socket Layer encryption protocol that can put payment data at risk. The council demands that stronger encryption be used, although may still believe it is not sufficient and should require full-disk encryption on terminals that process card payments.

The penalties for failing to comply with the PCI DSS can be severe to businesses in the RRH industry. Namely, because the banks and card processors have separate agreements with members of the RRH industry for indemnification of the fines, based on the size of the business, these are often paid by the businesses themselves. As a result, businesses in the RRH industry must review their own internal policies and procedures to include PCI DSS fundamental security practices. Additionally, RRH industry businesses should also review and amend vendor contracts to address compliance with PCI DSS, as well as only use third-party providers that understand and operate in compliance with said standard.

Furthermore, in late 2014, President Obama signed a BuySecure Executive Order to accelerate the transition to stronger technologies and the development of next-generation payment security tools. This new technology will apply to both new and existing credit cards issued by the General Services Administration to government employees, as well as debit cards issued as part of benefit programs like Direct Express. It will also upgrade retail payment card terminals at federal agency facilities to accept Chip and PIN-enabled cards. With Chip and PIN technologies, credit, debit and other payment cards will contain embedded microchips instead of magnetic strips, and face-to-face transactions will require consumers to use their personal identification number (PIN), similar to ATM cards. Once fully in place, these measures will hopefully drastically reduce the number and scope of Point-of-Sale malware attacks.

**CHANGES IN TECHNOLOGY**

A company doing business in the RRH industry must also be cognizant of the technological changes occurring. For example, a deadline has been imposed for U.S. retailers and card issuers to adopt EMV chip-and-PIN technology by October 2015. Due to what is being called the Payment Networks’ Liability Shift, financial institutions will no longer assume financial responsibility for fraudulent transactions if a merchant is using non-EMV compliant technology, including Point-of-Sale systems. While this may not prevent a future cyberattack, merchants in the RRH industry must take steps toward a more secure payment future.

Cybersecurity and compliance issues cannot be addressed across the board due to the limits placed based upon the size of a business and its budget. While larger companies within the RRH industry are the most lucrative targets of cyberattacks, it is the small to midsize company that will be forced to close its doors if a breach occurs for failure to have proper security safeguards and compliance best practices in place.
There are several things that keep me up at night, one of which is the changing environment for technology not only with respect to law firms, but also to clients and the demands being placed on clients to increase their data privacy and cyber risk protection. This translates now to law firms, which really need to be on top of their game when it comes to data security of client files, of information, of where things are being housed, and whether all of this is secure from outside intrusion. This is keeping me up at night as it (technology) is an ever-evolving landscape. And, it’s not just a challenge for law firms and our clients, but also governments. Far too often these days the headlines tell of another cyber breach of a government agency. This hot topic keeps me up at night.

**IMPORTANCE OF PRACTICE AREA TEAM EXPERTISE**

Historically law firms were organized around the way lawyers thought. Yet, when we were creating USLAW, we decided to organize by practice area team expertise to assist our clients with their various legal matters across the NETWORK. Clients are increasingly looking for very discreet knowledge of their industry so practice area expertise are the table stakes if you will. That’s an expectation people have — where you can really develop the wow factor and deliver on the really nuanced information, advice and understanding of their industry in the context in which they are trying to build their businesses and handle and mitigate the risks within the industry.

**DIVERSE BACKGROUND SUPPORTS PRACTICE FOCUS**

I’ve been involved with a lot of industries over the years including, insurance, banking & financial institutions, airlines & travel agents, but my practice area experience actually is commercial litigation and bankruptcy. I’ve done a lot of business transaction and M&A work because of the bankruptcy work I’ve done.

**ATTORNEYS AND CLIENTS COMING TOGETHER THROUGH USLAW**

USLAW brings together some of the brightest minds in business and law in order to network, educate and serve the legal needs of clients across a broad industry landscape. Attorneys and clients really benefit in a number of different ways when they are learning from one another, and when they can refer to colleagues in other places who have discreet knowledge of local courts or of local business terms in doing deals. They can really benefit from that local knowledge as well as the great industry knowledge, which is an asset of USLAW. So many of our conferences are organized around industries – construction, retail & hospitality for instance – and sharing that knowledge, not just in delivering legal services but understanding the business of the clients. It’s a really powerful tool to make the client service we deliver within our firm better and it is enhanced through the relationships we develop through the network.

**LOOKING INTO THE CRYSTAL BALL**

Part of my role at LeClairRyan is looking to the future of the delivery of legal services and how we respond to client needs in a changing world. As a member of USLAW leadership, I can say this has been a focus of our discussions as well. We have been strategic in our admittance of member firms and firmly committed to the needs of a growing client base. One of the more recent advancements and developments we’ve been working on is the Managing Partner’s Forum where managing partners from different firms share the best of what they are doing; they share those best practices with others to the benefit of USLAW member firms and their clients. There are great opportunities. When our firm first joined USLAW 13 years ago we had 70 people at our client conference, now we have close to 500. With ongoing education, networking, relationship building, a commitment to exemplary client service and a keen eye focused on the delivery of legal services, USLAW has a vibrant future.
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Do jurors feel like they’re in good hands with their insurance companies? Not really. Just shy of half of mock jurors hold negative feelings about insurance companies. With 2011 and 2012 bringing several catastrophic events – from wildfires, landslides, tornadoes and hurricanes – leading to an avalanche of property and business interruption claims, mock jurors’ views on insurance coverage and claims have likely changed.

Jurors have familiarity with claims. Indeed, according to the Insurance Information Institute, (http://www.iii.org/fact-statistic/homeowners-and-renters-insurance) one in 15 insured homes make a claim each year. How did those personal claims experiences and the media exposure about others’ claims affect mock jurors’ views on insurers? To get a better sense of what biases jurors may hold when they walk into a courtroom, Litigation Insights collected mock jurors’ attitudes on insurance companies from around the nation. The results below discuss jurors’ views on insurers’ ethics, profits, coverage, and claims handling.

**PROFITS OVER POLICY HOLDERS**

As the chart below depicts, nearly 40% of mock jurors believe that insurance companies put their profits over the rights of their policyholders. Again, mock jurors continue their theme of cynicism toward the insurance industry, assuming that their insurer is not necessarily on their side when money is involved.

Interestingly, 70% of jurors believed that the size of a claim influences an insurer’s decision to pay a policy benefit. Considering the multi-million dollar claims in most corporate property and business interruption claims, this is an important hurdle for insurers to inform themselves of during jury de-selection.

**(PROVERB) PROMISES, LIKE PIE CRUSTS, ARE MADE TO BE BROKEN = INSURERS SOMETIMES MISREPRESENT COVERAGE**

Although most mock jurors were unsure of whether insurance companies would misrepresent what a policy covers, nearly 25% agreed or strongly agreed that insurers would indeed misrepresent coverage.

More alarming, 24% of mock jurors agreed, and another 7% strongly agreed that, “Insurance companies only pay claims when forced to do so.” The seven-percent would be a strikingly minority in jury selection, but it could be difficult to excuse the remaining 24% of cynical jurors. Not to fear – on a more comforting note, 55% of mock jurors disagreed that insurers would only pay claims if forced to.

**JURORS’ POSITIVE CLAIMS EXPERIENCES TRANSLATE TO POSITIVE BELIEFS ABOUT CLAIMS HANDLING GENERALLY**

Before becoming disheartened that all is lost with jurors’ attitudes toward insurers, look to those with positive claims experiences – even in cases about multi-million-dollar business interruption and property claims. Even though general attitudes are negative, personal experiences go a long way in juror decision-making. Because most jurors (and mock jurors) have insurance claims experience, it often translates into more positive views of the claims experience. In fact, 50% of mock jurors state that insurers are mostly fair when it comes to evaluating and paying on claims.

**COMBATING UNFAVORABLE ATTITUDES WITH VISUAL AIDS**

Even the unfavorable attitudes discussed above don’t have to be a death sentence for your insurance defense case. Aside from the ultra-important jury de-selection stage, developing powerful case themes and telling a relatable, memorable story can give your case just the boost it needs to counter negative bias. But how to tell such a story?

One major component is the incorporation of well-tailored graphics with strategic purpose. In an insurance case, such graphics can play a number of roles. Let’s go over two significant ways that graphics can aid your case:

1. **Bringing the Policy to Life**

   If jurors soundly understand the framework of the insurance policy and the related law, the influence of their emotions (and your opponent’s emotional appeals) diminishes. But, because policy documents can be so lengthy, confusing, and dull, you must find visual ways to keep the jury interested in and attuned to your story. Here are a few:

   - **Animations.** Animations are great, but certainly not in all forms. Flashy text and images flying on and off the screen can be distracting for jurors. Instead, use animations to simplify. The policy is complicated enough, so offer information in bite-sized pieces for effective, step-by-step storytelling. Building as you go keeps jurors focused on your commentary, and prevents them from reading ahead or becoming overwhelmed.

     This effect is often accomplished by zooming in on important language from a larger document. For example, if the policy in question underwent numerous revisions, each click could zoom in on the language of a different revision so you can more closely discuss the terms you understood to be final.

   - **Colors & Icons.** Colors and icons are another tried-and-true organizational tool, and are very easy for jurors to recall. Both
can be used to – again – simplify, reducing clutter and wordiness and differentiating parties, themes, etc. You can then use these same distinctions moving forward so jurors have quick, shared reference points in your case, which creates helpful references and bookmarks for jurors’ later deliberations.

In Figure 1, we see two examples of document callouts. On the right, a yellow outline indicates language discussing the type of coverage, while on the right, a blue outline indicates language discussing OSHA violations.

This method helps add variation and emphasis without muddying the message, while avoiding slide after slide of big blocks of print. The imprint value of your message is inversely related to its complexity; each graphic needs to be concise and easy-to-understand.

The graphic (See Figure 2) tells the story of an insurance dispute involving a policy that required all independent contractors to release the builder from liability. The contractors were required to provide proof of insurance before any work was performed. A worker was fatally injured on the job and it was discovered that he had been allowed to work without the necessary proof of insurance. Because the majority of entries were accomplished with icons and very little copy, the key provision language fit nicely on screen as part of an animated sequence.

**2. Humanizing the Insurance Company**

Given jurors’ concerns about insurer motives and ethics, humanizing the insurer is a must. The goal is to separate jurors from any mental images they might have of some massive, faceless, profit machine. Graphics play a large part in doing just that:

- **Individuals Who Make Up A Whole.** Start with the basics. Emphasize the positive, human element of your company. This can include showing a few pictures of real people at work for the insurance company, and perhaps the people who were directly involved in negotiating or servicing the policy at issue. You could also supply some information about how many people the company employs, how long it's been in business, etc. Break down the company into its individual parts so it doesn’t seem like an unrelatable monolith.

Later on, include testimony slides with pictures of each deponent. This will add that same personal touch to the testimony and can bolster your witnesses’ credibility (See Figure 3).

- **There’s No Such Thing As A “Perfect” Company.** Infallibility is an extremely difficult position to take and tends to come off as artificial. Humans make mistakes. Your opponent is going to pitch a lot of accusations, and in most cases, there are areas where the company could have performed better in certain areas. So instead of trying to prove your perfection against the barrage, try to embrace apparent negatives – it can take the edge off of the accusations, give you more control over the message, and most importantly, feel sincere to the jury. Be proactive. The key is to show that when you do make mistakes, you take responsibility and work to correct them.

You can also come back with testimony or evidence demonstrating your company’s commitment to ethical practices and its track record of correcting any mistakes or oversights. A simple checklist can be effective here; one by one, you can highlight the lawful and/or ethical actions in which your company engaged.

**CONCLUSION**

Because so many jurors harbor negative feelings about insurance companies – but not all with attitudes extreme enough to strike them for cause – even a case that feels like it should be fairly straightforward can run into a jury with a bone to pick. However, with the right case themes and tactical graphics that fortify those themes, you can break down biases and get the jury focused on the merits of your case.

Adam Bloomberg is managing director, visual communications for Litigation Insights. With more than 21 years of experience, Adam has consulted with thousands of trial teams and corporate clients to develop communication strategies and presentations that educate, inform and persuade. He creates materials and exhibits for mock trials, focus groups, arbitrations and trials.
Investing in Germany is different than investing in the U.S. However, although Germans also know about share and asset deals in addition to knowing about founding companies and businesses, investors should still know some facts about German companies and their respective liability schemes and tax treatments. The legal and tax structure of a business is something to be particularly considered in structuring acquisitions of assets or shares in a German company.

**LEGAL TYPES OF COMPANIES**

German law distinguishes between corporations (Kapitalgesellschaften) and partnerships (Personengesellschaften). The most important differences between these legal types are the liability of the company and its respective shareholders/partners, and taxation matters.

**Corporations**

The two major types of corporations are the stock corporation (Aktiengesellschaft; in short: AG) and the limited liability company (Gesellschaft mit beschränkter Haftung; in short: GmbH). The GmbH is the most common form of incorporated companies for small and mid-market businesses in Germany. The AG is the corporate form assumed by many of Germany’s largest corporations. The main advantage of an AG is that its shares may be transferred relatively simply and can be listed on a stock exchange. The purchase and transfer of shares in a GmbH have to be notarized before a German Notary. The minimum subscribed capital amounts to €25,000 for a GmbH and €50,000 for an AG. GmbHs are managed and represented by their managing director(s) and AGs by their management board. Generally, the managing directors or members of the management board are authorized to represent the corporation acting jointly. Exceptions to this rule require a regulation in the corporation’s statutes. While an AG always requires a supervisory board consisting of at least three members, a GmbH is generally not obligated, but is free to install a supervisory board, unless German law for employee protection stipulates otherwise. The necessity of a supervisory board depends on the numbers of employees at the GmbH.

The managing directors of a GmbH generally have to follow respective shareholders’ resolutions and instructions. In contrast, the management board of an AG is more independent from the shareholders’ meeting in its day-to-day business decisions.

**Partnerships**

The two major types of partnerships that are used for business enterprises are the general commercial partnership (Offene Handelsgesellschaft, in short: OHG) and the limited partnership (Kommanditgesellschaft, in short: KG). An OHG requires at least two partners, who are always fully liable for the OHG’s liabilities. A KG requires at least two partners as well, but only one of them (“the general partner”) needs to be liable in an unlimited fashion. The partner’s liability can be largely limited to a specific amount (“the limited partner”), which is registered with the German commercial register (Handelsregister). Often a GmbH is implemented as general partner of a KG (so called GmbH & Co. KG). Such an amalgamation leads partially to the combination of advantages of both corporations and partnerships.
TAXES
Even more interesting is the choice of a specific legal form to be made by evaluating German tax matters. As a rule, never decide on company matters without evaluating current and future tax issues and vice versa.

The most important taxes in Germany are corporate income tax (CIT) (tax rate: 15%), personal income tax (tax rate: 14% up to 45%), trade tax (TT) (tax rate: at about 15% depending on the entity’s main location and its branches) and value added tax (VAT) (tax rate: 7% or 19%).

Income taxes and trade tax
German tax law does not have a “check-the-box selection” or something comparable. As a rule, the legal form of entity governs the applicable taxes:

Corporations are subject to corporate income tax at a tax rate of 15%, solidarity surcharge in the amount of 5.5% of the CIT, subject to trade tax (+/-15%) and generally taxed separately. However, in particular based on so-called profit and loss transfer agreements, a highly regulated tax group between corporations under control of another entity can be established. Partnerships are not subject to corporate income tax but are transparent for income tax purposes. In order to calculate the personal income tax burden of each partner, the taxable profit is determined at the company level and allocated to the individual partners according to their level of participation.

VAT and real estate transfer tax
The major German transaction tax is value added tax at a rate of 19% levied on services and goods; there is also a reduced rate of 7% for specific goods, and some services like health services are completely VAT exempt. Real estate transactions (including specific transfers and direct or indirect amalgamations of shares in real estate holding companies) trigger real estate transfer tax. The rate varies from state to state and ranges from 3.5% to 6.5% of the respective real estate value.

Withholding tax
Except for specific inter-group dividend distributions by a corporation to its shareholders, dividend payments generally trigger a 25% withholding tax on capital income (Kapitalertragsteuer) plus a solidarity surcharge. According to the regulations in the Double Tax Treaty (DTT) between the U.S.A. and Germany, the withholding tax rate can be reduced, if additional specific requirements in the German Tax Law can be met.

ACCOUNTING
German companies generally may choose to apply German generally accepted accounting principles (German GAAP: HGB) – or International Financial Reporting Standards (IFRS). While the regulations of IFRS are in broad parts comparable to US GAAP, the German GAAP is still driven by some principles deviating from the US GAAP regulations. Even if a company applies IFRS for internal and external reporting purposes, it still has to prepare an additional balance sheet in accordance with German GAAP as a basis for the tax balance sheet and the annual CIT and TT returns.

PERMITS
Generally, there are no restrictions placed upon foreigners who wish to establish a company in Germany. For conducting business in Germany, the German company has to register with a local trade office in order to receive a general business license (Gewerbebeschein). Additionally, there are some regulated industries for which special licenses are required, e.g. insurance and banking.

EVALUATION AND DECISION
Keeping in mind these legal and tax basics and the knowledge that these matters combined are even more complex, an investor can move forward. According to our experience, purchasing investors often ask for advice from lawyers when their discussions with sellers of a German business have progressed a great deal. Such an approach more often than not leads to the fact that a legal and tax structure which would be more advantageous for the investor is no longer feasible, because of the discussion and early determination of key issues, e.g. a share versus asset deal, between the parties. A decision regarding a share or asset deal often depends on the fact whether an entire business or part of a business are purchased, and in which legal form the business is currently conducted.

One general advantage of a share deal is that at first sight the transfer of the shares only affects the shareholders’ level, and the company level is usually not directly influenced. But there are also some disadvantages: possible risks and liabilities not identified when carrying out due diligence may still exist at the company level. Furthermore, the direct or indirect transfer of shares in a German company can lead to a forfeiture of tax loss carried forward at the company level. The avoidance of such consequences requires strong interface advice in the field of corporate and tax law. Also the implementation of a potentially intended debt push down for tax purposes sometime requires more effort than expected.

Asset deals are usually more complex because the assets have to be identified and determined within the purchase contract, but the investor has the possibility to choose explicitly what he wants to buy. With regard to contracts with third parties, the consent of the third party for the transfer of the respective contract from the seller to the purchaser is necessary. Therefore, starting timely discussions with third parties before signing a purchase contract is important. Certainly, such discussions are only appropriate at an advanced stage of negotiations between seller and purchaser. Company liabilities remain with the company unless the purchase contract stipulates otherwise, or unless a special statutory liability under German law applies, e.g. because of the purchaser continuing the business under the same business name as the seller. One effect of an asset deal is definitely the allocation of the purchase price to the purchased goods, and the subsequent possibility to write them off, which also applies to the good will.

RECOMMENDATION
When evaluating an acquisition, we generally recommend considering the interface issues of organizational, financial, legal and tax paying grounds at a very early stage of the acquisition process. This requires legal advisors with commercial lenses and strong experience in tax legal interface advice. And even more important, solutions for problems that may arise can be found by evaluating the entire spectrum of financial, legal and tax implications at an early stage, which also affects (and reduces) the investor’s costs.

Jossip Hesse is qualified as a lawyer as well as a tax advisor (Germany) and partner with Buse Heberer Fromm in Frankfurt and Essen. He is leader of the Practice Group Corporate/M&A and a member of the Practice Group Tax Law.

Christiane Micha is a lawyer qualified in commercial and corporate law as well as tax law, and senior associate with Buse Heberer Fromm in Frankfurt and Essen. She is a member of the Practice Group Corporate/M&A and the Practice Group Real Estate Law. Christiane can be reached at micha@buse.de.
AGENCY AND DISTRIBUTION CONTRACTS IN AN INTERNATIONAL CONTEXT

THE ISSUE OF CHOOSING FOR THE APPROPRIATE JURISDICTION
Doing business abroad proves not only a commercial challenge but also a legal one, raising questions like: should I conduct the sales myself or should I appoint someone else to handle the foreign market? And if I appoint such a third party what kind of contractual relationship suits my business best? And if a contract is drawn up, which law should be applicable? This article will briefly discuss the differences between agency- and distribution contracts and the question by which law those contracts should be governed.

AGENCY VERSUS DISTRIBUTION

For a company, setting up a sales organization from scratch in a foreign market can be a hassle, financially as well as legally. For that reason, it can be quite beneficial to seek a partnership with a third party who knows the market. Generally, this partner is either an agent or a distributor.

An agent acts as a representative for the exporting company: he manages client relationships and assists in the entering into contracts with customers. The customer orders directly from the company and all goods and services are to be delivered directly from the company to the customer. The agent receives a commission for his services to the company. Traditionally, many European countries have drawn up mandatory rules regarding agency contracts from which contract parties may not deviate.

A distributor on the other hand acts for his own account and risk. He buys from the exporting company and sells the products in its own market. A distributor therefore can be described as a merchant, and for that reason most European countries do not differentiate distribution contracts from other commercial contracts. Also in the Netherlands, no specific (mandatory) statutory rules exist that govern distribution contracts.

CHOICE OF LAW AND FORUM SELECTION

The choice of law can heavily influence the contents of a contract between a company and its agent or distributor. Because most countries have imperative rules on agency contracts these contracts will usually be governed by the laws of the country in which the agent has its seat and there is no possibility to deviate from this.

Distribution contracts on the other hand are usually not covered by imperative laws, the parties have the freedom to choose for a particular jurisdiction and/or court.

The freedom to choose a particular jurisdiction also gives more freedom to set the contents of the contract. Usually an exporting company wishes a contract to be governed by its own national law and judged over by its own national courts; there can however be reasons to choose differently.

Within the European Union

If the exporting company is European and the target market is also within a EU Member State, no particular reason exists not to choose for the home jurisdiction and courts. The EU Rome I Regulation stipulates that parties have the freedom to jointly make a choice of law which governs any dispute arising out of the contract. The Brussels I Regulation in turn provides contracting parties with the possibility to select a forum where they can bring their dispute.

When a judge finds that a contract includes a valid choice of law and/or forum, he will assume jurisdiction over the dispute and decide on the dispute (whereas possible) according to the chosen law. The ruling of the court can, by virtue of the Brussels I Regime, be enforced and executed in any European country (with the exception of Denmark). As of January 2015, it is no longer necessary to seek permission of a local judge for the enforcement of a ruling of a court of an EU member state.

Outside the European Union

Outside the European Union, the enforcement and execution of a court ruling can be more complicated since most countries do not recognize the validity of foreign rulings as such and there are not always (bilateral) treaties in place which may form the legal base for recognition and enforcement. For example, if a Dutch company has a ruling of a Dutch court in a case with a Chinese party it cannot enforce this judgment in China since the Chinese authorities do not recognize the validity of this judgment and there is no specific treaty between China and the Netherlands with regard to the recognition and enforcement of judgments.

Arbitration is usually the solution for situations like this. If parties agree to arbitrate, they choose not to request a ruling from a court but from an arbitral tribunal they have appointed themselves. Usually this choice is made in the original contract between the parties but it can also be made in a separate document drawn up after the dispute did arise. Generally, such ‘arbitration clause’ contains the choice for arbitration and the choice for the law governing the contract and the arbitration.

An arbitral judgment can (usually upon the prior permission of a local judge) be enforced in all 146 countries that have signed the New York Convention of 1959. Through this convention the signing states have accepted the obligation to recognize arbitral awards and to make them enforceable in other contracting states, subject only to certain limited defenses.

Arbitral procedures are known to have some other distinct advantages over normal court proceedings. For example, the possibility to choose one’s own arbitrators gives the parties the possibility to appoint experts on the subject of the contract and the dispute. Also the confidentiality of the procedure may be a reason to opt for arbitration.

CONCLUSION

Knowing the differences between agency and distribution contracts, as well as understanding under which law – i.e. country – those contracts should be governed, will deliver smoother commercial transactions when conducting business in foreign markets.
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Prior to this position, Lance served in senior risk management capacities for Harrah’s Entertainment, Caesars Entertainment, GES Exposition Services/VIAD and for the City of Philadelphia School District. Lance was honored as the Real Estate Insurance Leader 2014-2015 for Globe Street and was National President 2003-2004 for the Risk & Insurance Management Society (RIMS) and was also the Chief Risk Officer (CRO). He was Risk Manager of the Year in 2007. Lance teaches risk management as a faculty member for the National Alliance for Insurance Education & Research. Lance recently spoke with USLAW Magazine to share his impressions of USLAW and how he and his business benefit from USLAW.

THE GOLD STANDARD

USLAW is a resource. Sometimes we might lose sight of that and think of it as a group of law firms that got together to just form a network. Truly it is a terrific resource that can consistently over time – and has proven over time – to deliver their value. To be added (as a member) to USLAW can be like the Holy Grail for a lot of law firms. Insurance carriers who use USLAW look at it as the gold standard. The firms at USLAW can be a gold standard resource where clients can come in and find that right law firm for that right situation at the right time.

PREPARING, TRAINING, EDUCATING

Regrettably, today’s headlines often tell of gun violence, another active shooter situation, workplace crisis or tragedy in some company across the country. This is a trend that unfortunately and lamentably seems to be growing. How are companies preparing themselves? Some may run fire and bomb scare training drills. They need to also prepare for an active shooter scenario. It is the training aspect that is vitally important. One of the advantages that USLAW is out in front of is trying to say: ok we might not have the insurance answer for you but we are trying to work with you as a resource in order to make sure you are prepared. USLAW can provide insight so that you have a plan in place and can mitigate those losses after a workplace crisis or active shooter situation. Are you bringing in grief counselors? What is it your risk management teams are doing?

HELPING US HELP OUR CLIENTS RESPOND TO EMERGING TRENDS

There are always emerging trends popping up in different exposures and in different industries. Will they become game changers? From PCBs in construction to a resurgence of Legionella to drone usage, driverless cars, cybersecurity and a whole host of other potential technology trending matters, there are “trends” on the horizon worth studying and determining the impact they could have on individuals, communities and businesses. For AIG, we keep a watchful eye on emerging trends and are constantly engaging attorneys, experts and tech experts to ensure there is an approach in how we would respond for our clients. How is the defense going to be? That’s really what’s important for our clients and for USLAW to basically work cohesively together to identify those trends and how we will respond for our clients from a claims approach.

SPECIALISTS

One of the main things USLAW brings to the table for the insurance industry is the unique specialty individual. If someone doesn’t have the answer in the law firm that they are currently dealing with they know someone within the USLAW NETWORK who has that specialty – whether that is environmental, aviation, D&O insurance or whatever it is. USLAW law firms bring that special niche that we and our clients are looking for. Expertise is vitally important in order to bring that to our clients. USLAW firms are in partnership with the insurance community and that is very, very valuable.

STRENGTH IN GLOBAL COVERAGE

Both AIG and USLAW have strong similarities. AIG is in 90 countries. We have 62,000 employees worldwide. Whether in Canada, Europe or wherever, we are trying to provide our clients with the best opportunities wherever we can. We have thousands of clients who are looking for quality lawyers who can align with their needs and desires. USLAW’s global footprint of law firms helps deliver this quality to our clients. In today’s day and age, most litigation managers, risk managers, general counsel and even CEOs are looking for quality defense, and that is where USLAW is a true leader.

CONSISTENCY AND QUALITY

USLAW provides a foundational structure for anybody looking for top of the class lawyers. For clients or carriers who need an attorney – whether it is in Wisconsin, Florida, or Canada or beyond – USLAW can deliver. The huge opportunity for the individual, and in turn the company, is you are going to get the same top-quality attorney service that you would get in any other location. The advantage most clients receive is consistency as well as quality and that will reflect positively for their organization. Clients are looking for that right now in today’s day and age. AIG and USLAW continue to be top of class for our clients.
Bingham Greenebaum Doll LLP attorney Daniel Byron has been elected president and CEO of the Indiana Debate Commission. While serving as president, Byron will oversee the IDC’s handling of the 2016 Indiana gubernatorial and senatorial debates. He has been a member of the IDC since its founding in 2007.

Robert L. Brown of Bingham Greenebaum Doll LLP began his tenure as dean and professor of the W. Fielding Rubel School of Business at Bellarmine University on June 1, 2015. He was recommended by a committee that included several prominent business leaders following an international search.

Roxana S. Bell of Bingham Greenebaum Doll LLP has been selected to the American Bar Association’s 2015 Collaborative Bar Leadership Academy (CBLA) based on her leadership role as President-Elect of the Marion County Bar Association. She has also been selected for the 2014-2016 American Bar Association Section of Labor & Employment Young Lawyers Division Fellowship Program.

Patrick A. Williams, a partner with Clark Wilson LLP in Vancouver, B.C., Canada, was appointed as 1 of 18 inaugural members of the Civil Resolution Tribunal (CRT), Canada’s first online tribunal to resolve strata and small claims disputes in a more timely and affordable manner. When the CRT opens at the end of 2015, appointees will hear cases and reach binding, enforceable decisions. Their responsibilities will be similar to members of other independent, quasi-judicial bodies such as the Human Rights Tribunal. They are appointed for fixed terms of between two to four years, and may be reappointed up to five additional years.

John Wilcox of Dysart Taylor Cotter McMonigle & Montemore, P.C. in Kansas City, Missouri, was appointed to the Task Force on the Future of the Profession, created by the Missouri Supreme Court and the Missouri Bar Association. He sits on the Technology Subcommittee where his responsibilities include examining and determining best practices for technology issues including court records management as well as law firm records management; harnessing technology to help the profession and the courts; data security; technology’s role in the practice of law in rural areas; and virtual practice.

Flaherty Sensabaugh Bonasso PLLC (West Virginia) attorney Tom Flaherty was recently elected chair of the West Virginia University Board of Governors. A founding member of the firm, Tom has served on the Board of Governors since 2009. Among the duties of the Board of Governors are the control, supervision and management of the financial business and education policies and affairs of West Virginia University.

Goldberg Segalla’s Toxic Torts Practice Group launched Asbestos Case Tracker, a nearly daily email report that provides up-to-the-minute analysis of breaking asbestos court decisions. Asbestos Case Tracker offers access to the latest court rulings from across the country, including in the jurisdictions where asbestos litigation is most prevalent, as well as insight into this ever-expanding and increasingly challenging body of law. To learn more or to subscribe to Asbestos Case Tracker, contact Joseph J. Welter at (716) 566-5457 or jwelter@goldbergsegalla.com.

Mark Wortham, of Hall Booth Smith, P.C. in Georgia, was named to the Editorial Board for the State Bar of Georgia’s publication, The Georgia Bar Journal.

Jones, Skelton & Hochuli (JSH) publishes the JSH Reporter, which is designed to provide information about changes in the law and how these affect a variety of industries. Topics included in the current issue cover the EEOC conciliation process, access to social media, and the different types of warranties that cover a contractor’s work. Additionally, readers will find appellate highlights, cases of note, recent JSH accomplishments, and upcoming events. To view the most recent publication, visit www.jsh-firm.com/publications.aspx. To receive a print copy of the JSH Reporter, email marketing@jshfirm.com.

Community Information and Referral Services has appointed Whitney Harvey, of Jones, Skelton & Hochuli, as the 2015-16 President of their Board of Directors, effective July 1. Ms. Harvey has served as the Secretary for Community Information and Referral Services since 2014 and has been on the Board of Directors since 2013. Community Information and Referral Services was founded in 1964 with the purpose of bringing people and services together to meet vital needs. CIR handles more than 1 million requests for help with health and human services per year.
The Arizona Association of Defense Counsel’s Young Lawyers Division has elected Jason Kasting of Jones, Skelton & Hochuli, to be its 2015-2016 Executive Board President. Mr. Kasting has previously served as vice president and secretary for the Young Lawyers Division. Established in 1965, the Arizona Association of Defense Counsel is an organization made up of defense attorneys who mainly practice in the area of civil defense litigation. Mr. Kasting joined Jones, Skelton & Hochuli as an Associate in 2011, and concentrates his practice on general civil litigation and insurance defense, transportation defense, product liability defense and professional liability.

Klinedinst PC has launched a bi-monthly employment webinar series aimed to equip human resources specialists, business owners, and other professionals with the knowledge necessary to navigate complex and changing statutes. The webinars are provided free of charge, and include topics such as California’s new paid sick leave laws and tips for avoiding employee class action lawsuits. To learn more about the series and to sign up, visit www.klinedinstlaw.com/news/employment-law.

Roberta Cooper Ramo, a shareholder at Modrall Sperling in Albuquerque, New Mexico, and the first woman to head the nation’s largest lawyers group, has been chosen to receive the ABA Medal, the highest award of the American Bar Association. The ABA Medal recognizes exceptionally distinguished service by a lawyer or lawyers to the cause of American jurisprudence and is given only in years when the ABA Board of Governors determines a nominee has provided such service to the law and the legal profession. Among previous recipients are legendary justices of the U.S. Supreme Court, including Oliver Wendell Holmes, Felix Frankfurter, Thurgood Marshall, William J. Brennan Jr. and Sandra Day O’Connor.

Martin S. Driggers, Jr., partner with Sweeny, Wingate & Barrow, has been elected to the South Carolina Bar House of Delegates beginning on July 1, 2015, for a two-year term. The House of Delegates establishes policy for the South Carolina Bar. It meets at least twice a year and includes delegates from each judicial circuit. Between House meetings, the Board of Governors may act on matters not inconsistent with House policy. Recommendations for changes in South Carolina rules of procedure and practice are considered by the South Carolina Supreme Court.

Richard K. Traub, founding and co-managing partner of Traub Lieberman Straus & Shrewsberry LLP in New York, has been elected to the Presidential Council of the Association Internationale de Droit des Assurances (AIDA). AIDA, or “International Insurance Law Association,” is a global association that fosters and promotes collaboration between its members at an international level. AIDA also strives to increase understanding and knowledge of international and national insurance law, and proposes measures for adoption by the insurance industry at both the national and international level.

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

Bingham Greenebaum Doll LLP (Indianapolis, IN)

Bloomington’s (Ind.) Monroe Hospital LLC is ready for a new start, thanks to the team effort of Bingham Greenebaum Doll LLP attorneys James R. Irving, Thomas C. Scherer and Whitney Mosby, with assistance from firm paralegal Susan Mays and legal administrative assistant Mary McClain. Judge James M. Carr of the U.S. Bankruptcy Court for the Southern District of Indiana confirmed the liquidation plan of the former medical facility operator in Indianapolis on Wednesday, Feb. 11. The plan, funded by the sale of the debtor’s namesake hospital, took effect on March 11. The sale to an affiliate of Prime Healthcare Services Inc. closed on Dec. 31. Monroe Hospital filed for bankruptcy reorganization in August 2014.

Carr Allison (Birmingham, AL)

Carr Allison attorneys Thomas L. Oliver, II (Birmingham, Ala. office) and David Howard (Florence, Ala. office), successfully defended a major transportation client in a week-long trial in Circuit Court in north Alabama. The plaintiff, an elderly female who was wheelchair bound at trial, alleged that the Werner driver was negligent in the operation of his tractor trailer when he pulled into the highway while attempting to deliver a load of boats to a local dealership. While the plaintiff’s vehicle was able to stop, a subsequent car was not and violently struck the rear of the plaintiff’s car. She suffered severe injuries to her legs, shoulder and back incurring over $100,000 in medical bills. The extent of injuries were not in doubt whereas the case was defended on the validity of the negligence claim as well as the proximate cause of the accident. In closing arguments, plaintiff’s counsel asked the jury to return a verdict of $500,000. A verdict of $25,000 was returned by the jury, well below the amount offered prior to trial.

Flaherty Sensabaugh Bonasso PLLC (Charleston, WV)

Flaherty Sensabaugh Bonasso PLLC attorney James W. Lane, Jr. recovered and distributed a payout of over 84% on the unsecured claims for a group of creditors in the Chapter 7 bankruptcy case of Shawnee Hills, Inc., a former mental health services provider throughout West Virginia. Our clients consisted of 165 former employees who asserted that the debtor misappropriated their money, by diverting wages withheld from paychecks to fund employee benefit programs. The Debtor used the funds for general operating expenses of its failing business. We litigated with the Debtor and third parties, and recently made a final distribution of funds to the employee creditors, who recovered a total of 84% of their claims.

Goldberg Segalla (Buffalo, NY)

William J. Greagan and Matthew S. Lerner, partners in Goldberg Segalla’s General Liability and Appellate Practice Groups, obtained dismissal of a New York Labor Law § 240(1) claim against a construction company in the New York Appellate Division, Third Department. The dismissal of the claim – brought under New York’s plaintiff-friendly and controversial “Scaffold Law,” which can impose absolute liability on owners and contractors for elevation-related construction accidents – creates favorable case law for the defense of cases in which the weight and distance of a falling object is not significant enough to trigger liability.

In this case, the plaintiff was injured when an out-of-use scaffold frame fell onto him while he worked on a construction site in Saratoga Springs, New York. Under Labor Law § 240(1), an elevation-related risk arises where the elevation differential is “physically significant,” but under the 2009 Runner v. New York Stock Exchange decision, even small distances may sometimes pose an elevation-related risk in the eyes of the court.

Our team successfully argued that the trial court should have dismissed this claim because the distance the frame fell – only two feet – and the amount of force it was capable of generating when it struck the plaintiff were not significant, and the Third Department ruled accordingly. Precedent required the Third Department to reinstate the plaintiff’s other claims, leaving the lower court to decide at a future date negligence issues related to supervisory control over the plaintiff and his work.

The dismissal of the Labor Law § 240(1) cause of action, however, significantly reduces the defendant’s potential exposure in this matter and provides the defense bar with additional ammunition to chip away at the Runner precedent and combat claims brought under this section of the Scaffold Law.

Jones, Skelton & Hochuli (Phoenix, AZ)

Michael Hensley and John Lierman, attorneys with Jones, Skelton & Hochuli, obtained summary judgment for their client Sunquest Contractors (the “ROC”) alleging that a competitor, Bullhead Solar, Inc., was contracting without a license. The ROC investigated and issued cease and desist orders to Bullhead Solar, based upon statements that had been made by its employees to the Arizona Registrar of Contractors (the “ROC”) alleging that a competitor, Bullhead Solar, Inc., was contracting without a license. The ROC investigated and issued cease and desist orders to Bullhead Solar, and the Mohave County Attorney’s Office then brought criminal charges against Bullhead Solar.

The Jones, Skelton & Hochuli attorneys filed for summary judgment, arguing that the communications to the ROC were speech
protected by the Petition Clause of the First Amendment and that abuse of process can only occur through use of judicial processes, not through simple communications with the ROC. They also argued that interference with contract can only occur where the defendant induces a breach, but in this case if anyone induced a breach, it was the ROC or the county attorney. The court agreed and granted summary judgment on all claims, and awarded costs, to the Jones, Skelton & Hochuli client.

McCranie Sistrunk Anzelmo Hardy McDaniel & Welch LLC (New Orleans, LA)

Ford Motor Company recently prevailed following a nearly two-week long trial in an airbag non-deployment case. According to testimony, the operator of a 2006 Nissan Altima committed multiple hit-and-runs before being stopped by police after a pursuit. The driver completed a statement, listed an incorrect location and wrote that she thought she hit an alligator. Nevertheless, the officers did not perform a field sobriety test, and they released the driver with citations. Shortly after leaving, she attempted to pass a row of vehicles and caused an off-set head-on collision with a 1995 Ford Mustang operated by Robert Brumfield. Mr. Brumfield died at the scene.

Mr. Brumfield’s surviving spouse sued multiple defendants, including Ford. As against Ford, she alleged that the wire routing from the driver side airbag sensor was defective because it was susceptible to severing. Ford contended that the non-deployment was caused by a disconnected airbag diagnostic monitor that rendered the system inoperable and that any wire separations occurred long after signal closure occurred. Ford also presented evidence that Mr. Brumfield died as a result of a head strike to the A-pillar, and that he would have suffered the same fatal injury with airbag deployment.

Plaintiff’s airbag expert was Michael Nranian. Ford’s experts were Michael Klima on airbag system design and performance, Dr. Geoffrey Germane on accident reconstruction, and Dr. Thomas McNish on biomechanics and occupant kinematics.

During closing arguments, plaintiff’s counsel requested approximately $8.3M. After deliberating for approximately 9 hours, the jury returned a verdict in favor of Ford, rejecting the defect claims. Ford was represented at trial by Keith W. McDaniel, Quincy T. Crochet and Joshua Dierker of McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, LLC, and by Michael W. Eady of Thompson, Coe, Cousins & Irons, LLP.

Modrall Sperling (Albuquerque, NM)

Police presence in schools is a hot topic in the educational arena. Plaintiffs are reframe traditional wrongful arrest claims into more complicated ADA violations. Modrall Sperling attorneys Jennifer Anderson and Megan Muirhead successfully protected Albuquerque Public Schools (APS) against such a claim.

November 22, 2010, was an extraordinary day for C.V., a seven-year-old student at APS. C.V., who is eligible for special education based on his diagnosis as autistic and gifted, began his morning by disrupting his second grade class and ended his morning handcuffed to a chair by an APS School Resource Officer (SRO). In the hours between, C.V. threw his shoes at a teacher, ran away from staff, locked himself in a bathroom, kicked a teacher, kicked a police officer, shot rubber bands at the police officer, and tried to hit staff by swinging a power cord.

C.V.’s parents filed suit against APS claiming that the SRO violated Title II of the Americans with Disabilities Act by handcuffing C.V. Specifically, they claimed that C.V.’s behavior was a manifestation of his disability and that APS failed to accommodate his disability and discriminated against him by handcuffing him. On March 27, 2015, New Mexico United States District Court Judge Martha Vazquez entered judgment in favor of APS.

Judge Vazquez held that APS attempted to reasonably accommodate C.V. as evidenced by the hours of de-escalation efforts prior to the handcuffing. Judge Vazquez also found that there was no evidence that APS discriminated against C.V. because of his disability. Specifically, Plaintiffs had not established that C.V. was handcuffed “by reason of” his disability, i.e., there was no evidence that the officer would have treated a non-disabled student exhibiting the same behavior any differently. Plaintiffs have appealed this ruling to the Tenth Circuit.

Murchison & Cumming LLP (Los Angeles, CA)

A jury returned a defense verdict in a case where the plaintiff alleged the defendant negligently rendered assistance. The defense was represented by Murchison & Cumming attorneys Russell S. Wollman and Nanette G. Reed.

This case arises from an accident that occurred in 2012. The incident occurred at a condominium complex which is referred to as the “High Rise to the Stars” as many celebrities live there. One of the plaintiffs resided at the condominiums and her daughter, the additional plaintiff, was her guest. In 2012 the daughter allegedly fainted and hit her head after working out.

A relative spoke to the daughter via tele-phone while she was in the locker room. The relative was concerned and summoned a security guard who came and checked on her condition and offered to call 911 on two occasions. She refused and told him she wanted to go to her mother’s unit. When she started to go to her mother’s unit the security guard decided to escort her. When they arrived at the unit the guard turned his back to her and she fell for some unknown reason. She suffered facial fractures which required surgery and alleged chronic pain as a result of this incident.

The daughter brought a lawsuit for her personal injuries and economic damages and the mother brought a lawsuit for payment of a portion of her daughter’s medical bills. Plaintiff alleged the condominium’s security guard negligently rendered care which caused the injury. The condominium alleged that the security guard acted reasonably and within the standard of care for a security guard.

Plaintiff’s last demand before trial was $2,000,000. Defense’s last offer was $100,000 (by way of 998).

The jury returned an 11-1 verdict in favor of the Homeowner’s Association in less than 25 minutes.

Picadio Sneath Miller & Norton, P.C. (Pittsburgh, PA)

In spring 2015, Picadio Sneath Miller & Norton, P.C. received an opinion from the Pennsylvania Superior Court affirming the trial court’s opinion in favor of its client, the Municipal Authority. The authority had previously obtained a AAA arbitration award against one of its vendors. Subsequently the vendor filed a separated legal action against various officers of the authority claiming they had defamed the vendor and his company in connection with reporting on the AAA award at a public meeting.

Picadio Sneath Miller & Norton, P.C., on behalf of its client, the Municipal Authority, moved to execute on the AAA award by seeking the stock of the vendor company. Upon receipt of the stock, the Municipal Authority would become the owner of the vendor and therefore have the right to dismiss the vendor’s action against the individual officers.

In opposing the execution upon the stock, the individual owner of the vendor claimed that the stock was “marital property” – of the owner and his wife. This claim was made in spite of the stock certificates being made out only to the individual owner, and in spite of the fact that the owner and his wife remained married. In a case of first impression, the Superior Court held the “marital property” does not exist until the filing of a divorce complaint.

Upon receipt of the Superior Court opinion, Picadio Sneath Miller & Norton, P.C. entered Judgment in favor of its client the municipal authority. Faced with the loss
of his company, the vendor dismissed the pending action against the individual authority officers, and the parties settled all remaining issues in that related case. The opinion of the Superior court is RAD Management Associates, Inc. and Ray Damii v. Washington East Washington Joint Authority, No. 414 WDA 2014 (Pa. Super. 2015).

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

John E. Tull III and R. Ryan Younger, along with Michael McMullen and Jennifer Cheek of Schlee, Huber, McMullen & Krause, obtained a defense verdict for their clients, Ferrellgas, LP and Ferrellgas, Inc. (“Ferrellgas”), after a four-day jury trial in May 2015. The case concerned a leak from a propane storage tank at an industrial plant in Malvern, Arkansas. The leak occurred while the tank was being filled by Ferrellgas. When the leak could not be stopped immediately, the contents of the storage tank were “burned off,” during which time the surrounding area was evacuated by emergency management personnel. The evacuated area included a facility owned by Pactiv, LLC (“Pactiv”), which manufactures foam trays. Pactiv allegedly ceased production for two days and claimed that it was unable to make up the production lost. Pactiv claimed that it suffered in excess of $5 million in economic losses and filed suit against Ferrellgas, alleging strict liability and negligence. After 20 minutes of deliberations, the jury unanimously found in favor of Ferrellgas.

SmithAmundsen (Chicago, IL)

John Collen, Mike Cortina and Bill Hackney of SmithAmundsen in Illinois helped to secure a victory for financial institutions. The United States Court of Appeals unanimously ruled that underwater junior liens cannot be stripped-off or removed in a chapter 7 case.

SmithAmundsen’s insolvency & restructuring team filed a friend-of-the-court brief on behalf of the Community Bankers Association of Illinois supporting the winning side. Significantly, the court based its decision, in part, on an argument contained in our brief. John Collen was Counsel of Record on the brief with Mike Cortina and Bill Hackney acting as Of Counsel.

Sweeney, Wingate & Barrow, P.A. (Columbia, SC)

Sweeney, Wingate & Barrow, P.A. attorneys Mark Barrow and Joe Thickens recently obtained a defense verdict after jury deliberations at the close of a three-day trial in Richland County, South Carolina. Barrow and Thickens represented two defendants who permitted a zip line to be installed on their property at the request of a neighbor, who was also a co-defendant in the case. The neighbor purchased the zip line and hired a handyman to install it.

The zip line was used for over four years with other injuries to children in the defendants’ neighborhood before the plaintiff fell from it and shattered her elbow. The plaintiff alleged both products liability and premises liability causes of action, contending in part that the defendants chose not to install a seat sold with the zip line. Because the zip line’s handle was designed to rotate when gripped by a rider, the plaintiff maintained that it was unsafe for use without a seat or other secondary safety device. A significant portion of the defense focused on explaining the engineering purposes for the design of a rotating handle to the jury, as well as potential hazards posed by the alternate design proposed by the plaintiff’s expert.

During closing, the plaintiff’s attorney requested nearly $500,000. After considering the testimony of 10 witnesses, including experts for both parties, the jury returned a verdict in favor of the defendants.

Traub Lieberman Strauss & Shrewsberry LLP (Hawthorne, NY)

Traub Lieberman Strauss & Shrewsberry LLP attorneys Mario Castellitto and Timothy G. McNamara recently obtained dismissal of a tort complaint stemming from a construction site worker’s alleged injuries. In Sweeney v. AGA 15th Street, LLC, Skyward CM, et. al., Index No. 113886/11 (N.Y. Sup. Ct. New York County), plaintiff alleged that defendants, respectively the owner and construction manager of the project, were liable due to violations of Labor Law §§200 and 241(6) for plaintiff’s injuries occurring when a Bobcat construction vehicle ran over his foot.

Plaintiff asserted numerous injuries, including a stress fracture of the second metatarsal shaft, a crush injury to his left foot and ankle, derangement of both knees with pain and swelling, and various neurological complications. After missing three (3) months from work, plaintiff returned to employment in the same field.

Following completion of discovery, including non-party depositions, TLSS filed a motion for summary judgment. As to the allegations pursuant to Labor Law §200, defendants argued that they played no supervisory role during the demolition phase of work, when plaintiff’s incident occurred. Testimony of a witness affiliated with the defendants was that the owner and construction manager were essentially sequestered in an office trailer outside the project perimeter, waiting for the construction phase to begin.

The other branch of the TLSS dispositive motion relied on the lack of proof that the involved Bobcat vehicle was ill-maintained or had a nonworking back up beeper warning system. TLSS pointed out that: 1) plaintiff did not see the Bobcat prior to the moment of contact, and therefore cannot credibly say whether it was going forward or in reverse (plaintiff alleged that the latter direction would have required an operating back up beeper); and 2) plaintiff did not tell anyone or claim that the back-up beeper was inoperable on the involved Bobcat until one (1) year later, in his lawsuit deposition. The court thus found that “there is no evidence that the Bobcat driven by Blazewski was defective,” and thereupon dismissed the remaining claim under Labor Law §241(6).

Wicker Smith O’Hara McCoy & Ford, P.A. (Fort Lauderdale, FL)

Richard E. Ramsey and E. Holland “Holly” Howanitz, Wicker Smith partners from the Jacksonville, Florida, office, received a defense verdict in the case of Estes v. Douglas Swartz, M.D. This was a two-week medical malpractice trial where the Plaintiff alleged that the Defendant negligently prescribed the drug Macrodantin for a prolonged period of time. The Plaintiff contended that the extended exposure to Macrodantin caused him to develop a terminal pulmonary condition known as pulmonary fibrosis. The Defendant’s position was that prescribing the medication prophylactically to prevent recurrent urinary tract infections was reasonable and within the standard of care. Likewise, the Defendants argued that the Macrodantin exposure did not cause the Plaintiff’s pulmonary fibrosis. The Jury returned a complete defense verdict indicating that Dr. Swartz was not negligent and not a cause of damage to the Plaintiff.
by seeking treble damages, attorneys’ fees, and the ba

tures of Washington’s Insurance Fair Conduct Act (IFCA). The plaintiff’s claims arose out of a complex landfill gas generation construction project. When equipment at the project allegedly failed to perform as required by the contract, the plaintiff asserted a claim under the supply bond. The surety investigated the claim for two months, ultimately denying the claim on the ground that there was a genuine dispute as to liability under the bond. Following the surety’s denial, the plaintiff filed an action styled stellar J Corp. v. Argonaut Insurance Company, et al., No. 3:12-cv-02982, in the United States District Court for the Western District of Washington, seeking damages of over $14,000,000 based on allegations that the surety acted in bad faith by failing to perform an adequate investigation, wrongfully denying the claim, and violating IFCA by failing to comply with numerous provisions under the Washington Administrative Code.

Mr. Blischke and his team filed a motion for partial summary judgment seeking dismissal of the plaintiff’s bad faith and IFCA claims. Washington is viewed as a very unfavorable jurisdiction for insurers and sureties, a fact that the Court emphasized. Yet, despite noting that in Washington there is generally a “bounty on the head of insurance companies,” Judge Ronald B. Leighton granted the motion, concluding that there was a genuine dispute as to liability under the bond that justified the surety’s denial of the claim. This is a significant and notable outcome since there is limited Washington authority on the applicability of IFCA and bad faith claims against sureties, and there appears to be a growing trend by claimants to assert such causes of action in hopes of gaining leverage by seeking treble damages, attorneys’ fees and costs under IFCA.

Bingham Greenebaum Doll LLP (Indianapolis, IN)

Firm client Buggy Bowl Films LLC (BBF) was able to film as part of a documentary in production during the 2015 IHSAA Boys’ Basketball State Tournament, thanks in part to their relationship with Bingham Greenebaum Doll LLP. Firm attorney Daniel L. Boots helped BBF quickly identify and secure the necessary licensing and clearances required to film on location at the various tournament playoff sites throughout the state, while also assisting with acquiring the necessary media rights from the Indiana High School Athletic Association (IHSAA) for archival film footage, certain site and talent releases from the IHSAA and Pacers Entertainment, and the placement of appropriate insurance for the on-site filming and post-shoot production and eventual release of the film. Their documentary film, currently entitled The Buggy Bowl and set for release later this year, depicts the season-long journey of Barr-Reeve High School to this year’s Class A championship game. During the tourney, the small predominantly Amish school from rural southern Indiana again faced the same team that they lost to in overtime in last year’s championship game, a predominantly urban private Catholic school from the Indiana suburbs of Chicago in northeast Indiana.

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